IN THE SUPREME COURT OF FLORIDA

CHARLIE THOMPSON, :

Appellant, :

vs. : Case No. 76,147

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This court has agreed to take judicial notice of the appellate record in the first appeal of this case. References in this brief to the first record use the letter "F" while references to the record prepared for the present appeal use the letter "R".

STATEMENT OF THE CASE

On September 17, 1986, a Hillsborough County grand jury indicted CHARLIE THOMPSON for two counts of kidnapping and two counts of first degree murder. (F1303-05) On March 13 and 16, 1987, a jury found him guilty as charged and recommended death for both murder counts. (F899, 1063-64) On April 6, 1987, the trial court imposed two death sentences for the murders and two consecutive life sentences for the kidnappings. (F1262-66) Thompson appealed. (F1521) On July 20, 1989, this court reversed for a new trial. Thompson v. State, 548 So.2d 198 (Fla. 1989).

On May 11, 1990, a jury again found Thompson guilty as charged. (R929-30) On May 14, the jury recommended death by a vote of seven to five on both murder counts. (R927-28) On May 25, 1990, Judge Bonanno imposed two death sentences. (R942-44) Consecutive to these sentences, the court imposed two consecutive life sentences for the kidnappings and a consecutive fifteen year term of imprisonment for a sexual battery for which Thompson had been on probation. (R937, 945-46) He now appeals. (R953)

STATEMENT OF THE FACTS

In August, 1985, the Myrtle Hill cemetery in Tampa hired CHARLIE THOMPSON to maintain the grounds. (R265) He was a good worker. (R269) In May and June, 1986, he complained to a corrections officer and to cemetery superintendent James McKeehan that Myrtle Hill owed him $150 workmen's compensation for a sprained back. (R266-68, 276) McKeehan and chief bookkeeper William Swack explained to him that he had gotten more money than he should have. (R268) Later, Swack told McKeehan that Thompson was still complaining about the money. (R271) Thompson stopped coming to work, and Myrtle Hill ended his employment on July 27. (R266, 269)

On August 27, when McKeehan left Myrtle Hill at 10 a.m., Swack and his assistant, Nancy Walker, were in their office, and Swack's Cadillac was parked outside. (R255-56) When McKeehan returned at 10:30 a.m., their office door was closed, and he did not see the Cadillac. (R257) People could enter the cemetery offices unseen through the rear. (R254)

At 12:30 or 1:30 p.m., Swack's and Walker's bodies were found in the bushes at a park about two and a half miles from Myrtle Hill. (R232-34, 346) The bodies were forty or fifty yards from a trail and twenty feet apart. (R234, 239-40) Unlike the area around Walker, the area around Swack showed signs of a struggle and blood on the plants. (R243) His Cadillac was in the parking lot, one hundred fifty yards away. (R246-47, 258) No physical evidence from Thompson -- including footprints and fingerprints -- was found on the ground, the Cadillac, or elsewhere. (R248-49, 258, 348, 362-63)

Swack was 5'9" tall and weighed 183 pounds. (R285) He wore underwear, shoes, and socks, and a maroon shirt covered his face. (R240) Mud covered his body except for a white area where a watch might have been. (R242-43) His neck had a ligature mark by a gold chain. (R242) He had five superficial or non-lethal stab neck and chest wounds, a lethal stab wound into the left lung, three three-inch stab abdomen wounds causing internal bleeding, a wound from a gunshot probably fired at close range by his eye, and a bullet near his lower skull. (R286-93) The wounds were randomly located and might have occurred during a struggle. (R289-90) Blood in each wound track indicated that he was still alive when they occurred. (R290-91, 293) Death was rapid and caused by the gunshot, lung injury, and/or multiple stab wounds. (R290-94, 298)

Walker was 5'5" tall and weighed 170 pounds. (R294) She lay face down in her crossed hands. (R240-41) Underneath her clothes, mud covered her back, the underside of her underwear, and the back of her legs, suggesting that she had undressed and redressed after being on the ground. (R245) She died immediately from a bullet in the back of her head. (R295-96)

When McKeehan returned from the park, Swack's office door was locked. (R258) Inside the office, the calculator and typewriter were running, Walker's glasses lay on her work, and her purse was under the desk. (R259) Swack's cigarettes and lighter were on his desk; he seldom went anywhere without them. (R259)

In the cash disbursement journal in the unlocked safe, an entry read in Swack's handwriting, "8-27-86 Charlie Thompson

$1500.00." (R259-61, 271-72, 975) A check carbon in the back of the journal signed by Swack was dated August 27, 1986 and made out to Charlie Thompson for $1,500. (R263, 273, 976) Although McKeehan told his staff not to touch the journal, a secretary later made a payroll entry on August 29. (R262, 265)

Around 10 p.m. on August 27, Thompson sold Swack's ring at a bar to Kenneth Bell for $60 and, the next day, gave Swack's watch to Huetra Carnegie to keep until Thompson paid Carnegie a debt of $40. (R303-04, 308-09, 315-16) He did not say where he got the ring but told Carnegie he got the watch from someone at a store. (R303-04, 309) Carnegie thought it might have been obtained illegally but could not say that Thompson was lying. (R306) Bell and Carnegie gave the jewelry to the police in September. (R302, 309)

Lead detective Childers became aware that Herman Smith tried to cash a check at a bar. (R357) Childers interviewed Smith but did not otherwise eliminate him as a suspect. (R349-50, 357) Smith had a history of violence and using firearms. (R349)

On August 29, Thompson and three friends tried to buy a car at a Tampa used car lot with a $1,500 Myrtle Hill check. (R318-19, 326) He wanted to buy the car in his friend's name, and he used his friend's license because he did not have one. (R319) He gave a state ID card to the salesman. (R317-21, 978) The salesman could not identify Thompson at trial, but the ID card picture seemed to be Thompson's. (R319-21) The manager called the police. (R318-21)

Detective Childers took Thompson downtown at 1:35 p.m., began questioning him at 2:10 p.m., and read him his rights at 3:45 p.m.

(R324-33, 363) Childers, however, did not tell him he had a right to a lawyer at no cost. (R331, 362) Childers accused him of forcibly taking Swack and Walker to the park and shooting them but did not say that their clothes were removed. (R335-36, 351) Thompson denied shooting them. (R334-35) He said he went to Myrtle Hill around 9 or 10 a.m. to get a $150 check that the cemetery owed him. (R333-34) Swack gave him the check, but, at home, he noticed it was for $1,500 rather than $150. (R334) He was unable to cash the check in several bars that night. (R334) The interview stopped at 7:40 p.m. while he gave hair samples and fingerprints. (R334-36)

Around 10 p.m., Childers fraudulently told Thompson that a laser test would show whether he had fired a gun recently. (R337, 353, 359) Childers did not yet have enough evidence and wanted the test to elicit a statement from Thompson. (R353-54) The police showed the laser's harmlessness by first shining it on Childers's hand. (R338) About 10:35 p.m., they shined it on Thompson's hand and it glowed. (R339) It would glow in the presence of various materials, including gunpowder, urea, or gasoline. (R338-39, 353, 358-59)

Thompson then agreed to talk to the police. (R340) Within a few minutes, he made a tearful statement and then, at 11:02 p.m., a taped statement. (R340-44). He said that, when he called about a $156 check that the cemetery owed him, Swack told him to come the next morning. (R344) He went with a gun and showed Swack his check stubs. (R340-41, 344-45) Swack gave him a vacation check as an advance. (R345) Walker slapped him. (R341, 345) Swack wrote him

a check -- for $1,500, not $150. (R345) Swack told him to leave, but he told them to walk to the car with him. (R345) He directed them to a park, and they walked to a wooded area. (R341, 345)

The time sequence of events then became unclear. At some point, Thompson told Swack and Walker to take off their clothes, which he planned to take with him. (R341, 345) He did not intend to shoot them. (R345) According to detective Childers, Thompson said that Swack hit him with a stick, and he shot Swack. (R341) At another point, he told Walker to redress. (R341) The taped statement indicates that Thompson shot both at the same time. (R345)

Penalty phase

Carol Lawson was the mother of Thompson's three children and wore a neck brace. (R505, 602) He sometimes saw the children at the house of Carol's mother, Mary, who lived with her daughter, Darlene, and her son, Charles. (R501-05) During trial, the children lived with Carol's sister, Linda, and two of them were present for the penalty phase. (R603) According to Linda, Thompson loved his children and saw them when he could. (R603)

On September 10, 1983, Darlene and Mary saw Thompson in their kitchen. (R500-02) He wanted to see the children. (R502) Mary told him to leave and he did, but she and Charles went outside and told him not to return. (R501-03) He pushed Charles and a struggle ensued. (R501-03) After stabbing Charles with a pocket knife, he ran, but he turned himself in that day and admitted committing the offense. (R501-04) On November 29, he pleaded no contest to aggravated battery and was sentenced to two years in prison. (R504)

While in prison, he sent Carol several letters, but she did not answer them or visit him. (R505) After he was freed on October 18, 1984, he followed her but she avoided him. (R505-06) On October 31, she was walking with a friend when he grabbed her and spoke to her about the children. (R506) She said her mother had them. (R506) Thompson told her to be quiet or he would beat her. (R506)

Her friend drove away. (R506) Thompson took her to a wooded area and said he would kill her. (R506-07) He hit her in the face, threw her to the ground, removed her neck brace, and choked her. (R507) When she refused to have sex, he choked her further and told her to remove her clothes. (R507) They pulled off her pants and had sex for ten or fifteen minutes. (R507-08) Afterwards, he said he would kill her if she told her mother. (R508) She called the police from her mother's house. (R508) He tried to flee when the police found him a short time later. (R508-09)

He told the police he slapped Carol when they were arguing about their children. (R509) She wanted to have sex at her apartment, but he suggested a nearby field because it was closer. (R509) After they had consensual sex in the field, he walked her home. (R509-10) He pleaded no contest to second degree sexual battery on February 20, 1985 and received five years probation. (R510) He had no disciplinary problems while he was in jail. (R516-17)

A Mississippi midwife delivered Thompson, who had eleven siblings. (R512, 514) They had no electricity or water and used an outside toilet. (R515) He reached the fourth or fifth grade. (R514) His mother died when he was seven, his father when he was

twenty-two. (R512-13) At age sixteen, he moved to Florida to live with a sister and get better wages. (R513) A sister and brother spent twenty and two years respectively in mental hospitals. (R514) This family legacy increased his odds of being mentally ill. (R531)

Dr. Robert Berland and Dr. Michael Maher found that Thompson's overall IQ was 70 and his verbal IQ was lower. (R522-23, 558) A 70 IQ divides the retarded and non-retarded. (R523, 558) He had the verbal skills of a first grader and performed at the second or third grade level. (R523) He could not recite the alphabet. (R523) His mental illness may have reduced his scores. (R558) His brain was damaged, but he tried to hide the depth of his illness and did not malinger. (R559-60, 572-74, 579)

According to Dr. Maher, Thompson suffered from an organic personality syndrome, because brain damage had impaired his ability to relate to others and control his impulses. (R524, 591-92) Dr. Berland believed that he suffered from psychosis, resulting from genes or brain damage. (R580-81) His hallucinations, delusions, and flat emotions fit the three symptoms of psychosis. (R577)

His illness and low intelligence prevented logical or clear thinking. (R527) Paranoid personality traits made him suspicious, easily offended, and sensitive to criticism or snubs. (R524-25) He believed people were trying to get him, and he kept them at bay to prevent them from bothering him. (R580) He normally functioned by defensively avoiding people. (R580) During extreme emotional or physical stress, however, he suffered from psychotic episodes when

he could not distinguish the real and unreal and might believe or be influenced by illogical or foolish ideas. (R526-27, 591)

On August 27, 1986, his psychosis distorted his ability to assess facts realistically, make rational judgments, and understand what was meaningful. (R544-45, 593) He went to Myrtle Hill, thinking he had been cheated out of $150. (R534, 592) That he still talked constantly about the $150 several years later was unsurprising. (R544) His paranoia exaggerated the extent to which he was threatened, attacked, and humiliated. (R530) His murderous and enraged reaction showed his reduced judgment and self-control. (R530, 592-93) He took rudimentary protective measures, but killing Swack and Walker in broad daylight, allowing them to record the check in the journal, fencing the distinctive watch and ring, and showing the check to others revealed how psychosis and paranoia had reduced his ability to make rational judgments. (R539-40, 595-99)

The doctors agreed that Thompson was influenced by extreme emotional and mental distress and his ability to conform his conduct to legal requirements was substantially impaired. (R528, 544, 575-76) Dr. Maher also thought that Thompson could not appreciate the criminality of his conduct. (R544, 575)

SUMMARY OF THE ARGUMENT

I. The police officer changed his testimony at the second suppression hearing and admitted that he had not told Thompson that he had a right to a lawyer at no cost. This admission materially altered the facts, and this court's decision in the first appeal is therefore not the law of the case. Because Thompson was not given this key element of the Miranda warnings, his entire statement should have been suppressed solely for that reason. Even if the warnings he did receive could be deemed sufficient, they were still confusing and a mentally deficient defendant like Thompson would not have understood them. The doctors testified that he did not understand them. His statement that he could not afford a lawyer patently meant that he did not understand he could have one at no charge. The state presented no evidence to show that he did understand his rights. The absence of proper Miranda warnings also meant that his statement was presumptively coerced. The state could not overcome this presumption, because the evidence strongly suggested that Thompson's will was overcome by use of a fraudulent laser test.

II. The police officer was improperly allowed to give his opinion that Thompson was guilty. This opinion invaded the province of the jury to determine guilt or innocence. The defense did not open the door to this opinion by asking the officer whether he could say that Thompson admitted the facts of the homicide because the officer suggested the facts to him.

III. The prosecutor improperly obtained an incriminating stipulation and weakened the impeachment of state witnesses by threatening to use Thompson's testimony at his first trial as substantive evidence. This testimony was the fruit of the illegal statements that were discussed in Issue I and should have been suppressed. The state could not meet its burden of showing that the testimony was not induced by the illegal statements, because Thompson might not have testified at all if they had not been introduced as evidence.

IV. The lawyers improperly went to the jury room and played the tape for the jurors while the bailiff told the jurors that the attorneys could not answer any questions. Allowing counsel to present evidence to the jury and courtroom personnel to discuss the case with the jurors was fundamental error because the trial judge was not present during these events.

V. The killings were not cold, calculated, and premeditated because a reasonable hypothesis was that they were accomplished in an impulsive rage rather than by prearranged design. Thompson said in the taped statement that he did not intend to kill Swack and Walker and did not kill them until he struck back in self-defense after Swack hit him with a tree branch. This possibility of self-defense gave Thompson a pretense of legal justification sufficient to take his actions outside the scope of this aggravating factor.

VI. The heinous, atrocious, or cruel aggravating circumstance and the cold, calculated, and premeditated aggravating circumstance are unconstitutionally applied in Florida and the jury instructions

on these aggravators are unconstitutionally vague. Although this court has previously rejected this argument, a new United States Supreme Court decision casts serious doubt on this court's understanding of this issue.

VII. The killing of Walker was not heinous, atrocious, or cruel because her death was not instantaneous and she did not experience mental trauma greater than that inherent in any kidnapping. This court should adopt a new standard on this aggravator which emphasizes the physical pain and mental terror that the victims must undergo and the length of time the pain and terror last. Based on this new standard, neither killing was heinous, atrocious, or cruel.

VIII. The judge entered a written order imposing life in prison. Increasing it the next day to death by electrocution violated the double jeopardy doctrine. The order imposing death was only proposed and not final. The trial court's sentencing procedure was more like arbitration than a reasoned resolution of competing adversarial positions. The court improperly delegated to the state attorney the responsibility for preparing the sentencing order.

IX. The trial court refused a defense request to consider Thompson's mental retardation as a mitigating factor. The court's comments generally do not reflect any reasoned weighing of the mitigation that was supported by the evidence.

X. Executing the retarded is cruel and unusual punishment. Polls show that Florida residents are overwhelmingly opposed to

such executions. Georgia forbids executing the retarded. The Florida legislature has said that noxious stimuli should not be used on the retarded to eliminate bizarre or unusual behavior. Retarded persons do not have the knowledge and reasoning power to be deterred by capital punishment. They do not have the highly culpable mental state necessary for imposing the death penalty.

XI. Executing Thompson would be proportionately incorrect. This court rarely affirms a death sentence after the trial court finds both mental mitigators. Furthermore, not only was Thompson mentally ill, but also he suffered from mental retardation, brain damage, and an impoverished upbringing. The killings were probably accomplished upon reflection of at most a short duration.

XII. Florida's standard jury instructions improperly emphasize too strongly the jury's role as a mere advisor to the court. They therefore mislead the jury into thinking that it is not an important part of the sentencing process.

XIII. The departure from the guidelines based on unscored capital convictions was improper, because the extent of the departure was greater than would have been possible if the convictions had been scored.

ARGUMENT

ISSUE I

THE TRIAL COURT IMPROPERLY ADMITTED AS EVIDENCE THOMPSON'S STATEMENT TO THE POLICE, BECAUSE THE POLICE DID NOT TELL HIM HE HAD A RIGHT TO A LAWYER AT NO COST AND DID NOT INSURE THAT HE UNDERSTOOD HIS RIGHTS AND INTELLIGENTLY WAIVED THEM.

A

In the first appeal of this case, this court found a violation of Edwards v. Arizona, 451 U.S. 477 (1981) and suppressed part of Thompson's statement to the police. Thompson v. State, 548 So.2d 198 (Fla. 1989). This court, however, did not suppress all of the statement and rejected Thompson's arguments that his waiver of his rights was not knowing and intelligent. This court decided that "some evidence show[ed] that Thompson was capable of understanding his Miranda rights." 548 So.2d at 204.

The key factual assumption in this court's first opinion was that Thompson was given proper Miranda warnings. This assumption was understandable. Thompson conceded in his first brief on page 73 that he heard his rights and waived them but argued that he did not understand them. Likewise, the state asserted in its brief on page 29 that detective Childers read each right to Thompson and asked him if he understood it. Detective Childers testified in the first suppression hearing that he read Thompson his Miranda rights from the Tampa police department consent form. (R736) Specifically, Childers testified that he read to Thompson, "I further under-

stand that, prior to or during this interview, that I have a right to an attorney present and if I cannot afford one, one will be appointed to me at no cost." (R739) Thus, given the arguments of the parties and the officer's testimony, this court's assumption that the police properly read the Miranda warnings was justified.

At a hearing before the second trial, however, detective Childers admitted that his testimony at the first suppression hearing was false and that he did not tell Thompson he had a right to a lawyer at no cost. (R8-9) At the first hearing, Childers had incorrectly used a new Tampa police department rights form rather than the old form that he read to Thompson. (R32) The old form did not contain the language about appointing a lawyer at no cost. The only reference to this right to the appointment of counsel was the following unclear language: "I further understand that if I am unable to hire an attorney and I desire to consult with an attorney or have one present during this interview that I may do so and this interview will terminate." (R979)

These garbled words did not satisfy the requirements of Miranda. Even if they might have been sufficient in some cases, the mentally retarded defendant in the present case could not have understood them. Accordingly, the trial court erred by not granting Thompson's motion to suppress the confession (R29, 327-28) after the court learned of this new evidence that one of the mandatory Miranda warnings was not given.

B

In Miranda v. Arizona, 384 U.S. 436, 478-79 (1966), the Court held that a person "taken into custody or otherwise deprived of his freedom by the authorities in any significant way . . . must be warned prior to any questioning that . . . if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." In Caso v. State, 524 So.2d 422, 425 (Fla. 1988), this court held that "the failure to advise a person in custody of the right to appointed counsel if indigent renders the custodial statements inadmissible in the prosecution's case-in-chief. . . ." Accord United States v. Connell, 869 F.2d 1349 (9th Cir. 1989); United States v. Stewart, 576 F.2d 50 (5th Cir. 1978). Thus, if the police in this case failed to advise Thompson of this "right to appointed counsel if indigent," then the trial court erred by denying the motion to suppress and disregarding trial defense counsel's citation of Caso. (R27-29)

The state's only possible response here is that the "if I am unable to hire an attorney" language is sufficiently equivalent to the Miranda language. The Court has "never insisted that Miranda warnings be given in the exact form described in that decision." Duckworth v. Eagan, 109 S. Ct. 2875, 106 L. Ed. 2d 166, 176 (1989). Miranda did not require a precise formulation of the warnings and no "talismanic incantation" was necessary to meet its conditions. California v. Prysock, 453 U.S. 355, 359 (1981). If the warnings in their totality "touched all the bases required by Miranda," any

statements thereafter obtained from the suspect were admissible. Duckworth v. Eagan, 106 L. Ed. 2d at 177-78.

The warnings given in this case, however, did not touch all the bases required by Miranda. Duckworth v. Eagan itself reiterated that Miranda demanded a clear statement that "an attorney would be appointed for [the suspect] if he could not afford one." 106 L. Ed. 2d at 178. In the present case by contrast, Thompson was given the premise ("if I am unable to hire an attorney") but never told the conclusion ("then one will be appointed for you at no cost"). The conclusion instead was "I may do so and this interview will terminate." This conclusion did not refer to his inability to hire a lawyer because then the warning would nonsensically have read "If I am unable to hire a lawyer, then I may do so." Instead, it referred to the intervening language "if I desire to consult with an attorney or have one present." Consequently, the premise ("if I am unable to hire an attorney") was left hanging in thin air, without a conclusion. Nowhere in these warnings -- as detective Childers admitted (R8-9) -- was Thompson given the proper conclusion that he could have a lawyer appointed at no cost. See United States v. Connell, 869 F.2d 1349, 1353 (9th Cir. 1989) (Miranda warnings were confusing and failed to inform defendant clearly that he had right to have lawyer appointed for him at no charge).

The warning given in this case is difficult to interpret reasonably because it does not make much sense. The most reasonable interpretation is that, if Thompson could not afford a lawyer, he could still consult with one if he could find one willing to

help him. This warning therefore failed to convey to Thompson his Miranda right to have a government-appointed lawyer at no cost, and it put the onus on him to find his own lawyer. Because the warning did not satisfy the requirements of Miranda, the trial court should have suppressed the entire resulting statement. Caso.

C

Even if the warnings given in this case passed the test of Miranda, they certainly did not do so with flying colors. A mentally retarded defendant such as Thompson would have difficulty understanding what they meant. As Justice Marshall said in a slightly different context, "[s]uch suspects can hardly be expected to interpret . . . 'the pretzel-like warnings here -- intertwining, contradictory, and ambiguous as they are.'" Duckworth v. Eagan, 106 L. Ed. 2d at 186 (Marshall, J., dissenting) (citation omitted).

The garbled nature of the warnings is an important new fact which this court did not consider when it determined in the first appeal that "some evidence show[ed] that Thompson was capable of understanding his Miranda rights." Thompson, 548 So.2d at 204. This court's decision was based on the incorrect assumption that the Miranda rights were given in an clearly understandable manner. The new fact that the Miranda warnings were bungled, when combined with the evidence and argument presented at the first trial, provided a powerful basis for concluding that Thompson did not in fact understand his right to have a lawyer at no charge.

C

Defense counsel at the second suppression hearing referred to and relied on the evidence presented at the first suppression hearing (R23-29) and included the first hearing in the appellate record. He also renewed all motions that were made at the first trial. (R197, 327, 373) This court granted appellant's motion to take judicial notice of the record in the first case. This judicial notice was mandatory. Airvac, Inc. v. Ranger Insurance Co., 330 So.2d 468 (Fla. 1976). Reference in this appeal to the evidence presented at the first suppression hearing is therefore proper.

According to this evidence, detective Childers first read Thompson his constitutional rights at 4 p.m. after taking him to the station. (R736-38) As Childers read each right, he asked whether Thompson understood it. (R739, 749) When Thompson in each instance said he did, Childers put a check mark next to the right on the consent form. (R748) After Childers had read all the rights, Thompson said he understood them and signed the form. (R740) Childers did not explain the meaning of such words on the form as "inducement," "voluntary," "terminate," "signature affixed," and "requirement." (R748-49) Childers admitted at the suppression hearing that he did not know if Thompson had understood any of the words on the form. (R749)

Dr. Maher, a psychiatrist, testified that Thompson could not have understood this consent form without detailed explanations of the words on the form and their interrelationships. (R725, 756-57)

He may have believed that he understood the form but could not have actually understood it. (R762) According to Maher, Thompson was mentally retarded, about ten years old mentally, and about two and a half years old emotionally. (R754-55, 766) His overall IQ was only seventy; his verbal IQ was even lower. (R754) Consequently, many of the words on the form, such as "inducement," "affixed," and "prosecuted," were beyond his capacity to understand. (R758) Maher discounted Childers's testimony that Thompson had said he understood his constitutional rights. In Maher's own interview with Thompson, he had said he understood his rights and had immediately showed he did not. (R760)

Dr. Berland, a psychologist, agreed with Maher that retarded and brain-damaged persons like Thompson often say they understand, simply to avoid admitting they do not. (R796-97) Berland thought that, because Thompson's capacity to think abstractly was especially deficient, he would have had difficulty understanding many parts of the consent form. (R794) Berland also thought, however, that with further explanation in more primitive language, Thompson would have been capable of grasping the concepts involved. (R795)

During Thompson's initial interrogation, he denied committing the offenses and gave an alibi. (R740). According to officer Childers, Thompson seemed to have no difficulty understanding or answering the questions. (R740) Several hours later, however, after the police shined a laser on him, Thompson agreed to make a taped statement admitting his involvement in the shootings. (R742-45) On the tape, Thompson first gave a brief version of the events

surrounding the killing. (R773-74) Childers then asked him if he at any time requested an attorney, and he responded that he did not have the money to pay an attorney.[1] (R774-75)

Dr. Berland and Dr. Maher listened to this tape and concluded that Thompson did not understand his rights. (R759, 797) Specifically, he did not understand he had a right to remain silent until an attorney was present and a right to have an attorney appointed for him at no cost. (R759) His statement that he wanted an attorney but could not afford one showed he did not understand these rights. (R797, 801)

D

As was argued at the first trial, the first appeal, and again at the second trial (R23-29), the government may not use incriminating statements produced by custodial interrogation unless the police informed the defendant of his rights, and the defendant voluntarily and knowingly waived them. Miranda. This "waiver must have been made with a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it. Moran v. Burbine, 475 U.S. 412, 421 (1986). The court must evaluate the defendant's "age, experience, education, background, and intelligence, and whether he has the capacity to understand the warnings given him." Fare v. Michael C., 442 U.S. 707, 725 (1979).

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[1]At the first suppression hearing, this statement was transcribed as "Yeah, but I don't have the money to pay an attorney." (R775) At the second trial, Judge Bonanno listened to the tape and determined that the first word was unclear and might or might not have been "Yeah." (R384-85) Undersigned counsel has not yet listened to the tape and has no opinion on this ambiguity. It, however, makes no difference to the argument in either appeal.

The mental weakness of the accused is an important factor in this determination but is not necessarily dispositive. Thompson, 548 So.2d at 204; Ross v. State, 386 So.2d 1191 (Fla. 1980). The state has the burden of showing by a preponderance of the evidence under the totality of the circumstances that the waiver was knowing and intelligent. Thompson, 548 So.2d at 204.

The state presented no circumstances at the suppression hearing that satisfied its burden of showing that Thompson knowingly waived his right to the appointment of counsel at no charge. Absent the defective Miranda warnings, the only evidence at the suppression hearing on this point was the factors mentioned by this court in its opinion -- Thompson's attempt to give an alibi and detective Childers' belief that Thompson appeared to understand the questions posed during interrogation. Id. Although these factors might have been relevant in a general sense, neither factor had any relationship to Thompson's understanding of his specific right to a lawyer at no charge. Thompson could easily have given an alibi and been able to carry on a conversation and still not have understood this specific right. Moreover, the experts testified that retarded persons often pretend to understand the conversation to avoid admitting that they do not. (R760, 796-97)

By contrast, several circumstances showed that Thompson did not understand his constitutional right to a lawyer at no charge. First, as was argued above, a person of Thompson's intelligence could not have understood the bungled Miranda warning the officer gave him. A reasonable interpretation of the warning was that he

in fact did not have a right to a lawyer at no charge. The most important fact at the first suppression hearing -- Thompson's affirmative response when asked whether he understood that he had a right to have a lawyer appointed at no cost -- never happened.

Second, two experts testified that Thompson did not understand his rights when the police interrogated him and did not understand the words on the printed consent form. Moreover, the police officer admitted that he did not know if Thompson had understood the rights on the form. The state presented no expert witnesses to contradict this testimony. As the court said in Hines v. State, 384 So.2d 1171 (Ala. Crim. App. 1980), "[w]hen expert testimony indicates that a defendant could have intelligently understood the waiver of his constitutional rights only if they were simply and clearly explained, the record must expressly and specifically establish that such an explanation was given." Id. at 1181.

Third, from the time Thompson was arrested (1:35 p.m.) until the time he made the taped statement (11:02 p.m.), he was alone with the police for nine and a half hours. Sims v. Georgia, 389 U.S. 404, 407 (1967) emphasized this very point.

> The reliance by the State on subsequent warnings made to petitioner prior to his confessing is misplaced. Petitioner had been in the continuous custody of the police for over eight hours and had not been fed at all during that time. He had not been given access to family, friends, or counsel at any point. He is an illiterate, with only a third grade education, whose mental capacity is decidedly limited. Under such circumstances, the fact that the police may have warned petitioner of his right not to speak is of little significance.

Fourth and most important, Thompson's statement that he could not afford a lawyer when he was asked whether he wanted one patently meant he did not understand he could have one appointed at no charge. He misunderstood the same right that detective Childers bungled when reading the Miranda warnings.

Thompson's statement made the case very similar to Fields v. State, 402 So.2d 46 (Fla. 1st DCA 1981). In Fields, the police repeatedly informed the juvenile of his Miranda rights, and he said he understood them. When the police asked, however, whether he wanted a lawyer, he responded that he could not afford to get one. A psychologist testified that the defendant had a reduced mental ability, was brain damaged, and would have trouble understanding his rights. The Fields court held that the state had not met its burden of showing that the defendant had intelligently waived his right "to have counsel even if he could not afford the cost." Id. at 47.

These facts were also very similar to those in Commonwealth v. Waggoner, 540 A.2d 280 (Pa. Super. Ct. 1988). In Waggoner, the defendant, when asked whether he understood that he could have a lawyer present during any police questioning, replied that he could not afford a lawyer. The Waggoner court decided that "one could easily draw the conclusion that Waggoner had failed to understand that he could have a free lawyer appointed for him. Moreover, Waggoner's statement would seem to indicate that if he could have afforded a lawyer, he would have wanted one present." Id. at 288.

Finally, the facts of this case were strikingly similar to those in Smith v. Zant, 855 F.2d 712 (11th Cir. 1988), as the following comparisons show.

Smith v. Zant	Present case
1. Dr. Kuglar testified that Smith had a mental age of 10 and an IQ of 65.	1. Dr. Maher testified that Thompson had a mental age of 10 an overall IQ of 70, and a verbal IQ even lower.
2. Dr. Kuglar testified that Smith probably did not understand his rights and would not understand them unless they were slowly and carefully explained.	2. Dr. Maher and Dr. Berland testified that Thompson could not have understood his rights unless they were slowly and carefully explained.
3. The police did not explain the rights slowly and carefully because they did no more than read the rights and ask Smith if he understood them. He said he did and signed the printed waiver form.	3. The police did not explain the rights slowly and carefully because they did no more than read the rights and ask Thompson if he understood them. He said he did and signed the printed waiver form.
4. No evidence in the record showed that the prior prosecution of Smith made him more likely to understand his rights.	4. No evidence in the record showed that the prior prosecution of Thompson made him more likely to understand his rights.
5. Smith said twice that he did not want an attorney.	5. Thompson said once that he did not want an attorney and possibly once that he did.
6. Smith had an opportunity to sleep before being questioned but no chance to meet his family.	6. Thompson had no opportunity to sleep or meet his family before being interrogated for several hours

The Smith court found on these facts that Smith had not validly waived his rights. The facts in the present case were even more compelling than those in Smith. Under the totality of the circumstances in this case, the state did not meet its burden of

showing that Thompson knowingly and intelligently waived his right to a lawyer at no charge. At the suppression hearings, he presented competent and substantial evidence to support his argument while the state presented no competent evidence on this point. Accordingly, the trial court should have suppressed all his statements to the police.[2]

E

The defects in the Miranda warnings must also change this court's analysis of the voluntariness of Thompson's waiver of his rights, because "[f]ailure to administer Miranda warnings creates a presumption of compulsion." Caso, 524 So.2d at 425 (quoting Oregon v. Elstad, 470 U.S. 298, 307 (1985)). This presumption was not a part of this court's previous analysis of this issue. The state cannot overcome the presumption, because the record otherwise contains substantial evidence of police coercion.

The police may not obtain a confession by coercion and may not use "[t]echniques calculated to exert improper influence." Thomas v. State, 456 So.2d 454, 458 (Fla. 1984); Brewer v. State, 386 So.2d 232 (Fla. 1980). Today, due process forbids not only

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[2] See also Hall v. State, 421 So.2d 571 (Fla. 3d DCA 1982) (expert testimony showed that retarded juvenile did not knowingly waive his rights); Tennell v. State, 348 So.2d 937 (Fla. 2d DCA 1977) (same); People v. Redmon, 127 Ill. App. 3d 342, 468 N.E.2d 1310, 1314 (1984) (expert testimony showed that seventeen-year-old defendant with IQ of seventy needed more than a mere "ritualistic recital" of his Miranda rights before he could knowingly waive them); Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972) (police officer testified that sixteen-year-old defendant with IQ of less than seventy waived his rights and "appeared" to understand them; confession should have been suppressed because officer's testimony did not rebut expert testimony that the defendant did not understand his rights).

physical coercion but also "more subtle forms of psychological persuasion." Colorado v. Connelly, 479 U.S. 157, 164 (1987). In the present case, the police used these more subtle forms of persuasion on Thompson. As this court described the facts in its first opinion,

> During interrogation, police persuaded Thompson to submit to a "test." Turning down the lights and putting on goggles, police informed Thompson that a laser light directed at his arms would make them glow in the dark if he recently had fired a weapon. They did not tell Thompson that this "test" also reveals the presence of many other common chemicals and substances. . . . [P]olice shone the laser on Thompson's arm, producing a glow. Within minutes, Thompson made incriminating statements to the police.

548 So.2d at 202.

These facts were similar to those in Henry v. Dees, 658 F.2d 406 (5th Cir. Unit A Oct. 1981). In Henry, the police improperly took advantage of a mentally retarded defendant by telling him that he had flunked a polygraph. The court found that a "fundamental concern" in such situations was the "mentally deficient accused's vulnerability to suggestion." Id. at 409. The police should have taken "extra precautions" and should have "painstakingly determined" that the defendant comprehended what was happening. Id. at 411. The defendant's waiver of his rights therefore was not voluntary.

These facts were also similar to those in People v. Stanis, 41 Mich. App. 565, 200 N.W.2d 473 (1972). In Stanis, as in the present case, the defendant's IQ was seventy, and he suffered from organic brain damage. After several hours of interrogating the

defendant and three readings of his Miranda rights, the police obtained a taped confession about 10:30 p.m. As in the present case, the officer testified that the defendant appeared to understand the questions and that the police did not coerce the defendant's statements.

During this questioning, however, the police showed the defendant a little black box with a needle that moved back and forth. The officers told the defendant that the movements of the needle showed when he was lying. The Stanis court held that the use of this black box was "psychologically timed to have a serious impact on a person of the mental capacity ascribed to the defendant by the examining psychiatrists. . . . We have no doubt that such impact registered and that defendant's incriminating statements were far from voluntary and since lacking such voluntariness they were inadmissible." Id. at 479.

The laser in the darkened room served the same function in the present case that the black box with the moving needle served in Stanis. The laser and the subsequently glowing arm were "psychologically timed" to have a serious impact on a mentally retarded defendant. Officer Childers admitted that he used the laser because he wanted to elicit an incriminating statement from Thompson. (R353-54) That Thompson immediately thereafter made incriminating statements showed how effective this technique was. It was "calculated to exert improper influence," Thomas, 456 So.2d at 458, and was therefore illegal. "[T]he blood of the accused is

not only the only hallmark of an unconstitutional inquisition." Blackburn v. Alabama, 361 U.S. 199, 206 (1960).

The defective Miranda warnings in this case meant that the ensuing statements were presumptively involuntary. The state could not overcome this presumption because the police coercively and fraudulently used a laser to elicit a statement from Thompson after he refused for several hours to give them what they wanted. Accordingly the trial court should have suppressed this statement, because it was a product of psychological coercion.

F

The state may wish to argue that the law of the case doctrine prevents Thompson from rearguing this issue in a second appeal. The law of the case doctrine applies to questions of law actually presented and considered on a former appeal. U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. 1983). An exception to this doctrine, however, exists when the facts are different in the second appeal.

> The decisions agree that as a general rule, when an appellate court passes upon a question and remands the cause for further proceedings, the question there settled becomes the 'law of the case' upon a subsequent appeal, provided the same facts and issues which were determined in the previous appeal are involved in the second appeal. But if the facts are different, so that the principles of law announced on the first appeal are not applicable, as where there are material changes in the evidence, pleadings or findings, a prior decision is not conclusive upon questions presented in the subsequent appeal.

Ball v. Yates, 29 So.2d 729, 738 (Fla. 1946) (citation omitted). Accord Dupont v. State, 561 So.2d 460 (Fla. 2d DCA 1990); Barry Hinnant, Inc. v. Spottswood, 481 So.2d 80 (Fla. 1st DCA 1986); Saudi Arabian Airlines Corp. v. Dunn., 438 So.2d 116, 123 n.8 (Fla. 1st DCA 1983); State v. Rollins, 386 So.2d 619, 620 n.2 (Fla. 3d DCA 1980).

In the present case, officer Childers's admission that he did not inform Thompson of his right to have a lawyer appointed at no charge was plainly a material change in the evidence within the meaning of Ball v. Yates. All confession issues begin with whether Miranda warnings were properly given. A defective Miranda warning

generally means that the confession must be automatically suppressed. Moreover, the defect in the warnings in this case was directly related to Thompson's later statement that indicated that he did not understand his rights. The defect may also have confused Thompson about his rights. Finally, it made his statements presumptively involuntary.

This change in the evidence substantially changed the questions of law which this court must now decide. This court's previous decisions on this matter therefore cannot constitute the law of the case, because the material facts of the case are now different.

ISSUE II

THE COURT IMPROPERLY ALLOWED THE POLICE OFFICER TO INVADE THE PROVINCE OF THE JURY BY GIVING HIS OPINION THAT THOMPSON WAS GUILTY.

During recross-examination, defense counsel asked officer Childers whether he could say that Thompson admitted the facts of the homicides because they had actually occurred or because officer Childers had suggested them to him. (R368) The officer responded that he never suggested the facts to Thompson and that he could not otherwise answer the question. (R369) On redirect, the prosecutor asked for the officer's opinion on whether Thompson confessed because he in fact committed the crimes. (R369) Over defense objection, the officer answered that, in his opinion, Thompson committed the offenses. (R370)

This response was error because "[a] witness cannot offer an opinion as to the guilt or innocence of the accused person." Spradley v. State, 442 So.2d 1039, 1043 (Fla. 2d DCA 1983). Lay witnesses should not invade the province of the jury and may generally testify only about their observations, so that the jury can draw its own inferences and conclusions. Zwinge v. Hettinger, 530 So.2d 318 (Fla. 2d DCA 1988). Lay witnesses may testify in the form of inference and opinion only when "the witness cannot [otherwise] readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact." § 90.701, Fla. Stat. (1987). Opinion testimony should be disallowed when, as in the present case, the witness has already adequately explained

to the jury his observations and perceptions. Kight v. State, 512 So.2d 922 (Fla. 1987). Officer Childers had already testified at length about his perceptions of Thompson's demeanor and the circumstances surrounding his statement to the police. (R326-43) The jury could draw its own conclusions about this testimony and did not need to hear Childers's opinion that Thompson in fact was guilty.

Defense counsel did not open the door to this opinion. His question merely asked if Childers had some objective way of knowing whether Thompson had admitted to the facts of the homicide because Childers had suggested them to him. Childers then denied suggesting the facts. This question and answer did not open the door to Childers's opinion whether Thompson was in fact guilty. If it did, then defense counsel could never ask questions suggesting that the defendant's incriminating admissions to the police were not true, because, on redirect, the police officer could always give his opinion about the defendant's guilt or innocence.

This error was not harmless. As officer Childers admitted, absent Thompson's statement, the state did not have substantial and competent evidence to prove Thompson's guilt. (R371) Thompson's statement was the heart of the state's case, and allowing the officer to bolster it with his opinion about Thompson's guilt cannot be deemed beyond a reasonable doubt not to have affected the jury's verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ISSUE III

THE COURT IMPROPERLY ALLOWED THE PROSECUTOR TO THREATEN TO USE THOMPSON'S TESTIMONY AT THE FIRST TRIAL AS SUBSTANTIVE EVIDENCE, IN ORDER TO OBTAIN A DEFENSE STIPULATION THAT THOMPSON SOLD THE WATCH AND RING TO THE STATE WITNESSES.

A

After jury selection but before trial, defense counsel made a motion in limine to prohibit the prosecutor from using as substantive evidence, Thompson's testimony at the first trial that he sold Swack's watch and ring to the state witnesses. (R204) The prosecutor argued that he should be allowed to use this testimony to rebut an expected attack on the state witnesses' credibility, because the witnesses apparently had criminal records. (R207) The trial court reserved ruling on the motion. (R209)

Later, after the prosecutor cited cases which the defense counsel did not disagree with, the court denied the motion in limine over defense objection. (R229-30) Because of this denial, defense counsel agreed to stipulate that Thompson sold the watch and ring to the state witnesses. (R230) In return, the prosecutor agreed not to use Thompson's testimony at the first trial as evidence in the second trial. (R230-31)

When the state witnesses testified, the prosecutor told defense counsel that he would not use the prior testimony unless the defense attacked the witnesses' credibility. (R300) During cross-examination, the defense did not elicit evidence of their criminal records. (R305-06, 310-12) The court then read the

stipulation to the jury. (R313-16) The prosecutor again said that, in return for the stipulation, he would not use the prior testimony as substantive evidence. (R314)

B

Allowing the state in this manner to obtain an incriminating stipulation and to weaken the defense attack on the witnesses' credibility was improper because the state could not show that the prior testimony was not elicited by the improperly obtained statements which were discussed in Issue I and should have been suppressed. The prior testimony was therefore the fruit of the poisonous tree and could not be used as substantive evidence.

> [T]he petitioner testified only after the Government had illegally introduced into evidence three confessions, all wrongfully obtained, and the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby -- the fruit of the poisonous tree, to invoke a time-worn metaphor. . . . [H]aving illegally placed his confessions before the jury, the Government can hardly demand a demonstration by the petitioner that he would not have testified as he did if his inadmissible confessions had not been used. "The springs of conduct are subtle and varied," Mr. Justice Cardozo once observed. "One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others." Having "released the spring" by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony.

Harrison v. United States, 392 U.S. 219, 222, 224-25 (1968) (footnotes omitted).

The state could not meet its burden of showing that the illegally obtained confession did not induce Thompson's testimony. He testified at the first trial about several subjects, including the watch and ring. (F789-810) He admitted he had seen Swack and gotten a check from him but denied killing him or knowing anything about his death. (F797-98) Thompson testified that the police had coerced him into making the taped statement. (F805) Absent the illegally obtained confession, he might not have testified at all because the state's case was otherwise circumstantial. "We doubt seriously the state could meet such a burden here, given the otherwise entirely circumstantial nature of the evidence adduced at appellant's trial, and hence the lessened need for appellant to attempt to affirmatively contradict the state's case." Zeigler v. State, 471 So.2d 172, 177 (Fla. 1st DCA 1985). Even if he would have testified in any event, he might not have made the incriminating admission that he had sold the watch and ring if the prosecution had not previously "spread [his] confessions before the jury." Harrison, 392 U.S. at 226; Hawthorne v. State, 408 So.2d 801, 804 (Fla. 1st DCA 1982). Consequently, the state could not show that the illegal taped statement did not induce Thompson's trial testimony.

As defense counsel argued, allowing the prosecutor to use the prior statement violated Thompson's fifth amendment rights at the second trial. (R205) The police originally violated this right when they obtained the taped statement from Thompson, and this illegality induced his testimony at the first trial. The trial

testimony was therefore also obtained in violation of the fifth amendment as the fruit of the poisonous tree and introducing it at the second trial would have perpetuated the fifth amendment violation. The court should therefore have granted the motion in limine, and remand is necessary for a new trial.

ISSUE IV

FUNDAMENTAL ERROR OCCURRED WHEN, DURING DELIBERATIONS, THE ATTORNEYS PLAYED THE TAPE FOR THE JURORS AND THE BAILIFF COMMUNICATED WITH THE JURORS WHILE THE COURT WAS NOT PRESENT IN THE DELIBERATIONS ROOM.

During deliberations and while the trial judge was presiding over his docket of other cases, the jurors told the bailiff that they wanted to listen to the tape played at trial. (R474) Because the trial judge was busy with his docket, he suggested that the attorneys and the bailiff take the tape and a tape recorder and play it for the jurors in the jury room. (R475) The attorneys agreed to this procedure. It appears that the judge and the attorneys wanted to make sure that the tape was stopped at the right time, so that the portions of the tape that this court suppressed in the first appeal were not played. (R475-76)

Afterwards, the bailiff said that he went in first and told the jurors that they could not answer any questions. (R476-77) The attorneys entered, played the tape, and left, without answering any questions. (R477) The attorneys agreed that this is what happened. (R477)

This procedure was fundamental error. The law requires that the judge be present during all communications with the jurors. "[T]he communication with the jury during the judge's absence constituted reversible error." Brown v. State, 538 So.2d 833, 834 (Fla. 1989). Although the judge in Brown was in another building while the judge in the present case was in a nearby courtroom, this

distinction makes no difference. The judges in both cases were not present in the room where the communication occurred.

The record does not reflect that Thompson personally waived the presence of the judge. "[T]he presence of a judge is a fundamental right which can be waived only in limited circumstances and then only by a fully informed and advised defendant, and not by counsel acting alone." Id. at 835. The law requires a personal waiver of the judge's presence by the defendant himself before the waiver can be effective. Roberts v. State, 538 So.2d 833 (Fla. 1989).

Appellant is not arguing that the judge must be present whenever the jury wants to play a tape in the jury room or to view physical evidence introduced at trial. Appellant is instead arguing that the judge must be present when courtroom personnel (such as the lawyers below or court reporters) enter the jury room and present evidence to the jurors or when courtroom personnel (such as the bailiff below) make communications to the jury about the case. The bailiff's statement to the jurors that the attorneys could not answer any questions was very similar to the prosecutor's alleged statement in Brown that he did not want any more questions.

The reasons for requiring the judge's presence during this critical and sensitive phase of the trial are explained in Brown.

> Free discourse is essential in such a situation but is thwarted by the judge's absence. In the instant case the jurors might have requested that portions of the testimony be read back to them when informed that they could not have the transcripts. Both the prosecutor and defense counsel went into the jury room to talk with the jurors. Brown now

> claims that the prosecutor did most of the talking to the jurors and that he told them that he did not want any more questions. We do not know what tone of voice this might have been said in, nor do we know the prosecutor's demeanor and manner in dealing with the jury. The prosecutor's statement and conduct, indeed this whole procedure, might well have had a chilling effect on the jury's deliberations. No one can say at this point that the judge's absence did not have a detrimental effect on the jury's deliberations. The possibility of prejudice is so great in this situation that it cannot be tolerated. We hold, therefore, that communications with the jury must be received by the trial judge in person and that the absence of the judge when a communication is received and answered is reversible error. We disagree with the state that Brown's failure to object precludes our consideration of the judge's absence.

Brown, 538 So.2d at 846.

The policies and rules announced in Brown are equally applicable to the case at hand. As in Brown, we do not know what the prosecutor's demeanor was when he played the incriminating tape for the jury. As in Brown, we do not know what effect the bailiff's statement that the attorneys could not answer any questions had on the jury. As in Brown, open discourse between the jury and judge was thwarted. Accordingly, as in Brown, this court should reverse and remand for a new trial.

ISSUE V

THE KILLINGS WERE NOT COLD AND CALCULATED BECAUSE A REASONABLE HYPOTHESIS WAS THAT THEY WERE COMMITTED IN A RAGE WITH A PRETENSE OF LEGAL JUSTIFICATION AND BECAUSE THE INTENT NECESSARY TO PROVE KIDNAPPING COULD NOT JUSTIFY A FINDING OF THIS AGGRAVATING CIRCUMSTANCE.

The trial judge found that the killings were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R685, 935) This aggravating circumstance required proof beyond a reasonable doubt of "a careful plan or prearranged design" to commit murder before the crime began. Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Thompson, 565 So.2d 1311, 1317-18 (Fla. 1990).

The prosecutor speculated that Thompson had this prearranged design to kill when he entered the Myrtle Hill offices and took Swack and Walker on a two-mile death ride. (R616, 618-19) This speculation, however, was not the only possible interpretation of the events nor even the most plausible. As in Harmon v. State, 527 So.2d 182, 188 (Fla. 1988), the evidence was "susceptible to conclusions other than that [the killings were] committed in a cold, calculated, and premeditated manner." See Hamilton v. State, 547 So.2d 630 (Fla. 1989) (prosecutor's version of the events was unduly speculative).

A more plausible interpretation rested on Thompson's own statement and the physical evidence that he had Swack and Walker

take off their clothes so he could take the clothes with him. (R345, 774) Taking the clothes made it harder for Swack and Walker to get help after Thompson left them in the park. Obviously, if Thompson had a "careful plan or prearranged design" to kill, he would not have worried about this possibility.

The physical evidence of a struggle and the placement of the wounds provided further evidence that Thompson lacked the requisite prearranged design. (R243, 289-90) If, as the prosecutor claimed, Thompson took Swack and Walker at gunpoint to the park and shot them with planned calculation, then the struggle and knife wounds would not have happened, because Thompson would have pointed the gun at them the whole time. The prosecutor's account failed to explain why Thompson used a knife if he had both a gun and a careful plan to kill.

A more reasonable account of the physical evidence was that Thompson put the gun away at some point because he did not intend to use it on Swack and Walker. Thompson said later that he did not intend to kill them. (R345) See Holton v. State, 15 F.L.W. S500 (Fla. Sept 27, 1990) (emphasizing that defendant said he did not intend to kill victim). Mentally ill and mentally retarded, he probably did not know what he would do, except that he wanted the workmen's compensation money he irrationally believed had been stolen from him.

Gradually, circumstances overwhelmed him to the point that he confused the aggressor and victim and paranoidly believed that Swack and Walker had threatened and humiliated him. (R530) Rivera

v. State, 561 So.2d 536, 540 (Fla. 1990) ("murder resulted only after the crime had escalated beyond its intended purpose"). When Swack attacked him with a stick or tree branch, he became enraged, pulled out a knife in self-defense, and, during a struggle, stabbed Swack with it several times. As the psychiatrists testified, this murderous and enraged reaction showed how his psychosis and retardation distorted his judgment and reduced his emotional control. (R530, 544-45, 592-93) After Swack received fatal wounds to the chest, Thompson shot him with the gun, perhaps at the same time that he shot Walker.

"[T]he number of stab wounds and the force with which they were delivered were consistent with a killing consummated by one in a rage. A rage is inconsistent with the premeditated intent to kill someone." Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988). "[T]he evidence indicates that Thompson's mental state was highly emotional rather than contemplative or reflective. It is an equally reasonable hypothesis that Thompson hit his breaking point . . . , reached for his gun and knife, and killed [the victim] instantly in a deranged fit of rage." Thompson, 565 So.2d at 1318. Because the facts were susceptible to this conclusion that the killings were accomplished in a quick rage with little or no forethought, the trial court improperly found that they were cold, calculated, and premeditated. Harmon.

Furthermore, the state failed to prove beyond a reasonable doubt that the killings were committed "without any pretense of moral or legal justification. § 921.141(5)(i), Fla. Stat. (1985).

A pretense of justification is "any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculated nature of the homicide." Banda v. State, 536 So.2d 221, 225 (Fla. 1988); Christian v. State, 550 So.2d 450 (Fla. 1989). A pretense is "something alleged or believed on slight grounds: an unwarranted assumption." Banda 536 So.2d at 225 n.2 (quoting Webster's Third New International Dictionary 1797 (1981)).

Thompson's statement and the physical evidence suggested that he stabbed Swack during a struggle in self-defense after Swack attacked him with the tree branch. (R341) In a part of the taped confession that this court previously suppressed, he expressly said he acted in self-defense. (R786, 791) These facts made this case indistinguishable from Cannady v. State, 427 So.2d 723 (Fla. 1983). As in the present case, the defendant in Cannady kidnapped the victim, William Carrier, drove him to a wooded area, and shot him. As in the present case,

> [t]he only direct evidence of the manner in which the murder was committed was appellant's own statements. When he first began incriminating himself, he repeatedly denied that he meant to kill Carrier. During his confession, appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that appellant had at least a pretense of a moral or legal justification, protecting his own life.

Id. at 730-31. Cannady mandates a reversal of the trial court's finding that Thompson acted in a cold, calculated, and premeditated manner.

Finally, the evidence showed at best only that Thompson planned to kidnap Swack and Walker. The intent necessary to prove the underlying felony of kidnapping, however, could not be transferred to the killings, to show that they were cold, calculated, or premeditated. Perry v. State, 522 So.2d 817 (Fla. 1988).

These killings were susceptible to the conclusion that they were committed in an impulsive rage rather than in a cold and calculated manner. Thompson had at least the pretense that he acted in self-defense. The intent necessary to prove kidnapping could not be transferred to the killings. Accordingly, this court should strike the finding of the cold, calculated, and premeditated aggravating circumstance and remand for appropriate proceedings.

ISSUE VI

THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE AND COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE ARE UNCONSTITUTIONALLY APPLIED IN FLORIDA AND THE JURY INSTRUCTIONS ON THESE AGGRAVATORS ARE UNCONSTITUTIONALLY VAGUE.

The trial court denied defense motions that the heinous, atrocious, or cruel aggravating circumstance and the cold, calculated, and premeditated aggravating circumstances are unconstitutionally applied in Florida. (R606, 915-25) The court also decided over defense objection to instruct the jury on these circumstances. (R607)

The motions should have been granted and the jury instructions not given, for the reasons stated in the motions. See Maynard v. Cartwright, 486 U.S. 356 (1988). Appellant notes that the Supreme Court in Shell v. Mississippi, 111 S. Ct. 313 (1990), found that the Mississippi jury instruction used to define the heinous, atrocious, or cruel aggravating circumstance was unconstitutionally vague, even though it was identical to portions of the language approved in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), which in turn was approved by Proffitt v. Florida, 428 U.S. 242 (1976). If the Mississippi instructions were improperly vague, then certainly the Florida instructions were vague, because the Florida instructions did not define the circumstances at all. (R638)

Appellant recognizes that this court has rejected some of these arguments. See, e.g., Smalley v. State, 546 So.2d 720 (Fla.

1989). This court, however, has not yet had an opportunity to assess the impact of Shell, which implicitly overruled Dixon.

ISSUE VII

THE KILLINGS WERE NOT HEINOUS, ATROCIOUS, OR CRUEL.

A

The evidence showed that Walker was killed instantly by a gunshot to the back of the head. (R295-96) Persons killed instantly by gunshot generally have not been killed in a heinous, atrocious, or cruel (hereinafter "HAC") manner. Porter v. State, 564 So.2d 1060 (Fla. 1990). Although the fear and emotional strain which precedes an instantaneous death can sometimes make a killing HAC, Rivera v. State, 561 So.2d 536, 540 (Fla. 1990), the evidence in this case did not establish beyond a reasonable doubt that Walker experienced fear and strain beyond that experienced in many other violent felonies.

The prosecutor's claim that Walker had a lengthy foreknowledge of death was only speculation, because the evidence did not conclusively reveal exactly how the deaths occurred. Indeed the evidence suggested that Thompson never meant to kill them and took their clothes because he did not want them to call for help after he left. Needless to say, if he did not know that he would kill them, they could not have known either. The struggle was speedy and did not allow Walker much time to reflect. She did not even see it because she was on the ground with her face in her hands. Her fear was similar to that inherent in any kidnapping and did not set this crime "apart from the norm" of capital felonies involving kidnappings. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). A contrary

conclusion would mean that all murders involving kidnappings would be HAC. Accordingly, the trial court erred by finding this aggravating factor to exist for Walker's death. (R935)

B

Furthermore, as defense counsel argued below in a written motion (R915), this court has approved HAC findings in almost every conceivable circumstance. In most cases decided by this court, as long as the killings were not instantaneous with no foreknowledge by the victim, the killings were HAC. Accordingly, this aggravating circumstance does not "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877 (1983). Rather than separate "the few cases in which [the penalty] is imposed from the many in which it is not," Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (citation omitted), the HAC circumstance separates the many cases in which the penalty is imposed from the few in which it is not. It excludes only a few painless and unexpected murders and suggests to the jury and to the trial court that all other murders deserve the ultimate penalty.

This state of affairs should be allowed to continue. In Herring v. State, 446 So.2d 1049 (Fla. 1984), Justice Ehrlich argued that the "cold, calculated, and premeditated" aggravating circumstance, as applied by the majority, might be unconstitutionally vague. Id. at 1058 (Ehrlich, J., concurring in part and dissenting in part). In Rogers v. State, 511 So.2d 526 (Fla. 1987), this court adopted Justice Ehrlich's views and overruled Herring. See Herring v. Dugger, 528 So.2d 1176 (Fla. 1988). This

court should likewise recede from prior precedents and adopt a better clearer standard on the HAC circumstance.

The objective factors which sometimes guide this court's decisions on HAC are the degree of physical pain, the amount of mental torture, and the time the pain or torture lasts. If these are the relevant factors, then this court's interpretation should specifically include them and not rely on vague, subjective judgments like whether the murder is wicked, vile, or conscienceless. Appellant therefore suggests the following standard for HAC. A murder is HAC if, for an extended period of time and during the time that the victim is in contact with the murder, the victim experiences great physical or mental pain or is the subject of deliberate and substantial mental torture. The defendant must know about the pain. The length of time necessary to satisfy this standard varies with the degree of pain.

Mere foreknowledge by the victim for a short time that death is imminent is not enough to satisfy this standard because most victims know at least briefly they are about to die. The victim's mental pain does not satisfy the standard unless it is greater than that common to most violent felonies or the underlying felony (if the charge is felony murder). A proper understanding of the standard recognizes that most victims of violent crime experience substantial mental fear and anguish.

Judged by this standard, neither death was HAC. The evidence did not show extended foreknowledge or extreme mental terror beyond that common to many violent felonies. The facts also did not show

extended physical pain. Walker died instantly, and Swack died quickly after a short struggle, from a knife wound or a gunshot. His physical pain was probably less than that suffered by many victims who survive violent crimes. Accordingly, this court should strike the trial court's HAC finding in this case.

ISSUE VIII

THE TRIAL JUDGE FAILED TO FILE A PROPER WRITTEN ORDER AND THE ORDER HE DID FILE VIOLATED THE DOUBLE JEOPARDY DOCTRINE.

After the penalty phase, Judge Bonanno asked the prosecutor and defense counsel to prepare a proposed written sentencing order. (R648, 658) At a later hearing on Wednesday, May 23, the prosecutor had prepared a proposed written order but defense counsel had not. (R670-74) Counsel initially said he would have it ready by Friday but, at the court's behest, agreed to submit it Thursday, May 24. (R670)

Counsel did file this proposed order on May 24. (R931) It stated that the mitigation outweighed the aggravation and, accordingly, that Thompson was adjudged guilty and sentenced to life in prison. (R931-33) Judge Bonanno signed and dated this order the same day he received it, May 24, 1990. (R933)

The next day, on May 25, however, Judge Bonanno said, "I have reviewed the proposed order and judgment and sentence by the State. I think it appears to be in order with what the Court feels in this case." (R683) Judge Bonanno then orally read the state's order into the record. (R683-88) This proposed order was signed and dated on May 25, 1990. (R938) This procedure was improper for several reasons.

First, by signing and dating the defense order on May 24, Judge Bonanno imposed a life sentence. By signing and dating the state's order on May 25, the judge increased this sentence to death

by electrocution. Because the first sentence was already in effect, increasing the sentence violated the double jeopardy doctrine. Bickowski v. State, 530 So.2d 470 (Fla. 5th DCA 1988). In the event the state argues here that the defense order was only a proposed order, then the state's order was also only a proposed order.

Second, the only written order imposing death in this case is entitled "Proposed judgment, order, and sentence." A proposed order is not a final order. No final written order is in the record of this case, and none was ever prepared. Accordingly, this court must remand for mandatory entry of a life sentence. Grossman v. State, 525 So.2d 833, 841 (Fla. 1988).

Third, requiring both the prosecutor and defense counsel to submit proposed orders made the sentencing process like arbitration. The parties had to tailor their proposed orders to fit their perceptions of the judge's views or predilections, and the judge signed whichever order was better. The judge as arbitrator might not even have agreed with all of the statements in the order he chose and also might have believed that it left out important circumstances.

The capital sentencing process, however, is not an arbitration process but an adversarial process resolved by the judge, who must "independently weigh the aggravating and mitigating circumstances. . . ." Patterson v. State, 513 So.2d 1257, 1261 (Fla. 1987). The judge's decision-making procedure should result in an order which accurately reflects all of the judge's views, rather than an order

which merely reflects them more accurately than another order did. Because this court cannot be confident that the sentencing order accurately reflected the trial court's views, it should remand for resentencing.

Fourth, unlike Nibert v. State, 508 So.2d 1 (Fla. 1987), the trial court did not first determine what the relevant aggravating and mitigating circumstances were before directing the state attorney to prepare the sentencing order. Instead, the state attorney first decided what the relevant circumstances were and the judge later decided that he agreed with the state attorney. This was not an independent determination and weighing of the circumstances. This case was therefore like Patterson. "[W]e find that the trial judge improperly delegated to the state attorney the responsibility to prepare the sentencing order, because the judge did not, before directing preparation of the order, independently determine the specific aggravating and mitigating circumstances that applied in the case." 513 So.2d at 1261.

The proposed written order imposing death was not a final order and improperly increased the previously imposed legal life sentence. The judge did not prepare this order and this court cannot be confident that it accurately reflects the judge's views. Accordingly, this court should remand for entry of a life sentence or at least for a new sentencing hearing.

ISSUE IX

THE TRIAL COURT FAILED TO CONSIDER THOMPSON'S MENTAL RETARDATION AND OTHER NONSTATUTORY MITIGATION.

At the trial court's request, defense counsel submitted a proposed sentencing order which included the mitigating circumstances that Thompson was retarded, had not had any disciplinary problems, and was a loving parent to his three children. (R648, 658, 932) The prosecutor also submitted a proposed order which he claimed was essentially the same as that prepared by the judge at the first trial. (R672, 934) This claim was false because the prosecutor omitted two of the mitigators found at the first trial (age and nonstatutory mitigation). (F1510)

At the sentencing hearing, Judge Bonanno said only, "I have reviewed the proposed order and judgment and sentence by the State. I think it appears to be in order with what the Court feels in this case." (R683) Judge Bonanno then read the state's order verbatim. (R683-88)

These proceedings fell woefully short of satisfying the trial court's obligation to consider all mitigating factors presented by the defense. The three factors listed in the proposed defense order were certainly established by the evidence. (R516-17, 522-23, 558, 603, 671) These factors were also valid mitigation. Campbell v. State, 15 F.L.W. S342, S344 n.6 (Fla. June 14, 1990) (good prison record); Copeland v. Dugger, 565 So.2d 1348 (Fla. 1990) (retardation); Rogers v. State, 511 So.2d 526 (Fla. 1987) (good father). In addition, other valid mitigating factors were also

established by the evidence, including a deprived childhood (R512-14), see Campbell 15 F.L.W. at S344 n.6; a good work record, id.; and a family history of mental illness (R514, 531), see Thompson v. State, 456 So.2d 444 (Fla. 1984). The negative family setting and impoverished upbringing had special importance because Thompson was a borderline defective, functioning emotionally as a disturbed child. Brown v. State, 526 So.2d 903, 908 (Fla. 1988); Livingston v. State, 565 So.2d 1288 (Fla. 1988).

In the first trial, the trial court expressly found Thompson's age to be a statutory mitigator and found that the other evidence presented by the defense constituted non-statutory mitigation. (F1510) The non-statutory evidence rose "to a sufficient level to be weighed as a mitigating circumstance." Tompkins v. State, 502 So.2d 415, 421 (Fla. 1986). By finding Thompson's age as a mitigator even though he was thirty-six years old, the first judge relied on Thompson's mental retardation and his functioning at a low educational and emotional level. This reliance was correct, because whether a defendant's age is a statutory mitigator depends more on the defendant's emotional and mental maturity than on his chronological age. Echols v. State, 484 So.2d 568 (Fla. 1985); Amazon v. State, 487 So.2d 8, 13 (Fla. 1986) (nineteen year old defendant was emotional cripple with emotional maturity of thirteen year old); Fitzpatrick v. State, 527 So.2d 809, 812 (Fla. 1988) (defendant was emotionally disturbed man-child with emotional age between nine and twelve). Although Thompson was not necessarily entitled to the same findings in mitigation at the second trial as

at the first trial, King v. Dugger, 15 F.L.W. S11 (Fla. Jan. 4, 1990), the initial findings were at least persuasive, particularly when, as the prosecutor admitted, the evidence in both cases was the same. (R673)

When presented with this mitigating evidence, the trial court in the second trial had the "obligation to consider and weigh each and every mitigating factor apparent on the record, whether statutory or nonstatutory." Cheshire v. State, 15 F.L.W. S504, S505 (Fla. Sept. 27, 1990).

> [T]he trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court must then 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 extenuating 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.

Rogers v. State, 511 So.2d 526, 534 (Fla. 1987).

In Campbell, this court required trial courts to evaluate expressly each mitigating circumstance proposed by the defendant. (The present sentencing order predated Campbell by about three weeks.) Judge Bonanno failed to evaluate expressly the mitigating circumstances proposed by the defendant, failed to determine whether the evidence supported them, failed to find whether they were valid mitigators, and failed to determine whether they counterbalanced the aggravators. Instead, he said only that he had

read the state's proposed order and agreed with it. This was not enough. This court should therefore remand for resentencing.

ISSUE X

EXECUTING THE MENTALLY RETARDED IS CRUEL AND UNUSUAL PUNISHMENT.

Thompson's overall IQ was seventy and his verbal IQ was sixty-six. (R558) Seventy divides the mentally retarded from the non-retarded. (R523, 558) See § 393.063(23), Fla. Stat. (1985) (defining retardation). Dr. Berland and Dr. Maher testified that Thompson was mentally retarded (R523, 558) and no state evidence rebutted this testimony. Defense counsel at the first trial in this case argued that executing someone who was both mentally ill and mentally retarded constituted cruel and unusual punishment. (F1516-18) Defense counsel at the second trial renewed all motions made by previous counsel. (R197, 373, 670) By imposing the death penalty, the trial judge rejected this argument.

A

The eighth amendment prohibition of cruel and unusual punishment acquires meaning from the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). The Supreme Court, in cases such as Coker v. Georgia, 433 U.S. 584 (1977) (rape), and Enmund v. Florida, 458 U.S. 782 (1982) (accomplice liability), and Thompson v. Oklahoma, 108 S. Ct. 2687 (1988) (juveniles), employed a two-fold analysis for determining whether a particular death sentence was consistent with society's evolving standards. First, the Court looked to objective signs of how society viewed the punishment. Second, the Court evaluated the offense, to see if the death penalty for the

offense or the offender satisfied society's desire for deterrence and retribution.

In Penry v. Lynaugh, 109 S. Ct. 2934 (1989), the Court decided that executing the mentally retarded was not cruel and unusual punishment. This decision, however, was based largely on the Court's perception that the individual states had not yet developed a societal consensus against executing the retarded. Before the Supreme Court could decide that executing the retarded violated the federal constitution, a sufficient number of state courts and legislatures needed to decide that it violated the state's constitution or the state's social consensus. Penry v. Lynaugh in effect said that the issue was not yet ripe and sent it back to the state courts and legislatures for further development. Consequently, Penry v. Lynaugh was not dispositive of the issue in Florida, not only because the Florida constitution has its own cruel and unusual punishment clause in article I, section 17, but also because the states' decisions on the issue are part of the evidence on which the Supreme Court bases its analysis. The present case provides an appropriate vehicle for this court to decide whether executing the retarded violates section 17.

B

The same two-part analytical framework that the Court uses in federal cases is applicable to analysis under section 17, but it properly emphasizes the state rather than the entire nation. It first looks for objective signs of Florida's attitude on executing the retarded. Several such signs exist. For example, two polls

conducted in Florida showed overwhelming disapproval of executing the retarded. In a 1985 poll of 104 Florida residents, seventy-nine percent opposed executing the retarded, fourteen percent favored it, and eight percent were uncertain. Cambridge Survey Research, An Analysis of Attitudes Toward Capital Punishment in Florida (1985). The percentages for executing juveniles were only forty-six percent opposed, thirty-eight percent in favor, and seventeen percent undecided. Id.

In a 1986 poll of nine hundred registered voters in Florida, seventy-one percent would not recommend death for someone who was retarded, twelve percent favored such a recommendation, and seventeen percent did not know. Cambridge Survey Research, Attitudes in the State of Florida on the Death Penalty 61 (1986). The percentages for executing juveniles were forty-two percent opposed, thirty-five percent in favor, and twenty-three percent undecided. Id.

The Florida results were consistent with polls in Connecticut (eighty-three percent opposed), Georgia (sixty-six percent opposed), and Nebraska (sixty-six percent opposed). P. Tuckel & S. Greenberg, Capital Punishment in Connecticut (1986); R. Thomas & J. Hutcheson, Georgia Residents' Attitudes Toward the Death Penalty, the Disposition of Juvenile Offenders, and Related Issues (1986); D. Johnson & A. Booth, The Nebraska Annual Social Indicators Survey (1988).

A second objective sign of Florida's views on executing the retarded was the decision by Florida's neighboring state, Georgia,

to prohibit such executions for those who committed their offenses after July 1, 1988. Ga. Code Ann. § 17-7-131(j) (1989). The Georgia Senate also resolved, in resolution 388, to ask the state's board of parole and pardons to commute existing death sentences of retarded defendants. The relevant portions of this resolution were as follows:

> WHEREAS, the Center for Public and Urban Research at Georgia State University conducted a survey and found that two-thirds of the Georgians sampled are in favor of life imprisonment instead of the death penalty for retarded offenders; and
>
> WHEREAS, executing a retarded offender destroys public confidence in the criminal justice system.
>
> NOW, THEREFORE, BE IT RESOLVED BY THE SENATE that, with respect to retarded persons sentenced to death, this body urges the State Board of Pardons and Paroles to give special consideration to commuting the sentences of such offenders to life imprisonment.

These decisions by the Georgia legislature were prompted in part by widespread criticism of the 1986 execution of Jerome Bowden, who had an IQ of sixty-five. Georgia Barring Executions of Mentally Retarded Killers, N.Y. Times, April 12, 1988, at 8. Even Georgia's Attorney General said these decisions were "progressive and a step forward in explicitly recognizing we are not going to impose the death penalty on persons who are mentally retarded." Id.

The Georgia Supreme Court extended the reach of the new statute to those who committed their offense before July 1, 1988. "The legislative enactment reflects a decision by the people of Georgia that the execution of mentally retarded offenders makes no

measurable contribution to acceptable goals of punishment. . . . Thus, although the rest of the nation might not agree, under the Georgia Constitution, the execution of the mentally retarded constitutes cruel and unusual punishment." Fleming v. Zant, 386 S.E.2d 339, 342 (Ga. 1989). Although these events occurred in Georgia, the close cultural and geographic proximity of Georgia to Florida suggests that the same societal opinions exist in Florida.

A third objective sign is the plethora of laws that the Florida Legislature has passed to protect the retarded. Even a cursory review of the statutory indexes reveals numerous laws on this subject. Of particular interest is section 393.13, Florida Statutes (1987), whose short title is "The Bill of Rights of Retarded Persons."

According to this Bill of Rights, the retarded have a special right to liberty and the pursuit of happiness. § 393.13(2)(e). The potential of the retarded to lead independent and productive lives should be maximized. § 393.13(2)(b)(3). The retarded should not be subjected to treatment programs designed "to eliminate bizarre or unusual behaviors." § 393.13(3)(j). The law prohibits treatment programs "involving the use of noxious or painful stimuli." § 393.13(3)(j)(1). It would be cruel and unusual if this law prohibited the use of all noxious or painful stimuli on the retarded except the ultimate noxious or painful stimulus, electrocution in the electric chair.

Polls show that Floridians and others are overwhelmingly opposed to executing the retarded. Georgia has already prohibited

such executions. The Florida legislature has said it does not want "noxious or painful stimuli" to be used on the retarded for the purpose of eliminating "bizarre or unusual behaviors." These substantial and objective signs show that Florida's society looks with disfavor on the execution of the retarded.

C

The second part of the two-part analysis is whether executing the retarded "measurably contributes" to the penological purposes served by the death penalty. Enmund, 458 U.S. at 798. As the Supreme Court has said, "[a]lthough the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty." Id. at 797.

The two purposes served by the death penalty are retribution and deterrence. Thompson, 108 S. Ct. at 2699. The deterrence rationale is weak because every study shows that the deterrence achieved by the death penalty is no greater than the deterrence achieved by the threat of life imprisonment. H. Bedau, Death is Different 33-34 (1987). See Thompson, 108 S. Ct. at 2700 n.45. In any event, the deterrence rationale has no application to the retarded. Retarded offenders do not have the intelligence and knowledge to figure out that the death penalty might or might not apply to their crimes. What the Court said about teenagers applies equally well to the retarded. "The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches

any weight to the possibility of execution is so remote as to be virtually nonexistent." Id. at 2700.

The retribution rationale likewise fails to justify the execution of the retarded. The Supreme Court rejected this rationale for juvenile offenders, id. at 2699, and it is even weaker for the retarded. Even in the common law, "ever since the time of Edward the Third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment." 4 W. Blackstone, Commentaries *23.

Imposition of the death penalty requires a "highly culpable mental state," Tison v. Arizona, 481 U.S. 137, 157 (1987), and must be directly related to the defendant's "personal responsibility and moral guilt." Booth v. Maryland, 482 U.S. 496, 502 (1987); Enmund, 458 U.S. at 801. The Court determined that juveniles did not have this highly culpable mental state,

> for the very assumptions we make about our children when we legislate on their behalf tells us that it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent, who may be deterred by the harshest of sanctions and toward whom society may legitimately take a retributive stance.

Thompson, 108 S. Ct. at 2693 n.23. "The difference that separates children from adults for most purposes of the law is children's immature, undeveloped ability to reason in an adult manner." Id. at 2699 n.43 (citation omitted).

If juveniles presumptively do not have this highly culpable mental state, then retarded offenders certainly do not, because, unlike juveniles, a retarded person's mental status and ability to reason are by definition less developed than a normal adult's would be. ""[I]t is undeniable . . . that those who are mentally retarded have a reduced ability to cope with and function in the everyday world." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985). Unlike the mentally ill, who have disturbed thought patterns and emotions but not necessarily a reduced ability to learn or think rationally, retarded persons necessarily have "inefficient cognitive functioning." Zigler, Balla, & Hodapp, On the Definition and Classification of Mental Retardation, 89 Am. J. Mental Deficiency 215, 227 (1984).

Retarded persons have limited abilities to communicate, to remember, to control their impulses, to develop moral concepts of blameworthiness, to recognize or admit their own disability, and to acquire basic knowledge. Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 428-31 (1985). Even more than teenagers, the retarded are "less able to evaluate the consequences of [their] conduct while at the same time [they are] much more apt to be motivated by mere emotion or peer pressure. . . ." Thompson, 108 S. Ct. at 2699.

By definition, then, mentally retarded offenders do not have the highly culpable mental state that the eighth amendment requires to justify the retributive punishment of death. Moreover, to suppose that the retarded have the knowledge and reasoning power to

be deterred by the possible prospect of capital punishment for their crimes is "fanciful." Id. at 2700. Sentencing the retarded to die in the electric chair does not measurably contribute to either of these two penological "goals that capital punishment is intended to achieve. It is, therefore, 'nothing more than the purposeless and needless imposition of pain and suffering' and thus an unconstitutional punishment." Id. (citation omitted).

ISSUE XI

THE DEATH SENTENCES WERE DISPROPORTIONATE BECAUSE THOMPSON SUFFERED FROM MENTAL RETARDATION, BRAIN DAMAGE, MENTAL ILLNESS, AND AN IMPOVERISHED UPBRINGING; IN ADDITION, THE KILLINGS PROBABLY OCCURRED UPON REFLECTION OF ONLY A SHORT DURATION.

This court should reduce Thompson's death sentences to life in prison because death is disproportionate to the mercy shown in other cases. He was retarded, mentally ill, and brain damaged and functioned at a low educational level. He had an impoverished upbringing. The killings probably occurred upon reflection of only a short duration. These factors made his death sentences proportionately incorrect.

A

The trial court found that Thompson's diminished capacity and emotional and mental disturbance were statutory mitigators. (R935-36) The prosecutor presented no rebuttal testimony to the defense evidence on these two mitigators, and his closing argument on these points was perfunctory at best. (R619-21). At a post-trial hearing he admitted that these two mitigators were established by the evidence. (R673)

Certainly, the defense doctors' testimony strongly supported the trial court's findings. Dr. Maher and Dr. Berland found that Thompson's overall IQ was 70, he had the verbal skills of a first grader and performed at the second or third grade level. (R522-23, 558) Brain damage impaired his ability to relate to others and control his impulses. (R524, 591-92) He suffered from the three

symptoms of psychosis -- hallucinations, delusions, and flat emotions. (R577) During extreme emotional or physical stress, he experienced psychotic episodes when he could not distinguish the real and unreal and might believe or be influenced by illogical or foolish ideas. (R526-27, 591) His family's history of mental illness increased his odds of being mentally ill. (R531)

His mental illness and low intelligence prevented logical or clear thinking. (R527) Paranoid personality traits made him suspicious, easily offended, and sensitive to criticism or snubs. (R524-25) He believed people were trying to get him, and he kept them at bay to prevent them from bothering him. (R580)

On August 27, 1986, his psychosis distorted his ability to assess facts realistically, make rational judgments, and understand what was meaningful. (R544-45, 593) He went to Myrtle Hill, thinking he had been cheated out of $150. (R534, 592) His paranoia exaggerated the extent to which he was threatened, attacked, and humiliated. (R530) His murderous and enraged reaction showed his reduced judgment and self-control. (R530, 592-93) He took rudimentary protective measures, but killing Swack and Walker in broad daylight, allowing them to record the check in the journal, fencing the distinctive watch and ring, and showing the check to others revealed how psychosis and paranoia had reduced his ability to make rational judgments. (R539-40, 595-99)

The doctors agreed that Thompson was influenced by extreme emotional and mental distress and his ability to conform his conduct to legal requirements was substantially impaired. (R528, 544,

575-76) Dr. Maher also thought that Thompson could not appreciate the criminality of his conduct. (R544, 575)

This expert testimony established that, as in Smalley v. State, 546 So.2d 720, 723 (Fla. 1989), Thompson's "mental state was apparently the major contributing factor in the killing." His low intelligence and psychosis prevented him from thinking clearly and caused him to accept the foolish idea that he had been cheated out of $150. His paranoia then exaggerated the extent to which he felt threatened and humiliated after being attacked with the tree branch. He responded with murderous rage.

B

This court rarely affirms a death sentence when, as in the present case, the trial court found both statutory mental mitigators. Indeed, the casebooks contain relatively few cases in which the trial court imposed a death sentence after finding both statutory mental mitigators. This small number of cases, when combined with the large number of capital defendants who are mentally ill, suggests that capital defendants in Florida who have both a diminished capacity and an emotional or mental disturbance are normally sentenced to life in prison rather than death in the electric chair.

In four cases in which the trial court found both mental mitigators but sentenced the defendant to death, this court reduced the death sentence to life in prison. Smalley v. State, 546 So.2d 720 (Fla. 1989); Songer v. State, 544 So.2d 1010 (Fla. 1989); Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988); Ferry v. State, 507

So.2d 1373 (Fla. 1987). In two other cases, this court remanded to the trial court for reconsideration of the mental mitigation. Miller v. State, 373 So.2d 882 (Fla. 1979); Mines v. State, 390 So.2d 332 (Fla. 1980). On remand, the trial courts did impose a life sentence. See Miller v. State, 399 So.2d 472 (Fla. 2d DCA 1981).

In several other cases, this court determined that the trial court should have found the two mental mitigators but did not. This court then remanded and directed the trial court to enter a life sentence. Nibert v. State, 15 F.L.W. S415 (Fla. July 26, 1990); Huckaby v. State, 343 So.2d 29 (Fla. 1977); Shue v. State, 366 So.2d 387 (Fla. 1978); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976).

This court has affirmed death sentences in a few cases in which both mental mitigators were found, but these cases are distinguishable. Ferguson v. State, 474 So.2d 208 (Fla. 1985), involved gruesome murders of many persons in separate incidents. Unlike the present case, it appears that Brown v. State, 565 So.2d 304 (Fla. 1990), did not involve long-lasting mental illness but rather short-term problems resulting from family pressure. In Hudson v. State, 538 So.2d 829 (Fla. 1989), this court declined to disturb the trial court's finding that the mental mitigators were entitled to little weight under the circumstances of that case.

The most important distinction between the present case and cases such as Brown and Ferguson, however, is that Thompson is not only severely mentally ill but also mentally retarded. Appellant

knows of no capital case in which both mental mitigators were found and the defendant was also retarded. Even if this court rejects the argument in Issue X that executing the retarded is cruel and unusual punishment, the argument certainly demonstrates that retardation is a substantial mitigating factor. When it is combined with brain damage and paranoid psychosis, and evidence that Thompson's mental deficiencies were the major factor in the killings, the mitigation becomes overwhelming. See Copeland v. Dugger, 565 So.2d 1348 (Fla. 1990) (evidence of psychosis and mental retardation was "impressive" mitigation).

Furthermore, as was argued in Issue IX, the evidence also established several other significant mitigating factors. Thompson had a deprived childhood, had no disciplinary problems in prison, was a loving parent to his three children, had a good work record, and had a family history of mental illness. A person with overwhelming mitigation of this sort cannot be subjected to the death penalty, which is reserved for "the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d 1, 7 (Fla. 1973) (emphasis added).

Balanced against this mitigation was the heinous nature of the killings and Thompson's criminal record, as well as the occurrence of the killings during a kidnapping. The last of these aggravators was relatively insubstantial, because the jury probably convicted Thompson for felony murder and this factor was therefore already included in the charged offense. Similarly, although Thompson did

have a serious criminal record, the two prior crimes both involved family disputes. (R500-10)

The two murders were also not nearly as heinous as many others this court has considered. Thompson said that he did not intend to kill, and he acted in self-defense. He probably acted in an impulsive and paranoid rage rather than by design. The evidence did not show that Swack and Walker went to the park with foreknowledge of impending doom. It suggested instead that, rather than intend to kill them, Thompson took them to the park and took their clothes because he did not want them to call immediately for help after he left. Their fear was no more than that inherent in any kidnapping.

The struggle was probably quick and could not have allowed much time for Swack and Walker to reflect. Walker did not even see it because she was lying on the ground with her face in her hands. These facts showed at most a generalized fear from the kidnapping and a brief foreknowledge of death. They did not show an extended mental trauma greater than that common to many violent felonies.

The facts also did not show extended physical pain. Walker died instantly. (R670) After a brief struggle, Swack also died quickly, either from a knife wound or a gunshot. His physical pain was probably less than that suffered by many victims who survive violent crimes. Thus, although the state did present some evidence in aggravation, it could not outweigh the substantial mitigation presented by Thompson.

Finally, although the present case is similar to several cases,[3] it is especially similar to Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988). In Fitzpatrick, the trial court found the same three statutory mitigators which the first trial judge found in this case (including low emotional age, which Judge Bonanno at the second trial did not find). Although the evidence of mental disturbance in Fitzpatrick was stronger, the evidence in the present case showed mental retardation and brain damage in addition to mental disturbance. Moreover, Fitzpatrick had five statutory aggravators, as opposed to at most four and probably three or two in the present case. This court in Fitzpatrick reduced the sentence to life, despite the jury recommendation of death. This court should do the same in the case at hand.

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[3] See, e.g., Brown v. State, 526 So.2d 903 (Fla. 1988); Livingston v. State, 565 So.2d 1288 (Fla. 1988); Ferry v. State, 507 So.2d 1373 (Fla. 1987); Amazon v. State, 487 So.2d 8 (Fla. 1986); Thompson v. State, 456 So.2d 444 (Fla. 1984).

ISSUE XII

FLORIDA'S STANDARD JURY INSTRUCTIONS IMPROPERLY MINIMIZE THE CAPITAL SENTENCING JURY'S ROLE DURING THE PENALTY PHASE.

The trial court denied a defense motion (R606, 910-14) which cited Eleventh Circuit decisions for the proposition that Florida's standard jury instructions improperly denigrate the jury's important role by suggesting that the jury's recommendation during the penalty phase is mere advice which the judge can easily ignore. See Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988). The trial court instead read the standard jury instructions to the jury. These instructions repeatedly stated that the jury's function was only advisory and that the decision on punishment was the sole responsibility of the judge. (R498, 636) In Florida, however, a jury's recommendation of life can be overridden only if virtually no reasonable person could differ on the appropriateness of imposing death. Tedder v. State, 322 So.2d 908 (Fla. 1975). Consequently, these standard instructions incorrectly lead the jury "to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell v. Mississippi, 472 U.S. 320, 329 (1985).

Appellant recognizes that Combs v. State, 525 So.2d 853 (Fla. 1988) rejected this argument.

ISSUE XIII

THE REASON FOR DEPARTURE FROM THE GUIDELINES WAS INVALID.

The trial court imposed consecutive life sentences for the kidnappings and a consecutive fifteen-year sentence for the sexual battery for which Thompson was on probation. (R936-37) These consecutive sentences were a departure from the guidelines. The sole reasons for departure were the unscored capital convictions. (R937) If the judge had scored these convictions at two million points apiece, however, he could not have imposed consecutive life sentences and departed this far without listing other reasons for departure. Rease v. State, 493 So.2d 454 (Fla. 1986). Accordingly, Thompson was worse off because the convictions could not be scored.

This result was irrational and a violation of due process. The following proviso should therefore be added to Weems v. State, 469 So.2d 128 (Fla. 1985) and similar cases. If the sole reason for departure is an unscored conviction or victim injury, then the resulting sentence should not be greater than the sentence would be if the conviction or injury were scored.

CONCLUSION

Appellant asks for (1) a new trial, or (2) a reduction in sentence to life in prison, or (3) a new sentencing hearing.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 7th day of January, 1991.

Respectfully submitted,

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