IN THE SUPREME COURT OF FLORIDA

MICHAEL GLEN PATRICK REILLY,

Appellant,

v. CASE NO. 76,764

STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN #201170
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (cont'd)

CONSTITUTIONS and STATUTES

STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

An Escambia County grand jury indicted Michael Glen Patrick Reilly for first degree murder, sexual battery and aggravated child abuse committed upon Jonathan Wells. (R 2230) The five count indictment was filed on February 23, 1988. (R 2230) The indictment charged the single homicide in three counts: premeditated murder, felony murder during an aggravated child abuse and felony murder during a sexual battery. (R 2230) Reilly proceeded to trial and was found guilty as charged on October 28, 1988. The jury recommended a death sentence and Circuit Judge William Anderson adjudged Reilly guilty and sentenced him to death. On appeal, this Court reversed Reilly's convictions and ordered a new trial on March 8, 1990. Reilly v. State, 557 So.2d 1365 (Fla. 1990).

Reilly again proceeded to a jury trial with an alibi defense in Walton County on a change of venue from Escambia County. (R 3-7) Retired Circuit Judge Carl Harper presided. (R 7) The jury acquitted Reilly of premeditated murder. (R 1998, 2575) However, the jury found him guilty of the felony murder counts and the two underlying felonies which were also charged. (R 1998-1999, 2575-2576) The jury recommended a life sentence for the murder by a vote of eight to four. (R 2214, 2583)

Judge Harper ordered the two felony murder counts merged and adjudged Reilly guilty of a single count of felony first degree murder. (R 2693-2694) The court also adjudged Reilly guilty of the sexual battery and aggravated child abuse counts.

(R 2695-2724, 2726-2732) On August 31, 1990, the court sentenced Reilly to death for the murder, to life for the sexual battery and to 15 years for the child abuse. (R 2695-2724, 2726-2732) In support of his decision to override the jury's recommendation of life, the judge found three aggravating circumstances: (1) Reilly had a previous conviction for a violent felony; (2) the homicide occurred during the commission of a sexual battery and an aggravated child abuse; and (3) the homicide was committed in a heinous, atrocious or cruel manner. The court found that Reilly suffered from chronic mental impairments but concluded that no statutory or nonstatutory mitigating circumstances were established. (R 2695-2724)

Reilly filed his notice of appeal to this Court on September 28, 1990. (R 2735)

Facts -- Guilt Phase

Jonathan Wells went fishing alone at the bayou near his home on February 2, 1988. (R 719-720) His mother, Jamie Wells, said four-year-old Jonathan left home after 12:00 and returned for help with a tangled line a short time later. (R 720-721) Jonathan's father, Paul Wells, arrived home at 1:45 p.m. (R 686, 721) He had had a dispute with his boss and was fired from his job. (R 683-684, 708-709, 1402-1412) Paul began looking for Jonathan at 3:00. (R 715) Jamie Wells started looking for Jonathan around 4:30. (R 724) A neighbor, Ronald Moe, saw Jonathan at 2:35 walking up from the bayou carrying a stick which could have been a fishing pole. (R 929-933) Sybil

Knight, who lived in the same neighborhood on the bayou, saw Jonathan at approximately 3:15 or 3:30. (R 903-906, 917) Jonathan walked through her yard almost everyday to fish off the Knight's dock. (R 903-904) Sometime after 4:40, Jamie Wells found Jonathan's body near the edge of the water. (R 728-735) She had taken a path from the Knight's dock which followed along the edge of the water. (R 726-730) Jonathan was down an embankment near the edge of the water and partially hidden behind roots and brush growing there. (R 558-563, 594) His body could not be seen from the dock. (R 594) Ervin Page, a neighbor who was jogging nearby, came to assist and had someone call the paramedics. (R 494-512) The dispatcher for Emergency Communication received the call at 4:37, and the paramedics arrived on the scene at 4:41. (R 546-547, 550-551)

Dr. Thomas Birdwell performed an autopsy the following day. (R 829-830) He found evidence of strangulation and an incision to the neck, made by a sharp instrument, which cut the trachea and jugular vein. (R 831-834) Birdwell concluded that the cause of death was strangulation. (R 837-838) The incision to the neck probably occurred after death, since Birdwell did not find an inhaling of blood into the trachea which would have happened if the heart had been vigorously beating at the time of the incision. (R 837-838, 840-842) Other than two slight bruises to the head and some small scratches on the cheek and ear lobe, Birdwell found no other evidence of trauma. (R 832-836)

Physical evidence discovered during the course of the investigation included shoe impressions, a knife, blood and semen. Investigators found footprints near the body and footprints on a sandbar which was in excess of 520 feet away from the body's location. (R 565, 582, 591, 624, 639, 643-645) These prints were about 800 feet away in actual walking distance along the beach. (R 639) The footprints near the body proved to be those the police officers who first arrived, the paramedic or Irvin Page, the neighbor who was jogging and came to assist. (R 629-630) Tennis shoe tracks found on the sandbar were later matched to Michael Reilly's shoes which had been seized from his home. (R 621-622, 959-972) Reilly's mother also gave investigators two knives, one was a camping knife with multiple blades and the other a lock-blade type pocket knife with only one blade. (R 887-894) An FDLE seriologist found type A human blood on the thumb groove of the lock-blade knife. (R 1064-1071, 1073) He said the blood stains could have been on the knife as long a year. (R 1083-1084) The victim had type A blood. (R 1063-1064) Michael Reilly and his parents also have type A blood. (R 1082, 1511, 1529) Tests for the presence of semen performed on the swabs taken of the victim's mouth at autopsy and on a stain found on the victim's sweat shirt were positive. (R 787-794, 1060-1063) The seriologist also found blood type A and saliva present in the samples. (R 1084)

A State witness, Robert Potts, testified to seeing Michael Reilly on the afternoon of the homicide. (R 1113-1123) Potts

was the regular relief mail carrier for the neighborhood where Jonathan and Michael lived. (R 1107-1110, 1119) He delivered mail there on the day of the homicide. (R 1107-1112) Although he did not know Michael's name, Potts recognized him since he had given him his family's mail in the past. (R 1123-1124) Potts testified he saw a man walking down the street about 3:00 p.m. (R 1113) Potts finished another portion of his mail route, and about 35 minutes later, he saw the same man walking by and recognized him as Michael. (R 1115-1124) The man was wearing khaki pants, a dark blue windbreaker and a knit toboggan hat. (R 1116) Potts saw a news account about the homicide that night and three days later, he called the sheriff's department. (R 1124-1125) His call was not treated seriously. (R 1126) He called a second time after seeing Michael's mother on television making the statement that Michael had been home all day on the day of the homicide. (R 1131-1136) In a statement he gave to the prosecutor eight days after the homicide, Potts stated he saw the man he identified as Michael around 2:30 p.m. (R 1140, 1340-1359) At trial he explained that 2:30 would have been the normal time he would have been at that location but his route was running an hour later that day because of the amount of mail. (R 1138-1143)

Two jail inmates who were incarcerated in the jail's infirmary with Michael testified that he made incriminating admissions to them. (R 975, 1147) Randy White testified first. (R 975) He was in jail on two robbery charges and had recently returned from the state hospital in Chatahoochee. (R 978, 1031-

1036, 1041-1043) His record showed nine prior convictions. (R 1037-1040) White had been declared incompetent to stand trial and spent six months in the hospital on a diagnosis of borderline retardation. (R 1036, 1053) He also had a history of hallucinations and suicide attempts. (R 1041-1044) White said he heard Michael make statements about the homicide. (R 981-988) Once White approached Reilly and talked to him because Reilly appeared as if he was about to cry. (R 981-982) According to White, Michael said he was in jail for killing a little boy. (R 982) Michael allegedly said that he had the boy perform oral sex, he became excited and cut his throat. (R 983-984) On a second occasion, Michael was playing cards with another inmate, Alvin Johnson. (R 987-988) An argument arose over the card game, and White said he heard Michael tell Johnson, "I'll kill you just like I killed that little boy." (R 988) White asked Michael where the knife was located, and he answered that he had one like it at home. (R 987)

Kenny Peck was serving a sentence in the county jail when he met Michael in the infirmary. (R 1183-1187) Michael came to the infirmary on a Saturday and was isolated for a time. (R 1149) Peck talked to him a couple of days later. (R 1149-1150) Peck was reading his religious pamphlet in the day room when Michael approached and asked, "Well, tell me why your God took my little sister when she was small?" (R 1150-1151) After giving Michael an answer, Peck then asked Michael why he killed the little boy. (R 1156) Michael said, "Because he wouldn't suck my dick." (R 1156) According to Peck, Michael said he cut

the boy's throat to make it look as if someone else did the crime and that the knife would not be found. (R 1156-1157) Peck also said that Michael stated that the knife would not be found in the bay. (R 1178) Peck admitted he had access to television new accounts about Michael's case. (R 1188-1194)

Michael presented an alibi defense at trial. Lawrence Reilly, Michael's father, testified that Michael was at home on the afternoon of the homicide. (R 1524, 1529-1543) He is a nurse and was working the 11:00 p.m. to 7:00 a.m. shift at the hospital. (R 1525, 1530) Normally, Lawrence returns home and sleeps until until the late afternoon. (R 1532-1534, 1543) On the day of the homicide, however, he awoke round 2:00 and began watching television in the living room of the family's small, house. (R 1532-1538) Michael's bedroom door was easily visible from the living room. (R 1539) Between 3:00 and 3:30, Michael walked out of his room, where he had been studying, passed his father and went outside to check the mail. (R 1539-1541) Within a couple of minutes, Michael returned and handed his father the mail. (R 1539-1540) Michael went back into his room. (R 1540) Lawrence sat in his chair in the living room until 4:30 or 5:00 when the family ate dinner. (R 1532)

Mary Reilly, Michael's mother, was home all day on the day of the homicide. (R 1471-1474) She said Michael left home around 6:30 a.m. to take a bus to the Port Authority to check on a job. (R 1480) He did not get a job and he returned home by 10:20. (R 1481-1482) Mary asked Michael to run a couple of errands which he did, returning about 11:30. (R 1481-1484)

Around 12:00, Michael decided to go fishing. (R 1484) He returned from fishing between 1:30 and 1:45 p.m. and remained inside the rest of the afternoon, except for a minute when he picked up the mail around 3:00. (R 1485-1487)

Brandon Hartjen, who lived in the neighborhood, testified he saw someone, other than Michael, running from the crime scene immediately after he first heard screams from the scene. (R 1429-1431) Since he knew Michael, Brandon was sure the man he saw was someone else. (R 1431-1440) The man had dark hair and wore blue jeans and a dark blue T-shirt. (R 1431, 1440) After the screams, Brandon went to the location and saw Mr. Page and Jonathan's parents. (R 1431)

Candance Wagner testified to hearing a child screaming around 4:20 p.m. on February 2, 1988. (R 1413-1417) She had walked onto the sandbar in the bayou about 4:10 to fish with her relatives. (R 1415-1417) Almost immediately, she heard a child's screams. (R 1416-1417) The screaming would stop for a few minutes and then start again. (R 1417-1418) Later, she heard another scream from a woman's voice. (R 1419)

Dr. Emilio Antonetti, a physician, examined Michael on February 9, 1988, for the presence of any cuts, bruises or scrapes that may have occurred during the alleged assault. (R 1368-1370) The examination included the genitalia. (R 1370) No injuries were present. (R 1371) Antonetti testified that if Michael had been injured one week prior to the examination which was the day of the homicide, the injury would have been detectable. (R 1371-1372)

Michael's mother testified to his long history of learning disabilities and emotional problems. (R 1475-1477) He attended special schools for children with learning disabilities and emotional problems. (R 1476-1477) Although Michael attended classes at the community college, his instructors testified that he was not passing the courses. (R 1446, 1449, 1516-1519) Professor Scroggs detected that Michael had difficulty understanding even though he tried to learn the material. (R 1450) Professors Horton remembered Michael as a quiet student who never spoke in class. (R 1521)

Michael Reilly testified at trial. (R 1591) He said that on the morning of the homicide he went to the Port of Pensacola to find day work unloading boxcars. (R 1593-1594) After he was unsuccessful in obtaining work, Michael returned to his parents' home where he lived. (R 1595) His mother asked him to return a book to the bookmobile and to pay a dentist bill. (R 1595-1596) He performed the errands and returned home. (R 1596) Michael then decided to go fishing and did so from the white dock on the bayou. (R 1596) He said he returned no later than 2:20 p.m. and did not see Jonathan Wells while fishing. (R 1598-1600) Michael said he did not leave his home again until after 8:00. (R 1600-1601) Although he has picked up the mail from the postman in the past, Michael did not recall getting the mail that day. (R 1600-1601) He said he did not leave the house during the middle of the afternoon. (R 1601) When asked about the statements he allegedly made to the inmates, Michael denied making them. (R 1603-1605) He recalled one inmate,

Martinez, talking to others about making up statements and testifying against Michael to benefit themselves. (R 1604)

Daniel Kelly was in the jail infirmary when Michael was incarcerated there. (R 1703, 1707-1708) He recognized Michael because of the news accounts about his case. (R 1707) Kelly also knew Guillermo Martinez, another inmate in the jail infirmary. (R 1705) While in a holding cell with Martinez and other inmates, including State witness Randy White, Kelly heard Martinez encourage others to fabricate a story about Reilly's case from the news accounts to give to the prosecution in exchange for a deal. (R 1708-1709) Kelly did not participate and said he never heard Reilly make any statements about his case. (R 1708-1709) In fact, he said Reilly appeared scared because other inmates were harassing him. (R 1709-1712) Martinez denied talking to others about creating a story to testify against Reilly and claimed Reilly made incriminating statements in his presence. (R 1686, 1689-1690)

Motion to Suppress Statements to Inmates

Investigators focused on Michael as a possible suspect. (R 2317-2319) On Saturday, February 6, 1988, they went to Michael's house at 11:00 a.m. and asked him to accompany them to the sheriff's department for questioning. (R 2319-2320) The investigators began the questioning at 11:59. (R 2322) Michael was interrogated for over two hours. (R 2325-2326) Ultimately, Michael confessed, and on that basis, he was arrested. (R 1673) Michael was incarcerated in the jail infirmary Saturday

afternoon, and within three or four days, he allegedly made the incriminating statements to three inmates: Randy White, Guillermo Martinez and Kenny Peck. After an extensive hearing on a motion to suppress the statement given to the investigators on February 6th, the trial court concluded that Michael's statement was involuntary. (R 2296-2299, 2302-2402, 2452) The investigators had used coercive tactics, lead Michael to believe the homicide was being considered as an accident, and made promises of mental health treatment rather than prosecution. (see, transcript of the taped statement appearing at R 2479-2514 and 2355-2359) The trial judge's written order granting the motion stated,

> The defendant is of less than average intelligence and is emotionally handicapped. Promises were strongly implied to the defendant that confessing to involvement in the killing would result only in his receiving treatment and counseling, whereas denial of such involvement would result in much harsher consequences. It is evident that such promises induced the defendant to make the statements sought to be suppressed. Under these circumstances, statements were not voluntary.

(R 2452)

After the trial court suppressed the involuntary confession, Reilly moved to suppress the statements allegedly made to the inmates. (R 2420, 2433-2447, 2456-2459) The premise of the motion was that Reilly was illegally arrested on the basis of the involuntary confession, which rendered his incarceration and later statements tainted fruit of the illegal confession and arrest. (R 2456-2457) At the hearing, the only evidence

presented was depositions of the inmates detailing the circumstances surrounding the statements. (R 2446-2447) Defense counsel urged that Reilly, who had been arrested and incarcerated in the jail infirmary only a few days before the statements, was still under the influence of the promises of treatment which induced the confession to investigators. (R 2434-2438, 2444-2446) During argument, the prosecutor contended that the first appearance hearing, the appointment of counsel and a visit from his parents were sufficient intervening events to break the causal connection between the involuntary confession and the statements to the inmates. (R 2438-2444) The trial court denied the motion. (R 2459, 2475)

Penalty Phase and Sentencing

The State presented no additional testimony at the penalty phase of the trial. (R 2055-2058) A judgment for Reilly's conviction for sexual battery committed in 1983 was submitted as evidence in aggravation. (R 2057) Reilly presented two witnesses and testified in his own behalf. (R 2059, 2099, 2108) Additionally, Reilly played the tape recorded interview made when officers coerced his confession. (R 2111-2116, 2754-2839)

Dr. James Larson examined Michael after his arrest in 1983 for sexual battery. (R 2059-2068) Michael was nineteen at the time. (R 2077) Before testifying in this case, Larson reviewed Michael's school records and other psychological evaluations. (R 2069) The evaluation lead Larson to conclude that Michael was brain impaired and suffered from learning disabilities and

emotional adjustment disorders. (R 2072) Testing showed Michael's IQ to be in the 80's which is in the dull normal range. (R 2074) Larson found that Michael had a long history of severe learning disabilities and emotional disturbances. (R 2070) He was diagnosed as having these disabilities in the first grade and spent his school years in a variety of special schools for the either retarded or emotionally disturbed children. (R 2072-2075) Michael also has a number of physical problems, particularly with his eyes. (R 2070, 2072) He was ridiculed for this problem by other children in school. (R2070) At the time of the 1983 offense, Michael was also intoxicated. (R 2075) He had been drinking with a friend for hours, drinking straight vodka. (R 2077) The police arrested Michael less than an hour after the crime and he confessed, showing a great deal of remorse. (R 2075-2076)

Lawrence Reilly testified. (R 2099) First, he asked the jury to spare Michael's life even though Michael told him earlier that he wanted to go the death row. (R 2100) He also confirmed Michael's developmental problems. (R 2100-2103)

Michael testified in his own behalf initially about the circumstances surrounding his confession to the police, which the court had suppressed as involuntary. (R 2109-2117) He talked to the police for about two hours after his arrest. (R 2109) Initially, he told the police his activities for the day of the homicide and the fact that he did not see Jonathan Wells that day. (R 2109, 2758-2793) Because of the manner in which the police questioned him, Michael said he started to believe

that he might have been involved in Jonathan's death. (R 2110, 2116) Defense counsel played the tape recorded interview the detectives conducted with Michael. (R 2115-2116, 2758-2838) The officers told him they knew what happened and suggested that it was an accident. (R 2753-2838) They continuously asked Michael to tell them about the offense. (R 2753-2738) Furthermore, the officers said whoever did the crime would probably receive counseling rather than prison. (R 2753-2738) Michael ultimately told the officers he committed the offense. (R 2116-2117)

Michael also told the jury about some of his experiences while imprisoned on his previous conviction. (R 2117-2123) He said he was involved in some fights while in prison. (R 2117) On one occasion, another inmate attacked him and slammed his head against the floor. (R 2117) Michael required stitches and remained in the prison clinic for few days. (R 2117-2118) Michael said he did receive some disciplinary reports while incarcerated for possessing homemade wine, fighting, insufficient work and verbal disrespect. (R 2118-2120) He never fought with any of the correctional officers, and in fact, came to the assistance of one who was being attacked. (R 2118) He and another inmate held the attacker down and away from the injured officer. (R 2118)

SUMMARY OF ARGUMENT

1. Reilly moved to suppress statements he allegedly made to three jail inmates within four days of his arrest. Reilly's arrest was based upon a confession he gave investigators, which the trial court later ruled involuntary. The investigators had promised Reilly mental health treatment, instead of prosecution, in exchange for an admission of guilt. At the time of the statement to the inmates, Michael was still under the influence of the prior involuntary confession. This rendered the later statements likewise involuntary and unreliable in violation of the Fifth and Fourteenth Amendments. Furthermore, Reilly was illegally arrested which rendered his incarceration and later statements tainted fruit in violation of the Fourth Amendment. The trial court improperly denied the motion to suppress the alleged statements to the inmates.

2. The jury recommended a life sentence by a vote of eight to four. During the guilt phase of the trial, the jury rejected the State's theory that Michael committed a premeditated murder and acquitted him of that count of the indictment. This evidences the jury's belief that Michael did not intend to kill the victim during the commission of the sexual battery. The jury also heard the uncontroverted evidence of Michael's mental impairments, low IQ and learning disabilities. These factors established a reasonable basis for the jury's life recommendation. The trial court improperly imposed a death sentence in this case.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF THREE JAIL INMATES WHO TESTIFIED TO ALLEGED ADMISSIONS OF GUILT REILLY MADE WHILE HE WAS INCARCERATED PENDING TRIAL, SINCE REILLY'S ARREST WAS ILLEGALLY BASED ON HIS INVOLUNTARY CONFESSION.

Michael Reilly moved to suppress incriminating statements he allegedly made to three jail inmates within four days of his arrest. (R 2420, 2433-2447, 2456-2459) The motion should have been granted for the following reasons: (1) that at the time of the statement to the inmates, Michael was still under the influence of the prior involuntary confession, rendering the later statements likewise involuntary in violation of the Fifth Amendment and Article I Section 9 of the Florida Constitution; (2) since one of the reasons for the court's finding the confession involuntary was that Michael was easily lead, his later alleged admissions were, like the confession, unreliable and inadmissible under the due process clause of the United States and Florida Constitutions; and (3) that Reilly was illegally arrested which rendered his incarceration and later statements tainted fruit in violation of the Fourth Amendment. During argument, the prosecutor contended that the first appearance hearing, the appointment of counsel and a visit from his parents were sufficient intervening events to break the causal connection between the involuntary confession and illegal arrest and the statements to the inmates. (R 2438-2444) At the hearing, the only evidence presented was depositions of the

inmates detailing the circumstances surrounding the statements. (R 2446-2447) The trial judge had already heard evidence concerning the earlier confession to investigators and had ruled it involuntary. (R 2296-2299, 2302-2402, 2452) The trial court improperly denied the motion to suppress the alleged statements to the inmates. (R 2459, 2475) Reilly realizes that this Court addressed the admissibility of these statements on the first appeal. Reilly v. State, 557 So.2d 1365 (Fla. 1990). However, he urges this Court to reconsider the prior decision.

The test to be applied to determine the admissibility of a confession secured as the result of an illegal arrest or as the result of a prior involuntary confession is the same -- whether intervening events have broken the causal link between the illegal activity and the confession. Taylor v. Alabama, 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982); Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); Clewis v. Texas, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). All of the circumstances from the taking of the involuntary confession and the illegal arrest to the making of the statements sought to be suppressed must be evaluated. Moreover, the State has the burden of establishing that a break in the causal link occurred. Ibid. The State failed in its burden in this case. Michael was still under the influences of the promises made to him to secure his initial confession to the investigators at the time he allegedly talked

to the inmates. His alleged statements to the inmates should have been suppressed.

Investigators went to Michael's house around 11:00 a.m. on Saturday, February 6, 1988, and asked him to accompany them to the sheriff's department for questioning. (R 2319-2320) The investigators began questioning Michael at 11:59, and two hours later, they secured a confession and arrested Michael. (R 2322, 2325-2326) During the questioning, the investigators continually told Michael that the homicide was considered an accident. They continually told Michael that the perpetrator would not be prosecuted if he admitted the killing, but instead, he would receive counselling and mental health treatment. (see, transcript of the taped statement appearing at R 2479-2514 and 2355-2359) The trial judge's written order suppressing the confession as involuntary stated,

> The defendant is of less than average intelligence and is emotionally handicapped. Promises were strongly implied to the defendant that confessing to involvement in the killing would result only in his receiving treatment and counseling, whereas denial of such involvement would result in much harsher consequences. It is evident that such promises induced the defendant to make the statements sought to be suppressed. Under these circumstances, statements were not voluntary.

(R 2452) Michael was incarcerated in the jail infirmary that Saturday afternoon, and within three or four days, he allegedly made the incriminating statements to the inmates.

The State asserted that sufficient intervening events occurred between the illegal activity and the statements to

break the causal link. (R 2438-2444) However, the State presented no evidence to support the claim. (R 2438-2444) Defense counsel agreed that Michael had had a first appearance hearing and had counsel appointed at that time. (R 2435-2436) The State also claimed that Michael's parents visited him during this time. (R 2443) Consequently, the question is whether a first appearance hearing, the passage of three or four days, a visit from relatives and appointment of counsel vitiates the taint of the involuntary confession and illegal arrest. The answer is no. First, there is no evidence concerning the nature of any consultation Michael may have had with his parents or counsel. Merely being apprised of his rights under Miranda does not vitiate the taint. Brown v. Illinois. Likewise, a visit from friends or relatives does not break the chain of events. Taylor v. Alabama. The psychological influences of the technique used to secure the involuntary confession lingered. In fact, Michael was incarcerated in the jail infirmary which may have reinforced the false promise that he would receive treatment and not be prosecuted. Indeed, even one of the inmates testified that Michael approached him and asked to talk. (R 1150-1150) This could have been Michael's way of seeking a therapeutic forum. The State failed to meet its burden of establishing an attenuation of the taint of the prior illegal confession and arrest.

These alleged statements to inmates were also unreliable and their admission denied Reilly his rights to due process and a fair trial. Amends. V, VI, XIV U.S. Const.; Art. I Sec. 9, 16

Fla. Const. Even if this Court concludes that there was a break sufficient to remove the taint of the illegal police coercion, Michael's later statements were still unreliable. One of Michael's characteristics is that he is easily lead. The officers lead him to believe he was involved in the killing even though he denied any knowledge. Their insistence suggested to Michael that he must have been involved. This type of subtle coercion on someone with Michael's mental abilities, who is also highly suggestible, renders the reliability of the later statements suspect. See, Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

Michael's alleged statements to the three inmates were admitted in violation of his rights guaranteed under the Fourth, Fifth, and Fourteenth Amendments. This Court must reverse his convictions for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF A SENTENCE OF LIFE AND IN IMPOSING A DEATH SENTENCE UPON MICHAEL REILLY.

A jury's recommendation of life imprisonment must be given great weight, and

> In order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). If mitigating evidence provides any reasonable basis upon which the jury might have relied, the trial judge must impose a life sentence in accordance with the recommendation. E.g., Morris v. State, 557 So.2d 27 (Fla. 1990); Cochran v. State, 547 So.2d 928 (Fla. 1989); Fead v. State, 512 So.2d 176, 178 (Fla. 1987); Ferry v. State, 507 So.2d 1337 (Fla. 1987). The fact that the sentencing judge disagrees with the jury's sentencing decision does not authorize an override and the imposition of a death sentence. Rivers v. State, 458 So.2d 762, 765 (Fla. 1984). Two dominant mitigating factors justify the jury's life recommendation: (1) Michael did not intend to kill and (2) Michael's long-term, chronic mental impairments. The trial judge's decision to override the recommendation was wrong.

1. The Homicide Was Not Intentional

The jury concluded that Michael did not plan the murder. This conclusion follows from the jury's verdict acquitting him

of premeditated murder. (R 1998, 2575) The jury rejected the State's assertion that Reilly committed a premeditated murder and convicted him of felony murder. Michael's alleged statements to Randy White, which the jury may have chosen to believe, were that he became excited and killed Jonathan during the sexual battery. (R 983-984) Medical evidence supports Michael's alleged statement that he cut the boy's throat after death. (R 837-842) Dr. Birdwell found little blood in the trachea. (R 837-842) The evidence convinced the jury that Michael did not intend to kill.

This Court has recognized the lack of an intent to kill to be a reasonable basis for a jury's recommendation of life. In Norris v. State, 429 So.2d 688 (Fla. 1983), the State failed to prove the defendant intended to kill the victim whom he attacked during a burglary. The jury convicted of Norris of felony murder and recommended a life sentence. Reversing the judge's override of the recommendation, this Court said the lack of an intent to kill, coupled with the defendant's drug and alcohol problems, were reasonable factors for the jury to recommend life. Ibid. at 690. In Hawkins v. State, 436 So.2d 44 (Fla. 1983), the jury convicted the defendant of felony murders for the deaths of two robbery victims and recommended life. The evidence suggested that Hawkins was not the triggerman in the homicides even though present at the time of the shootings. This Court stated that the jury's verdict expressly rejecting premeditation was consistent with the jury's acceptance of this evidence which would form a reasonable basis for a life

sentence. Ibid. at 47. In DuBoise v. State, 520 So.2d 260 (Fla. 1988), evidence showed that he fully participated in the robbery and sexual battery of the victim and did nothing to prevent his co-perpetrators from beating her to death. This Court first held that Duboise was death eligible under Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). However, DuBoise's death sentence was reversed since the jury could have reasonable based its decision to recommend life on DuBoise's lack of intent to kill and his relative culpability. Ibid. at 265-266.

Reilly's jury, like the juries in these earlier cases, concluded that he did not intend to kill. Intent to kill is a significant fact in determining the appropriateness of a death sentence. See, Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). The life recommendation was reasonably based on this fact, and the trial court erred in overriding it.

2. Reilly's Mental Impairments

In his sentencing order, the judge found that Reilly's mental problems were real and long-standing. The court summarized these findings as follows:

> ...it is an undisputed fact that the defendant is a borderline retarded individual with a dull or low normal intelligence level. He has an IQ level of 80, placing him in the lowest 16% of the population. According to Dr. James D. Larson, a licensed forensic psychologist, the defendant is a "brain impaired" individual with severe learning disabilities. In fact, the defendant spent his entire educational efforts in special education programs.

> Consequently, his employment record and capabilities are limited to menial tasks involving manual labor. Since birth, the defendant has had a physical problem with an eye muscle (further injured by a rock striking the eye in 1970), resulting in some uncaring persons taunting him with the appellation, "wandering four eyes". His speech is also "halted" due to a stuttering problem he had during his childhood years. Throughout the trial of this case, I paid close attention to the defendant's appearance, his conduct in court, and to his testimony in both the guilt phase and the penalty phase. The court is well satisfied that the defendant's mental and physical disabilities are real, rather than feigned in order to gain sympathy.

(R 2707-2708) However, in spite of these findings, the court concluded that no statutory or nonstatutory mitigating factors were present.

The trial court incorrectly evaluated and applied an incorrect standard when considering the evidence of Michael's mental condition. (R 2702-2709) After finding the mental impairments Michael suffered to be real, the court rejected them as establishing any mitigation because Reilly "knew right from wrong", "knew his acts were illegal", and "could have conformed his conduct to the requirements of law." (R 2709) The court appears to have applied the test for legal insanity when evaluating the mental mitigating evidence rather than the standard provided for the mitigating circumstance concerning impaired capacity. See, Ferguson v. State, 417 So.2d 631 (Fla. 1982). Section 921.141 Florida Statute requires a mitigating circumstance to be found when the defendant's abilities to understand the criminality of his conduct or to conform are

substantially impaired; complete inability to understand or conform is not necessary. This use of the wrong legal standard is further demonstrated in the sentencing order when the court noted as support for his conclusions that Reilly had been previously found competent to stand trial in 1983, sane at the time of that offense, and not in need of involuntary hospitalization. (R 2709) Again, none of these determinations use the same legal standard as the mitigating circumstance. This Court held that a trial judge is required to find mitigating circumstances and to place them into the sentencing equation when the evidence establishing them is unrefuted. Nibert v. State, 574 So.2d 1059, 1061-1062 (Fla. 1990); Campbell v. State, 571 So.2d 415 (Fla. 1990). The trial judge failed to follow this mandate. Mitigating circumstances concerning Michael's mental impairment were present and compelling.

The jury did not ignore these viable mitigating circumstances. These factors provide a reasonable basis for the jury's life recommendation. Even if the judge had not been legally incorrect in his decision to reject all mental mitigation in this case, the jury was free to give the evidence greater weight. Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988); Robinson v. State, 487 So.2d 1040, 1043 (Fla. 1986). The court was not free to substitute its judgment concerning the evidence and the appropriate sentence merely because the judge disagreed with the jury. Rivers, 458 So.2d at 765. Michael's mental and emotional impairments justified the jury's recommendation. His IQ in the dull normal range is certainly a

compelling reason. Amazon v. State, 487 So.2d 8 (Fla. 1986) (defendant's mental age of 13 a reasonable basis for a life recommendation); Morris v. State, 557 So.2d 27 (Fla. 1990) (defendant's IQ of 75 found to be a reasonable basis for jury's life recommendation); DuBoise, 520 So.2d 260; see, also, Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Life-long, severe emotional and learning disabilities, such as those afflicting Michael, also support the jury's recommendation. Cochran v. State, 547 So.2d at 932. Dr. Larson testified that Michael suffered from brain impairments. (R 2072) This type of brain damage likewise supports the life sentence recommendation. Carter v. State, 560 So.2d 1166 (Fla. 1990).

The trial court improperly overrode the jury's life recommendation. Reilly urges this Court to reverse his death sentence with directions to impose a life sentence.

CONCLUSION

For the reasons presented in Issue I of this brief, Michael Reilly asks this Court to reverse his convictions with directions to grant him a new trial. Alternatively, for the reasons presented in Issue II, Reilly asks this Court to reduce his death sentence to life imprisonment.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN #201170
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand-delivery to Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Mr. Michael Reilly, #092729, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 26th day of August, 1991.

W. C. McLAIN