IN THE SUPREME COURT OF FLORIDA

DONALD DAVID DILLBECK,

Appellant,

v.

CASE NO. 77,752

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts Dillbeck's statement of the case but would submit the following recital of the facts as the Appellee's statement of the facts.

On June 24, 1990, Tony Vann, Vann's son, his wife and his mother, stopped at Gayfer's Department Store to exchange some clothing before they went on a picnic. (TR 1653). His mother was driving her 1962 Chevrolet Nova and remained in the car while the others entered the Gayfer's Department Store. (R 1654-1656). Mr. Vann noticed a man hanging around near the entrance of the department store and recalled that he was a white male, sandy hair, sunglasses, wearing khaki pants or jeans and an orange-yellow shirt. Mr. Vann testified that he entered the department store at approximately 2:30 p.m. and was inside approximately twenty-five minutes. When he came out he no longer saw the man nor his mother's car. (TR 1658-1659). When he finally did locate his mother's car, a knife and sunglasses were found therein which had not previously been there. (TR 1660-1661). Mr. Vann could not explain why Dillbeck would have been near his mother's car or would have left fingerprints inside his mother's car. (TR 1662).

Donna Sue Bivins worked at Gayfer's part-time on June 24, 1990. (TR 1664). She was *in her car in Gayfer's* parking lot when she noticed a struggle going on two cars over from hers. She heard moaning and she saw a man and a woman with blood all over their faces. (TR 1665). She got out of her car, walked past the car and noticed that the windows were rolled down. She

went into Gayfer's and contacted a security person, Cathy Wilson. (TR 1668). Ms. Bivins observed that there was a white male and a white female in the car and that the man was in the driver's seat with his arms around the woman's chest. (TR 1666). She testified that it looked like the woman was trying to get away and was fighting. (TR 1667). She observed that the female's face was covered with blood. (TR 1672).

Cathy Wilson, a security person with Gayfer's, walked out to the parking lot as a result of her discussion with Donna Bivins. (TR 1676). When she approached the car, she saw a young white male and a white female in the car and noticed that the man had put his hands on the woman's neck. (TR 1676). It appeared to her that Dillbeck was attempting to stop the woman from making noise and she observed blood coming from the victim's mouth. The woman seemed to be on the passenger's side of the car and the male was in the driver's seat. (TR 1677-1678). Because Ms. Wilson believed it might be a domestic squabble, she went to the back of the car and took the tag number. When she walked forward, she noticed that she could only see the man wearing a cap. She was able to see his face and identified the man in the car as Donald Dillbeck. (TR 1678-1680). As she returned to the store, she heard the car start up, she ran into Gayfer's and had someone dial 911. (TR 1681). Samuel Bradley, a second security person at Gayfer's, testified that at approximately 3:00 p.m., on June 24, 1990, several people were gathering to watch what was going on outside Gayfer's, pointing to an older model blue car. (TR 1723). When he approached the car, the car started up and

backed up, stalled, was cranked up again and then struck another car about twenty feet away and then kept going and then crashed again. (TR 1724). Mr. Bradley followed the car on foot and when he saw the car door open, he noticed a man jump out and start running towards McDuff's. The individual was a white male with blondish hair wearing a yellowish shirt that was covered with blood. (TR 1724-1725). Mr. Bradley followed the suspect until he got behind him on top of the hill near Monroe Street. At that point, he noticed that Dillbeck took off his shirt that was covered with blood. Mr. Bradley approached him. Dillbeck was asked to return to the office, at which point Dillbeck said, "Get away from me, man. I'll kill you, I'll kill you." Dillbeck then hit Bradley in the chest with the blunt end of a knife and then took off across the street. (TR 1727-1728). Mr. Bradley continued to chase Dillbeck into a water ditch. Dillbeck again yelled at him, "Leave me alone. I'll kill you, I'll kill you." (TR 1730). Mr. Bradley positively identified Donald Dillbeck as the man he was chasing. (TR 1732). On redirect, Mr. Bradley testified that Dillbeck did not look lost or scared when he threatened Mr. Bradley, nor was Dillbeck's speech anything but plain and clear when Dillbeck threatened him. (TR 1734-1735).

Mark Dent of the Tallahassee Police Department, testified that he was called to the scene at Gayfer's and arrived at approximately 3:06 p.m., to investigate a battery in progress. (TR 1736). He found the older blue model Chevrolet which had crashed and when he looked inside, he found a white female on the floorboard with her legs near the gas pedal. Her body,

especially the neck area, was covered with blood and she had a large laceration on her neck. Office Dent found a small knife on the passenger's seat near the body. (TR 1741).

Tanya Barefield, a paramedic with Tallahassee Memorial Hospital, arrived on the scene at 3:15 p.m., June 24, 1990, and attempted to assist Faye Lamb Vann. Mrs. Vann's body was lying down on the floorboard with her legs on the driver's side of the vehicle. Mr. Barefield testified that there was lots of blood and a large cut across the lower cervical spine (lower part of the neck area). She found no pulse and found Mrs. Vann's pupils fixed. Mrs. Vann was no longer bleeding, her lips were blue and there was no heart activity. It was Ms. Barefield's conclusion that nothing could be done. (TR 1752). She noticed a knife in the passenger's seat covered with blood and placed it on the dash of the car. (TR 1753). Ms. Barefield testified that there was no bleeding when she arrived because the victim's heart had stopped pumping. She observed large cuts on both sides of Mrs. Vann's neck. (TR 1757).

Officer Jennifer Smith with the Tallahassee Police Department testified that she located the yellow-orange shirt with bloodstains during the course of her investigation. (TR 1764). Mark Meadows with the Tallahassee Police Department testified that when he saw *Dillbeck*, *Dillbeck* was surrounded and at that point, gave up. Handcuffs were placed on him and he was searched, no weapon was found. (TR 1770-1772). Dillbeck had no shirt and was wearing greenish work pants. In his pocket, a Publix receipt was found as well as an address book, a Florida

map, a small money clip and a small piece of paper with writing on it. (TR 1772, 1774, 1777-1778). Dillbeck's face had blood on it. He was immediately transported to the police department. The officer noticed blood on Dillbeck's hands, chest and face and after fingerprints were taken, Dillbeck's pants were also seized. (TR 1779, 1781, 1782). On cross examination, Officer Meadows testified that approximately three dollars and some change were found in Dillbeck's pocket. (TR 1784). When Dillbeck arrived at the station, he seemed exhausted and asked for water. Dillbeck wanted to remove his socks because they were wet. (TR 1784). Officer Meadows testified that Dillbeck drank a lot of water and was limp and sweaty, he had to be assisted out of the police car. (TR 1785). Dillbeck was very passive and did not resist arrest. (TR 1786). Because Dillbeck seemed exhausted, Officer Meadows asked paramedics to check him. (TR 1786). On redirect, Officer Meadows testified that the paramedics did check Dillbeck and thereafter left. (TR 1787). Tallahassee Police Investigator Marcus Strickland testified that he was at the scene when Dillbeck was arrested and assisted in transporting him to the police station. When Dillbeck was first placed in a patrol car, in started kicking at the windows and started breathing deeply and hyperventilating. When Dillbeck arrived at the police station, he was thirsty and at that point, officers called the paramedics to check him. (TR 1798). Investigator Strickland testified on redirect that the paramedics stayed fifteen to twenty minutes. (TR 1800).

Investigator Berkley Clayton of the Tallahassee Police Department, Homicide Division, testified on June 24, 1990, he became involved in Dillbeck's case when he met him in the booking room at the police station. (TR 1802, 1803). Investigator Clayton did not know who Dillbeck was but later learned that Dillbeck matched the description of an escapee from the Department of Corrections. The Department of Corrections was contacted to identify him and Major Keels later positively identified Dillbeck as the escapee. (TR 1805). At first, Dillbeck told Investigator Clayton that his name was Robert Larry Greenwood. When asked if he was Dillbeck, the defendant answered, "Merry Christmas." (TR 1805). Dillbeck seemed calm and the officers were able to collect blood samples. (TR 1807). The police impounded a Publix cash register receipt which evidenced that a purchase of a Dura-edged paring knife had been made from the Publix Grocery Store at approximately 8:30 a.m., that same day. (TR 1808-1809). Later that day, Investigator Clayton went to Publix and purchased an identical knife. (TR 1810). The knife he purchased cost the same amount, $1.89, as the one found in the car with the blade bent. (TR 1811).

Major Clyde Keels testified on June 22, 1990, inmate Donald Dillbeck left the Quincy Vocational Center without permission. (TR 1817). He next saw Dillbeck on June 24, 1990, when he arrived at the Tallahassee Police Department to positively identify a person thought to be Donald Dillbeck. (TR 1818). Sgt. Don Wester, in charge of the Quincy Vocational Food Service, testified that Dillbeck had worked in the kitchen for about four

and a half months, feeding inmates and doing catering. (TR 1820-1821). Inmates who worked in catering were either medium or minimum security risks. On June 22, 1990, they were catering a Senior Citizens Center in Gretna, Florida, when Dillbeck escaped. (TR 1822).

Officer Ron McNeal testified that he was called to the crime scene to collect fingerprints and other physical evidence. In searching Mrs. Vann's car, he retrieved a paring knife, the victim's purse from the back seat, a tuft of hair from the dashboard area, yellow shorts with bloodstains on them, men's sunglasses, a black baseball cap from the front dashboard and a toy gun. (TR 1826). He also collected blood samples from the face and hands of Dillbeck and collected blood samples from the car. (TR 1829, 1836-1837). Technician Jeffrey May testified that he collected fingerprints, photos and videos on Monday, June 25, 1992. He examined the vehicle and processed both the inside and outside for prints. (TR 1860-1861). He processed the knife prints and a Publix receipt. (TR 1866-1867). Prints were found in the blood located inside the front driver's door, just inside the window which was Dillbeck's thumb print and Dillbeck's fingerprints were also found on the knife. (TR 1869, 1879). David Coffman, a crime lab technician at FDLE, testified that all the samples that were found containing blood were consistent with the victim's blood. (TR 1897, 1898, 1899, 1901, 1902, 1903, 1904, 1905, 1907). None of the blood found on Dillbeck's clothing matched Dillbeck's. (TR 1907).

The medical examiner, Dr. Thomas Wood, testified that he performed an autopsy on Mrs. Vann on June 25, 1990. (TR 1911). Twenty to twenty-five wounds were found on her body, consisting of lacerations done with a knife. Stab wounds were present as well as bruises and abrasions, with a few superficial cuts on the body. (TR 1913). The wounds were clustered in the front neck area and chin, a second cluster was found in the abdomen area on the right hand side lower half, other wounds were on the victim's back at a fairly high position and there was a single hip wound high on the left thigh. (TR 1916-1917). The neck wounds went through the muscle and windpipe area and were so deep as to cut the tissue in the back of the neck. Another stab wound went through the breastbone cartilage and one of the abdomen wounds punctured the liver. (TR 1917). It was Dr. Woods' testimony that someone would have to be moving around to make these kind of wounds. (TR 1918). It was his opinion that the victim was conscious during the time these wounds were being made and that when her windpipe was cut, she would have been trying to breathe but that blood would have been sucked into the wound and into the windpipe. (TR 1932). Although Mrs. Vann would have succumbed in a fairly short period of time, her death was similar to that of drowning, because her airways were obstructed by her own blood. (TR 1933). It was Dr. Woods' opinion that a knife would have made these wounds. (TR 1934).

Following a stipulation with regard to the victim's identification, the State rested its case. A judgment of acquittal was sought and denied. (TR 1936-1937, 1939).

At this point, defense counsel conceded that the Florida Supreme Court's decision in Chestnut v. State, 538 So.2d 820 (Fla. 1989), prohibited the admission of testimony regarding intent that was different from or less than an individual appreciating the difference between right and wrong. (TR 1941). The defense then commenced its case by proffering via telephone conference call the testimony of Dr. Berland. (TR 1942). Dr. Berland, a forensic psychologist, examined Dillbeck on November 12, 1990, in Leon County Jail. Based on his diagnostic evaluation, he found evidence of mental illness, although there was no evidence of insanity and recognized that Dillbeck appreciated the wrongfulness of his acts. (TR 1945). Dillbeck was competent but from the results of the MMPI and the Intelligence Tests given (TR 1946), it appeared that Dillbeck's MMPI showed evidence that he suffered from a thought disorder, psychotic thinking and mood disturbance. (TR 1949). Dr. Berland found some brain impairment which could cause the mood swings and evidence that Dillbeck suffered from impulsive behavior. (TR 1951, 1954-1955). It was Dr. Berland's belief that Dillbeck does not reason well and this could have been caused from a biological defect. (TR 1956).

On cross examination, Dr. Berland again affirmed that Dillbeck was not insane but had diminished ability to make a reasoned decision and that external forces would aggravate this mental condition. (TR 1958). Dr. Berland reasoned that the murder was a result of Dillbeck's impulsive condition although Dillbeck was not flagrantly psychotic. (TR 1962). Dr. Berland

testified that when Dillbeck stabbed the victim he did so because she would not let go of his hair. He panicked when she grabbed his hair and started honking the car horn. (TR 1964). Dr. Berland admitted that this might cause panic no matter what an individuals mental condition might be. (TR 1964).

Defense counsel sought to proffer the testimony of Dr. Thomas' videotape regarding whether Dillbeck had formulated the requisite premeditation and also sought the admission of Dr. Berland's and Dr. Woods' deposition taken February 23, 1991. (TR 1966).

Dr. Ioan Thomas' videotape testimony was taken outside the presence of the jury during a break in the State's case in chief. That testimony reflects as follows:

Dr. Thomas, physician and geneticist who works on fetal alcohol syndrome, testified that fetal alcohol syndrome is seen in individuals exposed prenatally to alcohol. (TR 1607). Fetal alcohol syndrome evidences some physical effects for example, individuals exposed to alcohol prenatally, have small heads, can be retarded, have small stature, have short eyelid fissures, small noses, long philtrum (space between the nose and the lips), very thin upper lips and cheek bones that are sometimes prominent. (TR 1690). Fetal alcohol "affect" results when a syndrome cannot be proven but there is evidence that an individual has been exposed prenatally to his mother's drinking. (TR 1690). An individual with fetal alcohol affect can have normal intelligence, but will evidence some "significant" abnormalities in neurobehavioral testing. (TR 1692). Dr. Thomas

testified that two drinks a day can cause this affect. On January 25, 1991, he interviewed Dillbeck by giving him a physical examination for approximately an hour. (TR 1693). Dr. Thomas found no symptoms of fetal alcohol syndrome but, based on a history given to him that Dillbeck's mother drank in excess of a case of beer a day, recommended that Dillbeck be examined for fetal alcohol affect. He referred the case to Dr. Frank Woods. (TR 1694-1695). As a result of further examination, Dr. Woods apparently concluded that Dillbeck suffers from fetal alcohol affect. Evidence of fetal alcohol affect results in some people having diminished intelligence, impulsivity, difficulty in controlling actions to circumstances, poor decision making and difficulty in school. (TR 1696, 1697, 1698).

On cross examination, Dr. Thomas admitted that he had one interview with Dillbeck for approximately an hour. He concluded that his cranial-facial area was normal and that the muscle tone strength was normal. (TR 1699). He further concluded that Dillbeck's intelligence was normal and that Dillbeck did not meet any of the physical conditions one would find in fetal alcohol syndrome. (TR 1700). His examination discovered nothing. (TR 1701). Dr. Thomas had no idea of Dillbeck's early development nor did he know about Dillbeck's receiving a GED and having some college credits. (TR 1702). Dr. Thomas did not look at any of Dillbeck's early prison medical records nor did he talk to any friends, supervisors or others. Dr. Thomas performed no mental tests, but rather relied on Dr. Woods' report. (TR 1705). He based most of his diagnosis on Dr. Woods' report and information

that he received that Dillbeck's mother drank prenatally. (TR 1705). Dr. Thomas never inquired about Dillbeck's background or his hobbies or the fact that Dillbeck played chess. (TR 1706). On redirect, Dr. Thomas testified that individuals with fetal alcohol affect have poor judgment and based on circumstances, this condition varies from person to person. The bottom line was that an individual could have fetal alcohol affect if they had a lack of control while under stress. (TR 1713). On recross, Dr. Thomas testified that Dillbeck killed because he could not control his impulses. He testified it was "likely" Dillbeck has fetal alcohol affect. (TR 1717).

Donald Hosey testified he was Dillbeck's birth father and that Dillbeck's mother, Audrey Eunice Hosey, had progressive drinking habits which got worse during her pregnancy. She drank four to six six-packs per day. (TR 1967).

The trial court excluded all the aforementioned evidence based on Chestnut v. State, 538 So.2d 820 (Fla. 1989).

Donald Dillbeck took the stand and testified that he was twenty-seven years old (TR 1972), and was first locked up at age fifteen (TR 1973). He had two previous convictions and was working in the kitchen food service at Quincy Vocational Center. (TR 1973). He was catering banquets and had done five catering jobs before he decided to escape at approximately 8:00 p.m., on Friday, June 22, 1990. He worked up his nerve to leave, left the premises and started running. (TR 1974). He had plans to call a friend, who lived in Orange County near Orlando, who was supposed to call to pick Dillbeck up. He walked from Quincy to

Tallahassee, having nothing to eat or drink and on the way he stole some clothes off a clothesline. (TR 1976). He walked all day Saturday, and on the way stopped at a gas station where he bought some Mountain Dew. (TR 1976). He continually attempted to call Gary Barnes, his friend in Orlando, without success. Saturday night he slept in the woods and was too tired to try to get food or drink. (TR 1977). When he arrived in Tallahassee Sunday morning, he bought some sunglasses and a Florida map Sunday morning, ate some doughnuts and drank some Mountain Dew. He arrived in Tallahassee tired, scared and his feet were blistered. He continued to try to call Gary Barnes all day Sunday, testifying that he called approximately twenty times. Sunday morning he purchased a knife at Publix because he couldn't reach Gary. (TR 1978-1979). Dillbeck testified that he never intended to stab or kill anyone, but he needed a ride and since he couldn't drive, his plan was to get somebody to drive him to Orlando. (TR 1979-1980). The last time he tried to call Gary was at the Tallahassee Mall. He walked outside the mall and saw a woman in a car and he thought she would make a good ride. (TR 1980-1981). He walked up to the car and said, "Lady, you are going to give me a ride." Dillbeck testified Mrs. Vann said she wasn't going anywhere, she started honking the horn at which point Dillbeck reached in and tried to stop her from honking the horn. He hit her in the face, and his hat fell into the car. Dillbeck testified he opened the door and Mrs. Vann grabbed his hair. He shoved her into the car. Mrs. Vann was screaming and because she wouldn't let loose of his hair, Dillbeck "went off"

and started stabbing her five or six times. Dillbeck testified that he thought he might be killing her. (TR 1981). Dillbeck testified that he never thought that he needed to kill her but he just panicked and that he didn't plan ahead of time to kill anybody, it wasn't deliberate. When Mrs. Vann stopped struggling he stopped stabbing. (TR 1982). Dillbeck then tried to start the car but couldn't drive and when he was about to crash the car, jumped out and took off running. Dillbeck knew that people were chasing him and he was caught soon thereafter. (TR 1983).

On cross examination, Dillbeck stated he escaped on Friday and had wanted to escape for a long time. (TR 1983). He had put in for Quincy so he could make an escape plan and that escaping was his sole motive for coming to Quincy. Dillbeck testified that he wasn't going to let anything stop him. He further observed that Gary Barnes was his good friend who he knew from prison. Barnes knew that Dillbeck was going to escape and had planned it with him. (TR 1984, 1985-1986). Dillbeck testified that he had stayed in shape while in prison and that he had lost thirty pounds since the Vann murder. (TR 1986-1987). Because he didn't want to get caught, he stole clothing along the way from Quincy to Tallahassee and made sure that he walked along Highway 90, out of sight. (TR 1987-1988). Dillbeck admitted that he was afraid to be caught and that he bought a map and sunglasses and food on his way. (TR 1989). Dillbeck bought a knife Sunday morning at Publix after he went to Publix to make a phone call to Gary Barnes and got the knife because it was cheap and put it in his pocket to conceal it. (TR 1990). Dillbeck admitted that he

could not reach Gary Barnes and needed someone to drive him, therefore he needed a weapon. (TR 1991). Dillbeck admitted that he might need to threaten someone to take him to Orlando and recalled that he stabbed the woman a number of times. (TR 1991-1992). Dillbeck testified that he walked around after leaving Publix at approximately 8:45 a.m., and tried to call Gary Barnes about ten times afterwards. At Gayfer's he was wearing sunglasses and a black baseball cap that he had found along the road on his trek from Quincy to Tallahassee. (TR 1994). When he saw the woman in the car, he found his opportunity to get a ride. He pulled out the knife after the struggle began. He had taken the purchased knife out of its packaging earlier and had made a sheath for it because he figured he might need it. (TR 1996). Dillbeck's claims he freaked out when Mrs. Vann bit his finger and grabbed his hair. (TR 1997, 1999). Dillbeck admitted that his freedom was threatened and that when she started honking the horn and bit him he started stabbing her. He admitted that he did not think that this woman would fight him. (TR 2002). He recalled stabbing her all over but thought he only stabbed her five times. (TR 2002). He stabbed her until she was dead. Since he was unsuccessful in driving Mrs. Vann's car, he got out and ran. Dillbeck could not remember threatening Sam Bradley who was chasing him, but remembered that people were chasing him. Dillbeck also did not remember throwing away the bloodied shirt he was wearing. (TR 2003). On redirect, Dillbeck testified that he was scared at the time and wasn't thinking logically. (TR 2006). He got into the car because his hat fell off and fell

into the car. (TR 2005). No further evidence was tendered as to guilt. Following jury deliberations, the jury returned its verdict finding Dillbeck guilty of premeditated and felony murder. (TR 2110).

At the penalty phase of Dillbeck's trial, the State filed a motion in limine attempting to restrict admission of evidence with regard to Dillbeck's mother's medical records as well as other evidence. (TR 2118). The trial court concluded that statistics of other youths' incarceration was not admissible with regard to prison conditions at Sumter Correctional Institution but any records which tended to show that Dillbeck was abused were admissible. The court further observed that Dillbeck's mother's later insanity records were not relevant to any factor with regard to the penalty phase although evidence concerning Dillbeck's mother's medical condition at the time he lived with her and a short period thereafter were admissible. (TR 2142). Defense counsel's motion in limine to restrict the admission of photos of the 1979 victim Dwight Hall was denied. (TR 2161).

The State first called Marshall King Hall, Deputy State Attorney for Ft. Myers, Florida, who testified that he was the lead prosecutor in Dillbeck v. State, a first degree murder case of a deputy sheriff in Lee County, Florida. (TR 2186-2187). Dillbeck pled guilty and through witness Hall, certified copies of the judgment and sentence were introduced reflecting that Dillbeck had been sentenced to a mandatory twenty-five year sentence for the 1979 first degree murder of Dwight Lynn Hall. (TR 2188, 2191). Defense counsel conducted an extensive cross

examination of Mr. Hall regarding Dillbeck's guilt and as to Dillbeck's intent to kill the officer. (TR 2191-2205).

Lee County Deputy Sheriff Don Schmitt testified that he investigated the murder of Deputy Hall on April 11, 1979, and arrested Dillbeck the next day at Ft. Myers Beach at 7:45 a.m. Dillbeck was given his Miranda warnings and questioned thereafter. (TR 2207). Dillbeck testified that the officer gave him a hassle and that when the officer wanted some identification, Dillbeck could not produce a valid driver's license. A scuffle ensued at which point the officer was on the ground and Dillbeck got the officer's weapon and shot twice at close range. Dillbeck then returned to the car to retrieve some cash and fled. (TR 2208-2209). Major Tom Wallace of the Lee County Sheriff's Office testified that on April 11, 1979, a deputy sheriff was shot and that approximately ten days later, they located the murder weapon underneath a cottage at the Pink Shell Motel. They retrieved the gun only after Dillbeck told them some thirteen days after the murder where the gun was buried. (TR 2212-2213).

Dr. Thomas Wood, the medical examiner, testified that Mrs. Vann was conscious when she was stabbed and that the wounds were not instantly fatal. She would have experienced normal sensations and she would have been struggling having difficulty breathing. (TR 2222-2223). When her windpipe was cut, there was nothing she could have done, although none of the other wounds would have rendered her unconscious. (TR 2225). The medical examiner testified she would have lived at least one minute, struggling to breath and drowning in her own blood. (TR 2226).

Officer Mike Strickland testified at the penalty phase that when he transported Dillbeck from the arrest site to the police station, Dillbeck said to him, "I already killed one of ya'll, a cop. Kill me. I'm going to the chair anyway, I'm going to the chair. Shoot me. I'm going to the chair so kill me." (TR 2228). On cross, Officer Strickland said that Dillbeck had a tirade and that after the tirade he started hyperventilating. Dillbeck asked to be shot. (TR 2228).

The State then published the deposition of Dr. Wallace Graves, the pathologist and medical examiner who performed an autopsy on Deputy Sheriff Dwight Hall in 1979. (TR 2229-2233). Dr. Graves testified two gunshot wounds were present, one in the officer's back and one to his face. The gunshot wound to the back was the fatal shot because it perforated the aorta and lung. (TR 2234-2235). The facial wound was made from approximately four to five inches, impact above the right eyebrow. The back wound was made at close proximity between ten to twelve inches away. (TR 2238, 2242). Officer Hall died from the back wound, he would have lost consciousness in minutes. The cause of death was that he bled to death. (TR 2243). The State rested. (TR 2244).

At the penalty phase, the defense first called Cindy Commorato, Dillbeck's thirty-year-old sister. She testified that she was three years older than her brother and proceeded to read a letter she wrote to her brother telling him that she loved him and was always thankful that somebody had helped them and save them. (TR 2246). She wrote the letter when Dillbeck was in Ft.

Myers, charged with the first degree murder of a police officer. (TR 2247). She admitted that she had mixed feelings towards her brother and although she thinks about him as a little boy and loves him, she is confused when she thinks about the murders he's committed. She admitted that she had not seen him the last couple of years and was mad at her brother prior to his arrest in Ft. Myers because he had been doing drugs and she had asked him to stop calling her. (TR 2247-2248). Ms. Commorato testified that she lived with her birth mother, Audrey Hosey, until she was seven and a half years old, thereafter she was taken away with her brother and they were put in a foster home. She was later adopted by the Anderson family however they did not adopt her brother. (TR 2249). Her brother was six years old before he was adopted by another family and after that she did not see him again until he was eleven years old. (TR 2250). Ms. Commorato testified that her real mother was crazy and an alcoholic. She was violent and recalled that her mother would make the children get on their knees and pray and if they kept mumbling or praying it was okay but if they did not, she would hit them. Near the end, before she was taken out of her mother's custody, her mother wouldn't even let them look out the windows. (TR 2251).

Ms. Commorato testified that the next-door-neighbors occasionally would try to help the children keeping their mother away from them. She recalled that her brother was slow when he was a child, and was unable to tie his shoes. (TR 2252). She recalled that people made fun of her brother because he was slow and that there was not always food in the house. Their birth

father left them when she was five and her brother was two. (TR 2253). She remembered different men coming into the house. Her mother had a preoccupation with the genitals. She was molested by her mother and had to be taken to the hospital on two occasions from beatings, one time when her mother spanked her with a knife. (TR 2254-2255). On cross examination by the State, Ms. Commorato testified that she kept up an "on-and-off" relationship with her brother while he was in prison and that Dillbeck had called her a couple of days before he escaped. (TR 2256). She testified that all of the abuse stopped after she was removed from her mother's custody and that she was separated from her brother when he was six. She did not know where her brother went but found him again when Dillbeck was eleven years old. (TR 2257). Ms. Commorato testified that the Dillbecks, Dillbeck's adoptive family, were kind, caring people who did not abuse her brother. Dillbeck associated with a bad crowd and thereafter she did not want to have anything to do with him after he started using drugs. (TR 2258). Ms. Commorato testified that she never used drugs (TR 2259). The only time she saw her mother again was once when she was eighteen years old. (TR 2259).

Donald Hosey, Dillbeck's real father, testified that he was married six years to Audrey Hosey. He testified that his wife drank while she was pregnant with Cindy but drank even more when she was pregnant with Donald. (TR 2260-2261). He testified that living with his wife was hell and that she would use all their money for booze. She started going out when he stopped giving her money. His wife was violent towards him and he admitted that

he had not seen his son in twenty-five years. (TR 2262-2263). On cross examination by the State, Mr. Hosey testified that he left when his son was two years old and he never tried to locate his children for the last twenty-five years. (TR 2264-2265).

Donald Dillbeck took the stand in his own behalf at the penalty phase and testified that he was really sorry for killing Mrs. Vann and that he wished he could bring her back. (TR 2272). He admitted that for weeks after her murder, he smelled her blood. (TR 2253). Dillbeck testified that he was first arrested at age fifteen in 1979 when he was in ninth grade. He later earned his GED while in prison. (TR 2273). Regarding the circumstances of the 1979 murder of Officer Hall, Dillbeck testified that a couple of weeks before he was arrested he had stabbed a man in Indiana when he was caught stealing a CB radio. Dillbeck testified he was on speed that night and that when the man tried to get him to go into the house, Dillbeck got a knife and stabbed him and took off running. He got scared and sick to his stomach and ran away when it became apparent that the police were looking for him. (TR 2274-2276). Dillbeck stole a car and drove to Ft. Myers, Florida. When the officer approached him, Dillbeck was counting some money and the officer asked him for some identification. Dillbeck had no identification and testified, "I was just looking for a chance to run. And we went back there to the trunk and he stayed right on me all the time. And then we went up to the glove compartment and he found a hash pipe. . . ." Dillbeck then testified that the officer said he was going to arrest him and a struggle ensued. (TR 2277).

Dillbeck pulled the officer's gun and shot him twice, and then took off running. But, before he ran away, he returned to the stolen car and got his stuff. (TR 2278). Dillbeck testified that he was using marijuana and prior to the two-week period when he killed the police officer in 1979, he had never hurt anyone. He admitted that he started using drugs at age thirteen and that he thought that the Dillbecks knew about his use of drugs. (TR 2279). Dillbeck said that while incarcerated at Sumter Correctional Institution, he was raped and that the prison conditions were terrible. (TR 2280). He hooked up with an older inmate to stop the abuse and performed sexual favors for protection. (TR 2281). Dillbeck explained that he was adopted at age six and he lived with the Dillbecks from age six to fifteen. He was close to the Dillbecks and thought that if he got the electric chair it would kill his adoptive parents. (TR 2281-2282). He knew that his real mother was dead and told the jury that he had written her a letter and that after she got the letter she ran out in front of a car and was killed or at least her surmised that that's what happened. (TR 2282-2283). The last time he saw his real mother he was four and a half years old. He knew that his mother had been placed in a mental institution and that his biggest fear was that he was going to be like his mother. (TR 2283-2284). Dillbeck had not seen his real father since he was three years old and was separated from his sister when he was six years old when they were moved to different homes. (TR 2285). Dillbeck recalled that he was happy when he found his sister again. He did terrible in school and he

had to repeat the first grade. He testified that the Dillbecks moved to Florida to be near him and that he really loved his adoptive parents. (TR 2286). Dillbeck recalled that his real mother drank, that he used to have to steal milk from his neighbor's porch and that his mother beat him. (TR 2287). He recalled that his mother would stuff cotton in his mouth and tape up his mouth. (TR 2288).

On cross examination, Dillbeck testified that he wanted out of prison and that when he stabbed the man in Indiana, he had to open a closed knife to stab him and did so without provocation because he never saw a gun although Dillbeck claims the man said he had a gun. (TR 2291). Dillbeck admitted that he stabbed him to get away. (TR 2292). He traveled to Florida because some friends were on spring break in Ft. Myers and Dillbeck bought maps and drove himself to Ft. Myers, Florida. (TR 2293). Dillbeck admitted that the deputy in Ft. Myers treated him okay but that he was looking for an opportunity to escape and was afraid to be arrested because he had stabbed somebody in Indiana. He was looking for a chance to run. (TR 2295). The deputy was nice to him and he did not want to hurt him but the police officer saw his hash pipe. (TR 2296). A struggle ensued when Dillbeck reached back and hit the officer in his genitals and attempted to run away. (TR 2297). Dillbeck then reached for the officer's gun with his left hand and pulled the trigger back twice and shot the officer twice. (TR 2298-2299). Dillbeck admitted that his marijuana use did not interfere with knowing what he did. (TR 2300). Dillbeck said he knew what he was doing

in Indiana. He also did not mean to kill Mrs. Vann. (TR 2300). Dillbeck admitted that his sister was the one that received most of the abuse from his real mother and that he was provided a loving home by the Dillbecks. (TR 2301). Dillbeck admitted that he got his GED while incarcerated at age sixteen and has some college credits. While at Avon Park, which was a much nicer place than Sumter, he played handball, chess, read, sunbathed and worked a few minutes a day. At Quincy Vocational Center, which was also a nice place, he had an easy assignment. (TR 2305, 2306).

At this point, the State stipulated to facts presented in a video deposition of Sharon Arnold, taken February 9, 1991. The tape was played to the jury. Sharon Arnold testified that in 1979, she lived in Ft. Myers, Florida, and was present in the area when the deputy was killed April 11, 1979. (TR 2309). She was walking along Ft. Myers Beach when, at approximately 11:00 or 12:00 p.m., she saw a police car's lights and heard two shots within seconds. (TR 2310). On cross examination, she testified she was approximately fifty feet away from the police car and observed that there was another car near the police car. She testified she did not see anyone then suddenly she saw someone move towards the trunk of the white car. It was a white male. She then saw the man leave the trunk and run off towards the cottages nearby. (TR 2311-2312). She walked up to the police car and saw the policeman lying face down. She checked him and found no pulse. (TR 2312). She observed there was a lot of blood. She called the police. She saw no guns but testified

that she had heard two distinct shots prior to her approaching the police officer. The video taped deposition ended.

Charles Myers, a firearms examiner for FDLE in 1979, testified that the officer's wounds were near contact wounds. (TR 2316). Based on powder marks on Dillbeck's face at the time, one of the bullets passed within inches of his face. (TR 2323).

Dr. Berland was called by the defense and testified as a forensic psychologist that he examined Dillbeck on November 12, 1990, for approximately five to six hours. (TR 2336, 2343, 2344). He found no evidence to support an insanity plea but relying on his diagnostic interview and documentary evidence, conducted a number of tests. (TR 2345). Based on the scores, Dillbeck's MMPI demonstrated mild defensiveness but nothing was clearly evident with regard to what was wrong with Dillbeck. (TR 2356, 2359). He found Dillbeck to have an IQ of 81 and detected brain damage. (TR 2368-2369). He determined that Dillbeck suffered from moderate psychotic disturbances and that Dillbeck admitted to him auditory hallucinations and visual hallucinations because Dillbeck reported having peripheral movement, specifically seeing things from the corner of his eye. (TR 2375). Dr. Berland had Dillbeck's mother's medical history available (pursuant to the State's trial motion in limine, the court ruled that records of the first years of Dillbeck's mother's medical records were admissible, however, later years were not relevant and not essential to any diagnosis of Dillbeck). (TR 2382). Dillbeck's mother's medical history was admitted into evidence over the State's objection. (TR 2387).

Dr. Berland testified that Dillbeck was not out of control but suffered psychotic disturbances; he had the ability to interact but disturbances affected his perception. Dillbeck looked normal but Dr. Berland believed that Dillbeck needed medication with he would need to take all his life. (TR 2387-2389). Based on what Dillbeck told Dr. Berland about the crimes, Dr. Berland concluded that Dillbeck would "likely" misjudge circumstances and that the stressors, specifically lack of sleep, the fact that he had escaped, would have impacted on his reasoning and judgment with regard to Mrs. Vann's murder. (TR 2391-2393). His bottom line was that Dillbeck's mental condition effects his actions. (TR 2393).

On cross examination, the State asked Dr. Berland why he could not account for why Dillbeck was "explosive" in killing Mrs. Vann but did not display the same kind of conduct when he was captured. (TR 2396). Dr. Berland indicated that Dillbeck was out of contact when he killed Mrs. Vann but not with the cops. Berland admitted that Dillbeck was not hearing any voices or hallucinating at the time of the murder and that he admitted that he stabbed Mrs. Vann to shut her up, not to get the car from her. (TR 2398-2399). Dr. Berland admitted that the 1979 murder of the police officer was not a result of mental health problems, but believes that Dillbeck's mental health symptoms have gotten worse over the years. (TR 2400). Dr. Berland testified that in 1979, Dillbeck suffered a lesser form of psychosis than he did in 1990 when he killed Mrs. Vann. (TR 2401). Berland testified that Dillbeck only heard voices a few times and only had some

problems sleeping. (TR 2404-2405). Dillbeck had average intelligence and was not suffering under any extreme mental or emotional disturbance at the time he murdered Mrs. Vann or the deputy in 1979. (TR 2407). Dr. Berland further admitted that Dillbeck appreciates the right/wrong of his conduct and that whatever mental illness exists, did not impact on the murder. Dillbeck was not substantially impaired. (TR 2408).

On redirect, Dr. Berland testified Dillbeck had paranoid perception of harmless events and was mildly hypomanic because of brain injury complicated by his "mental health". (TR 2410-2411).

The defense called Mary Margaret Lee, a neighbor who knew Audrey Hosey, and testified that Audrey was a fruitcake who neglected her children. (TR 2414). She recalled that Dillbeck's real mother always drank beer and never fed the children nor washed them. It was her conclusion that Audrey Hosey liked women and this was confirmed when Audrey made a pass at Ms. Lee's mother. (TR 2416). Ms. Lee testified on cross examination that she would help take care of the kids and fed them and that they would stay over at her house periodically. She did not know anything about Dillbeck after he was adopted. (TR 2417).

Phillip Adams, a classification officer at Quincy Vocational Center, testified that Dillbeck had two or three disciplinary reports in eleven years and had a relatively good record. (TR 2419-2420). Dillbeck also had an attempted escape conviction but Mr. Adams was not aware of any other problems but had not reviewed Dillbeck's records prior to testifying. (TR 2421). Sgt. Wester testified that he manned the food service at

Quincy Vocational Center and that Dillbeck had worked there for four and a half months, going out on catering operations. (TR 2423). He testified that Dillbeck was a good inmate and did what he was told. (TR 2424). On cross examination, Sgt. Wester testified that Dillbeck never exhibited any bizarre behavior, did not have sleep problems nor did he note that he was hearing voices or had bugs biting him. (TR 2424). Sgt. Wester noted that Dillbeck would run a lot and that he got along well with everybody until he escaped on June 22, 1990. (TR 2426, 2428).

Dr. Frank Woods was called by the defense and testified as a neuropsychologist and Baptist preacher (with no active affiliation/no active pastorate). He conducted an interview of Dillbeck on February 7, 1991, for four hours. (TR 2430-2433). He observed that something was wrong with Dillbeck's brain, in that he had a disorder which resembles schizophrenic thought, not as severe as schizotypal personality disorder, and found that there was a pattern of cognitive deficiencies also possible congenital illness. (TR 2434). Dr. Woods, based on a number of tests, concluded that Dillbeck's memory was impaired which would be an indication that he had permanent brain damage. (TR 2440). He also found that Dillbeck has some visual memory impairment. (TR 2444). Dr. Woods was familiar with fetal alcohol syndrome and affect and had done studies with regard to these conditions. With fetal alcohol affect, one would naturally expect possible memory loss or difficulty. (TR 2445). He concluded that Dillbeck's brain does not process effectively, interpersonal or social information. Dr. Woods concluded that Dillbeck's thinks

people are more like machines than people and doesn't appreciate interpersonal interaction like normal people. (TR 2452). Dr. Berland diagnosed Dillbeck as having schizophrenic spectrum, specifically, Dillbeck's drives people away from interpersonal relations because he cannot control the situation. (TR 2453). Dr. Berland indicated that when Dillbeck told him about the murders, Dr. Berland was disturbed because Dillbeck was unspeakably cold. (TR 2456). Dr. Berland noted that when Dillbeck uses speed, it makes him wild. (TR 2457). When Dillbeck goes without sleep, he becomes agitated and blows up. (TR 2458). Dr. Berland concluded that at the time of the murder, Dillbeck was under mental more than emotional stress. (TR 2664). Under intense situations, Dillbeck is uncontrollable. (TR 2464).

On cross examination, Dr. Berland admitted that Dillbeck has no problems understanding anything except interpersonal questions. In explaining the difference between his explosive conduct in murdering Mrs. Vann and his subsequent passivity when captured, Dr. Berland said that Dillbeck probably "cooled down after the stabbing allowing him to think a little". (TR 2468). Dr. Berland noted that Dillbeck suffered from lefthandedness syndrome because he is left handed. He also observed that Dillbeck suffered from schizoid personality because he was a loner and avoided social contacts and avoided interpersonal relationships. (TR 2472, 2474). Dr. Berland noted that Dillbeck does not have a paranoid personality but doesn't possess normal human interpersonal warmth. (TR 2480). Dr. Berland also admitted that he was not aware of whether Dillbeck had friends in

prison or that Dillbeck tried to call his good friend when he escaped. (TR 2481). Although Dillbeck admitted that he hated the burden he put on his family, Dr. Berland felt he was schizoid because he did not mention the victim's family although he readily admitted Dillbeck had no relationship with the victim's family. (TR 2481). Dr. Berland testified that Dillbeck was not making a "rational choice" when he stabbed the victim. (TR 2482).

Chaplain Archie Bright testified that as a Chaplain with the Department of Corrections, he worked at Sumter Correctional Institution from 1976 through 1986. It was his understanding that Sumter had the most violent inmates and incarcerated youthful offenders who had committed serious crimes. (TR 2488). He knew that there were rapes and robberies occurring in prison and due to "budget constraints" not much could be done. (TR 2488-2489).

Chaplain Ted Womack, Chaplain for Leon County Jail, testified that Dillbeck had contacted him expressing an interest in religion. (TR 2490). Chaplain Womack had given him a Bible and Christian literature. Dillbeck started taking Bible correspondence courses. (TR 2491).

Dr. Thomas' testimony was played for the jury which has previously been detailed herein and may be found at (TR 1685-1719).

Lt. Black testified that no formal complaints about Dillbeck had been made in prison although Dillbeck had been in segregation from other inmates. (TR 2500). Dillbeck introduced

into evidence the psychological assessment report of Dr. Woods (TR 2502); the Hosey household report from the guidance clinic from Terre Haute, Indiana; Dillbeck's school records and the final report of Sumter Correctional Institution conditions, dated September 21 to September 25, 1981; (TR 2503-2504) Dillbeck's progress reports from December 4, 1979 through November 8, 1989, a disciplinary report dated August 19, 1984. (TR 2504).

Dillbeck was recalled to the stand and testified that he had received psychological testing in 1979 or 1980, and nothing thereafter. (TR 2506). On cross examination, however, Dillbeck also admitted that he had received substance abuse counseling and graduated from the Carmen House Program, which was a nine month and nineteen day program while incarcerated. (TR 2507). Defense called Mr. Zerniak, who testified that he prepared prison reports regarding security. The bulk of his testimony reflected that Sumter Correctional Institution, in 1979 and 1983, had high incidences of assaults by one inmate on another. (TR 2512-2517).

Classification officer Bill Welch testified that routinely inmates are interviewed for progress reports on a six month basis. (TR 2520). He detailed Dillbeck's progress reports starting December 4, 1979 through November 8, 1989. (TR 2521-2540). A review of those reports reflected that Dillbeck was a good inmate who adjusted well and for the most part was clear of any disciplinary problems. He held several jobs while incarcerated and took educational courses. In March 1983, after being transferred from Sumter Correctional Institution to Zephyrhills Correctional Institution, Dillbeck was placed in

adjustment confinement and received a disciplinary report for attempted escape. He was then returned to Sumter Correctional Institution. (TR 2531-2532). Dillbeck received a second disciplinary report in August 1984 and a disciplinary report on March 18, 1985, for intoxication. (TR 2535). On January 21, 1986, he convicted for attempted escape (TR 2537), however, there were no reports available or admitted with regard to Dillbeck's stay while in Quincy Vocational Center. (TR 2541).

Charles Dillbeck testified at the penalty phase that Donald Dillbeck was his only son and he raised him in Anderson, Indiana. Mr. Dillbeck was a truck driver and was away from home. He moved to Florida in 1980, to be near his son when he was incarcerated for shooting the police officer and visited him every week. (TR 2544-2545). Mr. Dillbeck read a letter Donald Dillbeck wrote to him dated April 2, 1985, which indicated he does not want his family to worry about him. (TR 2548). Ada Dillbeck also took the stand and testified that she and her husband adopted Dillbeck at age six. They were told that Dillbeck had a reading disability and was a slow learner. (TR 2551-2552). They were very close and when Donald was in school he played football, basketball, was in the Boy Scouts, and played in the band. (TR 2552). Dillbeck started using drugs when he was thirteen although Mrs. Dillbeck testified that she did not know that until he got into trouble in Ft. Myers, Florida. She testified Donald was never violent until he stabbed the man in Indiana and he had never hurt anyone, was never aggressive, had not demonstrated a temper and was very obedient. (TR 2553). She indicated as a

child he was always afraid that he would be taken away from her (TR 2554), because he had been taken away from earlier foster parents. Donald never talked about his birth mother, but she knew that he had had a bad childhood. (TR 2555). She recalled a time when Dillbeck's real mother put a ladder on top of him and walked on top of it. (TR 2556). She knew that Donald was very upset when he was arrested at fifteen years old and that he pled guilty to the first degree murder of the police officer. (TR 2557-2558). She read to the jury a letter dated July 11, 1990, written by Dillbeck approximately one month after his arrest for Mrs. Vann's murder. (TR 2559-2560). In the letter, Dillbeck expressed concern that he made his family suffer. Mrs. Dillbeck testified that she loved her son. (TR 2561).

Defense rested its case and then sought to introduce a March 18, 1985, report without objection. (TR 2571). By stipulation, the videotaped deposition of Phillip Reeder, dated February 9, 1990, was read to the jury. Mr. Reeder was the stabbing victim in Indiana in 1979. He testified that on March 30, 1979, he was living at 830 Stoner Drive. He walked outside and noticed Dillbeck inside his truck. He walked up to the truck and opened the door and saw a young man sitting there. He told Dillbeck not to run and that he would walk him back to the house. (TR 2574-2576). Mr. Reeder testified the kid was a rough looking kid about 5'10" or 5'11", slender built, wearing a green army fatigue jacket and had blondish greasy hair and bad teeth. (TR 2579). Mr. Reeder testified that he saw Dillbeck's arm come up and hit him and then Dillbeck started to run away. At that

point, he noticed blood gushing out of his chest. (TR 2580). Mr. Reeder did not see the knife and observed that it must have been open when it was in Dillbeck's pocket. Mr. Reeder was stabbed in the left ventricle of his heart. (TR 2581).

The State's last witness on rebuttal was Dr. Harry McClaren, a forensic psychologist, who, without objection, was allowed to testify as an expert. (TR 2587). Dr. McClaren testified that the day after the murder he was contacted by the prosecution and started gathering information concerning Mr. Dillbeck. He collected Department of Corrections records, police reports, witnesses statements, the psychological evaluation by Dr. Berland, depositions and other educational records of Dillbeck. He received the medical records of Dillbeck's mother, who was schizophrenic, spoke with a number of people, specifically corrections people, the Dillbecks, Dillbeck's sister; sat in on a conference call with Dr. Frank Woods; and saw the live testimony of a geneticist, Dr. Thomas. He spoke with Dillbeck for approximately seven to eight hours and spent another hour with Dillbeck a second day; gave Dillbeck psychological tests such as the Weschler Adult Intelligence Scale Revised, IQ, the Minnesota MultiPhasic Personality Inventory for Personality and Psychopathology and the Bender-Gestalt for Organicity or Visual Motor Difficulties. (TR 2588-2591). Dr. McClaren concluded that Dillbeck was of average intelligence and suffered from some visual motor difficulties and had some degree of brain dysfunction. (TR 2592). There was no evidence from the MMPI of any schizophrenic conduct or syndrome and it was his belief that

Dillbeck suffered from anti-social personality disorder and substance abuse disorder which was in remission due to his protracted incarceration. (TR 2593-2594). Dr. McClaren defined personality disorder as a conflict with society's rules which has in the past been called a sociopath personality and usually starts at the age of fifteen and continues into adulthood. (TR 2595). It was his belief that Dillbeck met the anti-social personality disorder criteria because he, Dillbeck, does not worry about long term problems. Individuals with this kind of disorder suffer from impulsivity; manipulative behavior; lack of impulse control and gets into trouble because they do not think things out. They seek immediate gratification and do not worry about long term problems. (TR 2597-2598). Dr. McClaren concluded that Dillbeck does not suffer from schizoid personality disorder nor a schizotypal personality disorder. (TR 2599-2600). Dr. McClaren concluded that Dillbeck does not have a very severe inability to control his actions because people who usually have severe problems are always in trouble. For example an individual incarcerated would always be in trouble in jail and have disciplinary infractions. To the contrary, Dillbeck had very few disciplinary difficulties. (TR 2601). Around the time of the murder, Dr. McClaren testified Dillbeck was oriented and as a result of all the information before him, made a list of the purposeful behavior in which Dillbeck engaged. (TR 2602). [At this point defense counsel objected to Dr. McClaren's chart, finding that it was not scientific but simply a closing argument for the prosecution. Defense counsel further argued that Dr.

McClaren was relying on statements made by Dillbeck to the doctor, therefore under the decision in Parkin v. State violated the Fifth Amendment. (TR 2603). The trial court, after further discussion, overruled defense counsel's objection with the exception of factor seventeen, eighteen and nineteen, which Dr. McClaren admitted were factors, information emanating from his interview with Dillbeck. (TR 2610)].

Dr. McClaren continued on direct examination that, in his opinion, Dillbeck had an ability to conduct goal oriented behavior and he took into account certain factors in making this assessment. (TR 2615). He observed in summary that Dillbeck was a person of average intelligence with no mental health history who, procured a transfer to allow him to escape. Dillbeck had access to the free world and ran regularly to keep himself in shape. On the last catering job, he slipped away and selected conditions that were favorable to insure success. Dillbeck obtained a change of clothing to avoid detection and acquired further disguises such as his sunglasses and cap and traveled through a wooded area to avoid detection. Dillbeck used his money to buy a weapon rather than intoxicants because he had a purpose. (TR 2616). Dillbeck carefully selected his target, a female alone in the car, and attacked her so that he could secure her car and perfect his escape further. After he stabbed her and crashed the car, he continued to flee on foot. He got rid of his bloody shirt which was incriminating and did not give up until he was cornered. After he was caught, he made statements that indicated he understood the gravity of the problem and although

he attempted to falsify his identification at first, he knew what he was doing. (TR 2617-1618). Dr. McClaren testified Dillbeck is goal oriented and although he was under a lot of stress, that stress was based on his escape from prison and not due to any mental illness. Dillbeck could appreciate the wrongfulness of his conduct and could conform his conduct to the requirements of the law. (TR 2618-2619).

On cross examination, Dr. McClaren testified that he told Dillbeck when he interviewed him that he was working for the prosecution and that in reviewing his information, he compared his results with Dr. Berland's results. Dr. McClaren was adamant that Dillbeck does not suffer from any schizophrenic disorder. (TR 2626, 2628).

All testimony was concluded. Following jury instruction (TR 2742-2747) (no further objections were raised as to the penalty phase instructions, see (TR 2747-2749)), the jury returned a recommended sentence of death by a vote of 8-4. (TR 2750). Sentencing took place on March 15, 1991, at which point Dillbeck asked for a life sentence for his parents' sake, indicating that they were also victims. (TR 2755). Defense counsel requested on behalf of the Dillbecks, mercy for Donald Dillbeck and informed the trial court that he believed the death penalty was an abomination and vengeance was not a valid reason to sentence someone to death. (TR 2755-2757). The trial court, in its written order (TR 3160-3173), concurred with the jury's recommendation and sentenced Donald David Dillbeck to death, finding:

The most compelling evidence of mitigating circumstances is with regard to the fetal alcohol affect which resulted in the defendant's borderline normal intelligence level and defendant's lack of impulse control. When defendant's borderline normal intelligence level is considered with other evidence it simply becomes insignificant in the overall picture. The defendant's ability to play chess, to accumulate twelve hours of college credits, to perform work so that a supervisor will describe him as 'one of the best inmates I'd ever worked' and to formulate a plan for escape which took years to implement far outweigh any mitigating effect of his low intelligence level.

The claim of a lack of impulse control does not stand when considering defendant's exemplary record of only two disciplinary reports in eleven years of incarceration, a large portion of which was spent in the most violent institution in the state corrections system. Surely, if defendant had any difficulty in controlling his impulses, his prison record would be substantially different.

A review of all of the evidence, the testimony and demeanor of the witnesses causes the evidence in mitigation to pale into insignificance when considering the enormity of the proved aggravating factors and compels the sentence in accordance with the recommendation of the jury.

WHEREFORE, based on the foregoing reasons, this Court has determined that it is appropriate to follow the jury's recommendation and to impose the death sentence upon the defendant, Donald David Dillbeck.

(TR 3172).

SUMMARY OF ARGUMENT

Dillbeck's complaint that the trial court erred in not sustaining his cause challenge regarding three prospective jurors who were excused peremptorily is wanting. Dillbeck received additional peremptories and has not suggested he was forced to trial with an unacceptable jury.

Pursuant to Chestnut v. State, 538 So.2d 820 (Fla. 1989), Dillbeck was not entitled to a diminished capacity defense to the first degree murder of Mrs. Faye Vann.

The trial court further did not abuse its discretion by permitting Dillbeck to be examined by Dr. McClaren. Moreover, the fact that Dr. McClaren testified as a rebuttal witness for the State at the penalty phase did not violate Dillbeck's rights pursuant to Parkin v. State, 238 So.2d 817 (Fla. 1970).

The flight instruction read to the jury was modified pursuant to Dillbeck's request and therefore any assertion that said instruction was erroneously given is not properly before the Court on appeal.

The aggravating factor that the murder was committed in a heinous, atrocious and cruel manner is constitutional in Florida and was not appropriately applied to the facts sub judice. Moreover, Dillbeck's death sentence is proportional in that the aggravating factors far outweigh the paucity of mitigation and when compared to other cases, the sentence of death is appropriate.

The trial court's finding that the murder was committed while Dillbeck was effectuating an escape was proven beyond a reasonable doubt. Additionally, no error resulted from the instruction given regarding whether the aggravating circumstances outweighed the mitigating circumstances and thus, the death sentence was appropriate.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN RULING THAT SEVERAL PROSPECTIVE JURORS WERE EITHER QUALIFIED OR NOT TO SIT IN THIS CASE, IN VIOLATION OF DILLBECK'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS

Recognizing that he must show that the court manifestly abused his discretion in denying Dillbeck's challenges for cause to remove prospective jurors, Dillbeck points to three jurors for whom he asserts excusals should have been granted. Specifically, he points to Horacine Lawrence, arguing that there was a "reasonable basis for believing she could not have rendered an impartial recommendation based upon the law and the evidence"; Dr. Barnett Harrison, because, as a medical doctor, he proclaimed "bias against mental health experts and his bias towards Dr. Woods; and Darren Headrick, who Dillbeck asserted was an improper juror and should have been removed for cause because his responses "abundantly exhibited that unwillingness to discharge his duties as required and his oath as a juror".

The record reflects that neither Ms. Lawrence, Dr. Harrison nor Mr. Headrick sat as jurors at Dillbeck's trial. In fact, defense counsel used peremptory challenges to remove each. (TR 1588). The record also reflects that upon exhaustion of defense counsel's peremptory challenges, the trial court, out of an abundance of caution, gave defense counsel the two additional peremptory challenges he requested, which defense counsel utilized against Ms. Kundrat and Ms. Ferguson. (TR 1573-1575). With regard to the two alternate jurors, defense counsel was also

given an additional peremptory challenge as to each alternate and after striking Mr. Ussery, accepted, without objection, Michelle Holcome. At that point, the jury was in place.

In Trotter v. State, 576 So.2d 691, 693 (Fla. 1990), this Court held in order to show reversible error, a defendant must demonstrate that all peremptory challenges were exhausted and he was forced to trial with an objectional juror. The court opined:

> . . . Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific jurors whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted. The defendant cannot stand by silently while an objectional juror is seated and then, if the verdict is adverse, obtain a new trial. In the present case, after exhausting his peremptory challenges, Trotter failed to object to any venireperson who ultimately was seated. He thus has failed to establish this claim.

576 So.2d at 693.

In the instant case, the record reflects that not only were the three jurors pinpointed by Dillbeck not excusable for cause, but Dillbeck has also failed to demonstrate reversible error where he was given additional peremptory challenges, and he was not forced to go to trial with any "objectional jurors". See also Penn v. State, 574 So.2d 1079, 1081 (Fla. 1991), wherein the court summed up:

> Penn never objected to any of the jurors after exhausting his peremptories and has not alleged, let alone demonstrated, that an incompetent juror sat on his jury. We therefore find no merit to this point on appeal.

See also Floyd v. State, 569 So.2d 1225 (Fla. 1990).

Based on the foregoing, the State would submit Dillbeck is entitled to no relief as to this claim.

ISSUE II

WHETHER THE COURT ERRED IN REFUSING TO LET DILLBECK ELICIT EVIDENCE OF HIS LACK OF SPECIFIC INTEND TO COMMIT A MURDER IN VIOLATION OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO CONFRONT HIS ACCUSERS, PRESENT EVIDENCE IN HIS BEHALF AND HAVE A FAIR TRIAL

Citing Chestnut v. State, 538 So.2d 820 (Fla. 1989), Dillbeck acknowledges that the state of law presently is adverse to his claim sub judice. While acknowledging that a diminished capacity defense is not cognizable in Florida pursuant to Chestnut, supra, and in fact defense counsel conceded that Chestnut controlled before the trial court (TR 2840, 2847), he concludes, "The trial court in this case, erred when it refused to let Dillbeck present evidence that his organic brain damage and or mental aborations as they affected his ability to formulate the specific intent to kill." (Appellant's Brief at 52-53).

In Chestnut v. State, supra, this Court addressed this exact issues raised by Dillbeck and rejected same. Dillbeck argues that his "organic brain damage", the genesis of which occurred prenatally when his mother heavily imbibed alcohol resulted in fetal alcohol affect or, in Dr. Thomas' words, a difficulty in controlling his actions to circumstances or poor decision making. (TR 1697-1698). Although Dr. Thomas performed no mental tests himself, he relied on the test results of Dr. Woods' report and

the fact that Dillbeck's mother drank prenatally to conclude, that Dillbeck suffered from a fetal alcohol affect. (TR 1705). The best Dr. Woods could derive from testing was that based on the Rey Auditory Verbal Learning Test given (TR 2437-2438), Dillbeck's memory was impaired sufficiently because he could not remember fifteen words given to him five times. In essence, Dr. Woods "suspected permanent brain damage because of the bad memory." (TR 2440). On cross examination, however, Dr. Woods concluded that because Dillbeck does not possess normal human interpersonal warmth, he was not making a rational choice when he stabbed Mrs. Vann. (TR 2482). Dr. Berland concluded on cross examination that Dillbeck was of average intelligence (TR 2406), never experienced any symptoms at any time during the murder of Mrs. Vann with regard to hallucinations and was not under extreme emotional or mental disturbance at the time of the murder. (TR 2407). The doctor further concluded that Dillbeck appreciates his conduct and "whatever mental illness" he had did not impact on the murder. There was no substantial impairment of Dillbeck's faculties at the time that he committed the murder. (TR 2408).

Dillbeck argues herein that he did not have the premeditated intent necessary for first degree murder when he killed Faye Vann. What he is actually arguing is the very argument this Court rejected in Chestnut that he should be permitted to use a diminished capacity defense to this first degree murder crime without asserting legal insanity. See Occhicone v. State, 570 So.2d 902 (Fla. 1990); Hall v. State, 568 So.2d 882, 884-885 (Fla. 1990); Parker v. State, 570 So.2d 1048, 1052 (Fla. 1st DCA

1990); Christian v. State, 550 So.2d 450, 451 (Fla. 1989) (diminished capacity rejected); Drew v. State, 551 So.2d 563 (Fla. 4th DCA 1989), and Bunney v. State, 579 So.2d 880 (Fla. 2nd DCA 1991).

To the extent, Dillbeck argues that he had only "one defense" that he did not commit the homicide with premeditation, such argument is unpersuasive. As observed in Chestnut v. State, 538 So.2d at 825:

> It could be said that many, if not most, crimes are committed by persons with mental aborations. If such mental deficiencies are sufficient to meet the definition of insanity, these persons should be acquitted on the grounds and treated for their disease. Persons with less serious mental deficiencies should be held accountable for their crimes just as everyone else. If mitigation is a appropriate, it may be accomplished through sentencing, but to adopt a rule which creates an opportunity for such persons to obtain immediate freedom to prey on the public once again is unwise.

Dillbeck has demonstrated no basis upon which relief should be granted or for that matter, reconsideration of this Court's decision in Chestnut v. State, supra.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN REQUIRING DILLBECK TO SUBMIT TO A PSYCHOLOGICAL EXAMINATION BY THE STATE'S MENTAL HEALTH EXPERT

Dillbeck next argues that the trial court erred in allowing to the State to examine him prior to the penalty phase, because "there is no provision in the Florida law that would authorize an examination of Mr. Dillbeck." (Appellant's Brief at 55). Dillbeck admitted to the trial court at the motion to compel psychological examination hearing on February 13, 1991:

> . . . I'll concede that as the law exists, the kind of testimony Dr. Berland would present in the first phase has to be excluded under Chestnut. It is not to say that some day Chestnut may not be overturned. But as the law exists, I will concede Chestnut requires it to be excluded. So I don't want this to be looked at in a vacumm. In all likelihood we will proffer Dr. Berland's testimony. But as I stand here, I can see that the State has to exclude that if the State's objects to it. So it may be that this is not the great issue that it might appear. I say that sort of to put it in context. But, again, to summarize my argument, I don't think there is a Fifth Amendment defense to all this. There is not a Sixth Amendment defense to all this. But the fact of the matter is there is simply no provision under Florida law that would allow it. And it is for the reasons we would object to any psychological examination of Mr. Dillbeck. I might add, in all these cases that talk about insanity defense and the question of competency, there is a rule that provides for that. It is discussed at length in the rules of procedure. And I contrast that with the complete absence of any rule covering the situation. So again, it is for these reasons we would object to any examination of Mr. Dillbeck.

(TR 2840-2841).

The record reflects the trial court did not specifically hold that he was proceeding under Rule 3.220(f), Rules of Criminal Procedure, but rather found that it was an "issue of fundamental fairness" not to allow the examination. (TR 2848). The State argued before the trial court that it was appropriate for Dr. McClaren to interview Dillbeck in order that Dr. McClaren could make a proper assessment of Dillbeck's mental health. In fact, the record reflects that when Dr. McClaren testified all evidence pertaining to information he derived solely from his interview with Dillbeck was disallowed pursuant to defense

counsel's objection (TR 2610-2614), and no motion to strike Dr. McClaren's testimony was made at the conclusion of his testimony.

Dillbeck argues that "the issue thus becomes whether the 'catch-all' provision of Rule 3.220(f) is broad enough to justify the State's discovery demands for the penalty phase of the trial." (Appellant's Brief at 55). Pointing to Maxwell v. State, 443 So.2d 967 (Fla. 1983), and Burns v. State, ___ So.2d ___ (Fla. Decided May 16, 1991), 16 F.L.W. S389, rehearing granted and decision pending, Dillbeck argues that the current discovery rule does not apply to sentencing. Whether this is so is of no consequence because the trial court did not allow the examination of Dillbeck pursuant to Rule 3.220(f), Fla.R.Crim.P.[1] Rather, the trial court determined it would not be fundamentally fair to not permit an examination where there was no rule that prevented it and more importantly, the prosecution had given a justifiable reason for requesting said examination. In that regard, the question then becomes did the trial court abuse his discretion in allowing Dr. Harry McClaren to examine Dillbeck. The answer, of course, is no.

Rule 3.780, Rules of Criminal Procedure sets out the procedures to be used in a capital proceeding pursuant to §921.141, Fla.Stat. Nothing contained therein provides that the court is without discretion to entertain evidence or permit the gathering of evidence when a party has demonstrated the need for same. For example, the trial court has the discretion in

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[1] The State would submit that discovery rules have been applied to sentencing, see Gardner v. Florida, 430 U.S. 349 (1977), and Jacobs v. State, 357 So.2d 169 (Fla. 1978).

obtaining presentence investigation reports or updates, see Rose v. State, 461 So.2d 84 (Fla. 1984), and Jackson v. State, 366 So.2d 752 (Fla. 1978), however, the court cannot dispense with evidence during the penalty phase of the capital case without first giving the parties an opportunity to present their evidence to an advisory jury where the record shows that the jury's verdict at the guilt phase legally permitted the death penalty if other factual issues warranted the penalty. See State v. Ferguson, 556 So.2d 462 (Fla. 2nd DCA 1990). Likewise, it is within the sound discretion of the trial court to decide whether a continuance ought to be granted between the guilt phase and the penalty phase in a capital trial or whether certain evidence will in fact be admitted.

Moreover, in light of this Court's pronouncement with regard to the trial court's responsibilities in determining mitigation pursuant to Campbell v. State, 571 So.2d 415 (Fla. 1990), and Nibert v. State, 574 So.2d 1059 (Fla. 1990), it has become imperative that the State be given a fair and full opportunity to explore and rebut inaccurate or incorrect or misleading "mitigation" that may be presented. In Nibert v. State, 574 So.2d at 1062, this Court held:

> . . . Where uncontraverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. See Campbell. Thus, when a reasonable quantum of competent, uncontraverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. A trial court may reject a defendant's claim that a mitigating circumstance has been proved, however,

> provided that the record contains 'competent substantial evidence to support the trial court's rejection of these mitigating circumstances.' Knight v. State, 512 So.2d 922, 933 (Fla. 1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988); Cook v. State, 542 So.2d 964, 971 (Fla. 1989) (trial court's discretion will not be disturbed if the record contains 'positive evidence' to refute evidence of the mitigating circumstance); see also Pardo v. State, 563 So.2d 77, 80 (Fla. 1990) (this court is not bound to accept a trial court's finding concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law).

In Nibert, the court reversed and remanded for imposition of a sentence of life imprisonment where in part, expert testimony went unrefuted. The court held:

> In this instance, there was no competent, substantial evidence in the record to refute the mitigating evidence. Rather, the record shows that Nibert was a child abused, chronic alcoholic who lacks substantial control over his behavior when he drank, and that he had been drinking heavily on the day of Snavely's murder.

574 So.2d at 1063.

Likewise, in the instant case it was incumbent upon the State to come forward and demonstrate that the psychological testimony presented by Dillbeck was not unrefuted. Clearly Dr. McClaren's testimony brought into issue the correctness of Dr. Berland's and Dr. Woods' and Dr. Thomas' diagnoses that Dillbeck had a lack of impulse control. The fact that the State believed and persuasively argued to the trial court that it was imperative that Dr. McClaren also interview Dillbeck as did Dr. Berland, Dr. Thomas and Dr. Woods, does not bring into question the correctness of the trial court's ruling nor demonstrate that the

trial court abused its discretion. Albeit, Dillbeck points to the fact that other methods might have been employed to refute the defense's doctors, that alone again does not demonstrate an abuse of discretion by the trial court.

To suggest that the earlier decision in Parkin v. State, 238 So.2d 817 (Fla. 1970), prevents such an examination, is of no moment and distinguishable. First, Dillbeck testified at trial that he escaped from the Quincy Vocational Center (TR 1974); that he walked from Quincy to Tallahassee and stole clothes from a clothesline in order to change his clothing (TR 1976); that he slept in the woods so he would not be detected (TR 1974, 1977); that he bought sunglasses and bought a knife at Publix in order to have a weapon (TR 1978-1979); on cross examination he admitted he had started to plan for this escape for a long time (TR 1986); that he needed to stay in shape and ran (TR 1986); that he did not want to get caught and stole clothing on his way from Quincy to Tallahassee (TR 1988); that when he arrived in Tallahassee on Sunday morning, he went to Publix and he bought a knife because it was cheap and he needed a weapon which could be concealed (TR 1990-1991), and that he waited for an opportunity to get a ride to Orlando when he could not reach his friend and earlier in the day, he had taken the knife out of its packaging and made a sheath for it in case he needed it. (TR 1994-1996). To suggest as Dillbeck's has, that in some way, he was compelled to confess is simply in error. Indeed, in Parkin v. State, 238 So.2d 817, 822 (Fla. 1970), the court concluded:

> In answer to the questions certified to us by the district court, we hold that, where a

> defendant in a criminal case serves notice that she will rely upon a defense of insanity and the court over her objections orders her to give testimonial response to court appointed psychiatrists under pain of forfeiting the testimony of her privately engaged psychiatrist, the defendant's rights to freedom from self-incrimination are not invaded.

So, to, Dillbeck's claim must fail on two levels, first, nothing was presented to the trial court or the jury that Dr. McClaren obtained solely from his interview with Dillbeck; and second, under a similar theory at the penalty phase, once the State is informed that mental health mitigation is likely to be presented, the State must be given a fair and full opportunity to explore, and present, evidence to rebut the defense's expert testimony. The trial court sub judice did not rule on the applicability of the discovery rules with regard to sentencing and therefore the issue is not ripe in this case. The trial court did not abuse its discretion in ascertaining that a party made a colorable showing of need, to-wit: that the prosecution's expert believed it necessary that he examine Dillbeck as well as look at a plethora of other evidence in explaining his opinions. Dillbeck is entitled to no relief as to this claim.

ISSUE IV

> WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THE COULD CONSIDER, AS EVIDENCE OF GUILT, THE DEFENDANT'S FLIGHT

Dillbeck next argues that the jury instruction given with regard to flight (TR 2094-2095), was error. He asserts that "after defense objection (T 2030-31), the court made a modified instruction. . . ." (Appellant's Brief at 67), suggesting that

the issue has been properly preserved for appellate review. The State would submit that the record bares out that although an objection was made by defense counsel with regard to the flight instruction, the objection covered neither of the arguments herein presented, to-wit: that "the evidence of Dillbeck's fleeing the parking lot after stabbing Vann does not constitute flight," or that there is no justification for giving such an instruction at all. (Appellant's Brief at 67). In fact, the record reflects at (TR 2030):

> MR. MURRELL: I certainly concede there has been evidence as to flight, but I would object to it for one reason. The last sentence, it says - - well, the last clause there, it says, 'Such may be shown in evidence as one of a series of circumstances from which guilt can be inferred.' In my view, the trouble with this instruction is the jury may take it to mean that you can assume or that you can infer he is guilty of first degree murder, premeditated murder, simply because he fled the scene. I don't think that's accurate. What you can infer is that he committed some sort of a crime. But, I don't think that tells you anything about whether or not this crime was premeditated. And I think it leads the jury to the impression that they can conclude he is guilty of premeditated murder simply because he fled the scene. I would suggest that it read 'Such may be shown in evidence as one of a series of circumstances from which it may be inferred that he committed a crime. Or that the accused committed a crime.'

(TR 2030-2031).

The court concurred with defense counsel's objection and recommendation (TR 2031), and no further objection was raised with regard to this instruction. (TR 2032, 2106).

The cases are legion that in order to preserve a point on appeal, a timely and specific objection must be raised below.

See for example Sochor v. State, 580 So.2d 595 (Fla. 1991). In the instant case, defense counsel got exactly what he desired, a modification of the flight instruction after he conceded that the evidence supported a flight instruction. To suggest that he is now able to raise the claim on appeal is wrong. To suggest that there is any merit to this claim is equally wrong. The State is not unmindful of the recent decision in Fenelon v. State, ___ So.2d ___ (Fla. 1992), 17 F.L.W. S112, wherein the court determined that because of inconsistencies among cases, "as well as with the lack of a meaningful standard for assessing what type of evidence merits the instruction", specifically, the flight instruction, "we are thus persuaded that the better policy in future cases where evidence of flight has been properly admitted is to reserve, and to counsel, rather than to the court. . . ." Accordingly, we approve the result below although we direct that henceforth the jury instruction on flight should not be given." 17 F.L.W. at S113. Clearly, Fenelon, supra, is not applicable to the instant case because of its prospective impact. With regard to the underlying determination that the instruction in Fenelon was harmless error beyond a reasonable doubt, State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986), Fenelon controls.

Sub judice, defense counsel conceded the evidence was sufficient to warrant the flight instruction. Unlike Wright v. State, 586 So.2d 1029 (Fla. 1991), Dillbeck's actions were not merely fleeing the scene of the crime. Moreover, while the court has now suggested that there is no rational meaning given the flight instruction per Fenelon, Dillbeck's "fundamental question

there is no justification for giving such an instruction at all", is error. Fenelon, supra, urges that a flight instruction is unwarranted not because it would be inappropriate in all cases but rather because it has been inconsistently interpreted. In Vinigra v. State, ___ So.2d ___ (Fla. 3rd DCA 1992), 17 F.L.W. D907, the Third District Court of Appeals had no difficulty even after Fenelon was decided in determining that the trial court properly instructed the jury therein as to flight. The facts of that case are very similar to the ones sub judice.

Terminally, as previously noted the State would submit that if this Court should find that defense counsel properly objected to the instruction and that the issue is properly before the Court, and that the instruction was unwarranted, any error is harmless error beyond a reasonable doubt. The record is replete with evidence of Dillbeck's conduct after he murdered Mrs. Vann; he fled the scene on foot, having wrecked her car, and was chased by Samuel Bradley until almost the time he was caught. Based on the evidence in the instant case, any error satisfies State v. DiGuilio, supra. See also Dailey v. State, ___ So.2d ___ (Fla. 1992), 17 F.L.W. S187, and Jackson v. State, 575 So.2d 181, 188-189 (Fla. 1991).

ISSUE V

WHETHER THE TRIAL COURT ERRED IN PERMITTING DR. HARRY McCLAREN, A PSYCHOLOGIST TESTIFYING FOR THE STATE, TO TESTIFY ABOUT THE REASON HE BELIEVED DILLBECK ENGAGED IN "PURPOSEFUL RATIONAL BEHAVIOR" AS WHAT HE OBSERVED WAS NOT THE SUBJECT OF EXPERT TESTIMONY AND INVADED THE PROVINCE OF THE JURY, IN VIOLATION OF THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL

Dillbeck next argues that it was error for Dr. Harry McClaren to recite a list of factors that he considered in concluding that Dillbeck was able to engage in purposeful rational, goal oriented behavior. The record reflects at (TR 2602), that Dr. McClaren was asked whether in his opinion the defendant was able to engage in purposeful goal oriented behavior in June of 1990. In response to said question, McClaren stated:

> . . . I started to make a list of reasons why Mr. Dillbeck was able to engage in purposeful rational behavior and within a fairly short period of time was able to come up with between twenty-five and thirty reasons, and after the evaluation to find more, and was ultimately able to have a list of over thirty reasons why.

(TR 2602).

An objection was raised by defense counsel at this point (TR 2603), that the chart was nothing more than a closing argument for the prosecution. Defense counsel further argued:

> Secondly, I would object because it relies on statements given to him by the defendant about the offense and under Parkin, he may not be permitted to testify to that. Parkin says it would violate the defendant's Fifth Amendment right.

(TR 2603).

Following further discussion, the court observed:

> This witness should not be allowed to testify to any matters that were revealed to him by this defendant during a court ordered examination that have not been otherwise testified to by some other witness prior to this time.

(TR 2608).

The court further observed:

> My understanding of what the question is to this witness is what is the basis for your opinion. And this witness went through the exercise of determining matters that he relied on in arriving at his opinion. And I think that's perfectly legitimate testimony by an expert witness. . . . Now are there any matters on this list other than seventeen, eighteen and nineteen that you feel should not come in because they have not previously -- its not previously been before the jury? . . .

(TR 2609).

At which point, defense counsel argued:

> It's hard to tell what he's relying on. I don't know whether he is relying on what the defendant told him or what he read it someplace else.

(TR 2609).

The court stated:

> I will overrule the defense objection with regard to all of those except seventeen, eighteen and nineteen.

(TR 2610).

Defense counsel did not renew his objection to any of Dr. McClaren's testimony thereafter.

Dr. McClaren testified as a rebuttal witness for the State at the penalty phase of Dillbeck's trial. Dillbeck called in Dr. Berland at the penalty phase who testified that Dillbeck suffered from some brain damage, a moderate psychotic disturbance (TR

2375), which affects his perceptions. (TR 2388). It was Dr. Berland's testimony that Dillbeck would likely misjudge the circumstances (TR 2390), and that stressors such as lack of sleep and the fact that he was an escapee would have caused him to overeact, panic and be fearful. In essence, Dillbeck became out of control. Dr. Berland opined that Dillbeck had a paranoid perception of harmless events and was mildly hypomanic because of brain injury complicated by his mental health, thus he was acting under these influences although influences were not "extreme". (TR 2410-2411). Dr. Frank Woods also testified and concluded that there was something wrong with Dillbeck's brain. (TR 2434). He suffered from a disorder which resembles schizophrenia although not as severe, specifically schizotypal personality disorder. (TR 2434). Dillbeck had a poor memory based on Dr. Woods' testing (TR 2440), and suffered from fetal alcohol affect as evidenced by his memory loss or difficulty. (TR 2445). Dr. Woods testified that Dillbeck's brain does not process effectively interpersonal or social information. Dillbeck thinks people are more like machines than people and he does not appreciate interpersonal interaction like normal people. (TR 2452). Dillbeck suffers from schizophrenic spectrum which is a condition that makes Dillbeck drive people away from interpersonal situations and when Dillbeck can not control the situation, he goes out of control. (TR 2452-2453). Dr. Woods testified at the penalty phase that he expected Dillbeck to explode if Dillbeck was backed up against a wall unless he was treated for what was wrong with his "brain". (TR 2457). When

Dillbeck becomes intensely agitated as a result of sleep deprivation, he blows up. (TR 2558). In short, Dr. Woods concluded that Dillbeck could not conform his conduct to the requirements of the law when Dillbeck loses control. (TR 2464). On cross examination, it was also disclosed that Dillbeck suffers from lefthandedness syndrome because he is left handed (TR 2472), and schizoid personality because he is a loner and avoids social contact. (TR 2474).

Based on the testimony presented, it was well within the State's inquiry of Dr. McClaren to ask him in his opinion whether Dillbeck was goal oriented and could control his behavior. Moreover, it was within the scope of what is expected pursuant to §90.702, Fla.Stat., that an expert may testify as to the underlying premise for the conclusions drawn.

Dillbeck argues that Dr. McClaren should not have testified for two reasons. First, he asserts that it was improper and second, that it invaded a province of the jury. As to the first, as heretofore argued, the evidence was indeed relevant in putting into perspective a full picture of Dillbeck's mental health and as to the second, there was no invasion of matters to be decided by the jury. Dr. McClaren testified that in his opinion, based on these factors as an expert witness, Dillbeck was goal oriented. Dillbeck's reference to Gurganus v. State, 451 So.2d 817 (Fla. 1984), and Drew v. State, 551 So.2d 563 (Fla. 4th DCA 1989), are not on point.

The State, pursuant to Nibert v. State, supra, has an obligation to come forth and refute evidence which is misleading,

or incorrect. As this Court observed in Gore v. State, ___ So.2d ___ (Fla. 1992), 17 F.L.W. S247, S250:

> He first argues that the trial court erred by allowing the State to question a defense psychiatrist on the issue of Gore's mental state at the time of the offense. This witness testified on direct examination that Gore was no insane, but that his present behavior was a result of his upbringing, and that he had an anti-social personality disorder. On cross examination, the State elicited testimony that Gore knew the difference between right and wrong, was capable of understanding the nature and quality of his acts, and was capable of conforming his conduct to the requirements of the law. This testimony, designed to show Gore's ability to be responsible for his own actions, was relevant to rebut the defense's mitigating evidence that Gore was merely the product of his upbringing. We find no abuse of discretion in allowing the testimony to be elicited.

(Emphasis added). See also Goldstein v. State, 447 So.2d 903 (Fla. 4th DCA 1984). No relief should be forthcoming as to this issue.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE AGGRAVATING FACTOR THAT THE MURDER WAS COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL MANNER BECAUSE THAT INSTRUCTION FAILED TO ADEQUATELY LIMIT AND GUIDE THEIR DELIBERATIONS

Dillbeck argues that the jury was not sufficiently instructed on whether the murder was committed in an especially heinous, atrocious or cruel manner. Citing to the instruction given at (TR 2743-2744), he argues that although this explanation of the aggravating circumstance was taken from State v. Dixon, 382 So.2d 1, 9 (Fla 1973), it was inadequate to guide and limit

the jury's sentencing function. The record reflects that although Dillbeck voiced his concern about this instruction prior the modified instruction given by the trial court, he voiced no objection to the instructions given the jury at the close of all instructions at the penalty phase. (TR 2767).

The validity of the instant instruction has most recently been reaffirmed in Martin v. Singletary, ___ So.2d ___ (Fla. 1992), 17 F.L.W. S282, S283, n.4, reaffirming the constitutionality of the instruction given. See also Smalley v. State, 546 So.2d 720, 722 (Fla. 1989).

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD CONSIDER WHETHER THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL AND IN FINDING THIS AGGRAVATING FACTOR APPLIED

Although acknowledging that stabbing deaths often justify a finding that the murder was especially, heinous or cruel and that a stabbing murder seems to epitomize the definition of this aggravating factor as defined in State v. Dixon, 283 So.2d 1, 9 (Fla. 1983), Dillbeck argues that the instant murder is an exception. He argues that "killings that are the direct product of an emotional rage or mental illness are not especially heinous, atrocious and cruel," citing Huckaby v. State, 343 So.2d 29 (Fla. 1977), and Halliwell v. State, 323 So.2d 557 (Fla. 1975), as examples of same. The trial court found, however, that this aggravating factor was appropriate and proven beyond a reasonable doubt. The trial court found:

> Evidence was presented at this aggravating circumstance and the jury was instructed on it. The medical examiner testified without contradiction that there were twenty-twenty five stab wounds inflicted by the defendant on the victim. The wounds were made by a knife with a serrated blade which had been selected and purchased by the defendant for the specific purpose of its use as a weapon. The stab wounds were clustered in the throat, the abdomen and the upper back. One of the wounds to the upper back was approximately four inches long. The medical examiner further testified that the victim died as a result of one of the stab wounds severing the windpipe causing the victim to drown in her own blood. He also testified that the victim struggled for an extended period of time while the stabs were being inflicted before she lost consciousness. The evidence also showed that she attempted to flee from the automobile but the defendant held her while he continued to stab her. The court finds that it was proven beyond a reasonable doubt.

(TR 3143-3144).

This Court has upheld the finding that a stabbing murder is heinous, atrocious or cruel, where there is multiple stab wounds and the victim has been made to suffer or struggles, attempting to breathe or where the victim either drowns in his or her own blood or bleeds to death. See Haliburton v. State, 561 So.2d 248 (Fla. 1990) (victim stabbed thirty-one times on cheek, neck, arms and scrotum); Floyd v. State, 497 So.2d 1211 (Fla. 1986) (victim lived for two to four minutes after being stabbed twelve times and defensive wounds were present); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) (several of the more than thirty stab wounds were defensive wounds); Duest v. State, 462 So.2d 446 (Fla. 1985) (eleven stab wounds and victim lived for minutes before dying); Lusk v. State, 446 So.2d 1038 (Fla. 1984) (three stab wounds and victim bled to death); White v. State, 415 So.2d

719 (Fla. 1982) (fourteen puncture wounds and slit throat); Morgan v. State, 415 So.2d 6 (Fla. 1982) (death caused by one of ten stab wounds); Turner v. State, 530 So.2d 45 (Fla. 1988) (victim pursued into phone booth, cut and stabbed to death, pleas for mercy); Breedlove v. State, 413 So.2d 1 (Fla. 1982) (victim attacked while sleeping, stabbed, did not die immediately); Medina v. State, 466 So.2d 1046 (Fla. 1985); Campbell v. State, 571 So.2d 415 (Fla. 1990) (victim stabbed twenty-three times with defensive wounds); Sireci v. State, 587 So.2d 450 (Fla. 1991) (victim sustained fifty-five stab wounds and numerous lacerations and abrasions, neck was slit); Bates v. State, 465 So.2d 490 (Fla. 1985), resentencing affirmed, 506 So.2d 1033 (Fla. 1987) (drowned in own blood), and Perry v. State, 522 So.2d 817, 821 (Fla. 1988), wherein this Court observed:

> The trial court also found as an aggravating circumstance that this killing was especially heinous, atrocious and cruel. The evidence reflects that Johnny Perry tried and tried again to kill Kathryn Miller. She was brutally beaten in the head and face. She was choked and repeatedly stabbed in the chest and breast as she attempted to ward off the knife. She died of strangulation associated with the stab wounds, comparable, in the medical examiner's testimony, to drowning in her own blood. Evidence that a victim was severely beaten while warding off blows before being fatally shot have been held sufficient to support a finding that the murder was especially heinous, atrocious and cruel. . . .
>
> Although there are undoubtedly killings more outrageous, wicked and vile than that shown here, we cannot say with certainty that this is not the kind of killing which the Legislature intended to be punished by death and we leave the trial court's determination undisturbed.

So, to, in the instant case, the trial court was correct in concluding that the evidence demonstrated beyond a reasonable doubt that this murder was especially heinous, atrocious and cruel.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD FIND THAT DILLBECK COMMITTED THE MURDER WHILE TRYING TO EFFECTUATE AN ESCAPE

Dillbeck argues that the trial court erred in instructing the jury that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, pursuant to §921.141(5)(e). Dillbeck chooses to give a limited construction of this aggravating factor by suggesting that because Dillbeck had "left the Quincy Work Center two days earlier and was forty miles from there when he killed Fay Vann" he could not possibly have been effecting an escape from custody. Such a contention is erroneous. The record reflects that Dillbeck planned to escape and finally commenced his plan when he slipped away from Quincy Vocational Center. His plan included getting in touch with his friend, Gary Barnes, so that he could be picked up. When he was unsuccessful in reaching Gary Barnes, in continuation of avoiding detection and carrying out his escape, Dillbeck purchased a weapon and consciously decided that he was going to have to secure a ride to Orlando, Florida. In this continuing saga to effectuate his escape from custody, he targeted Mrs. Vann because she was a woman sitting alone in her car and walked up to her and told her that she was

going to be his ride. When she resisted, he killed her. The trial court was imminently correct in concluding that this aggravating factor was proven beyond a reasonable doubt. (TR 3162-3163).

Albeit, the fact scenario is slightly different, this Court, in Bryant v. State, 533 So.2d 744 (Fla. 1988), found the same aggravating factor proven beyond a reasonable doubt therein. See also Swafford v. State, 533 So.2d 270 (Fla. 1988), and Tafero v. State, 403 So.2d 355 (Fla. 1981). The trial court gave the standard jury instructions with regard to this aggravating factor. There was evidence upon which the trier of fact could have found this aggravating factor proven beyond a reasonable doubt and therefore, it was not error for the trial court to so instruct. Based on the foregoing, this issue is without merit. However, should this Court determine that the trial court erred in finding this aggravating factor, it is submitted that striking this one statutory aggravating factor would not have changed the outcome sub judice. As such, any error is harmless error beyond a reasonable doubt. See Capehart v. State, 583 So.2d 1009 (Fla. 1991), Sochor v. State, 580 So.2d 605 (Fla. 1991), and Martin v. Singletary, supra.

ISSUE IX

WHETHER, UNDER A PROPORTIONALITY ANALYSIS, DILLBECK DESERVES A DEATH SENTENCE

The trial court, in his thirteen page order in support of the sentence of death, reviewed each of the applicable aggravating factors and reviewed the mitigation presented, both

statutory and nonstatutory. The trial court found five statutory aggravating factors proven beyond a reasonable doubt: 1) that the murder was committed while Dillbeck was under a sentence of imprisonment; 2) that Dillbeck had previously been convicted of another capital felony in 1979; 3) that murder was committed while engaged in flight or committed during another felony; to-wit: robbery and burglary; 4) that the murder was committed to avoid a lawful arrest, and 5) that the murder was especially heinous, atrocious and cruel. None of the aforenoted aggravating factors have seriously been questioned by Dillbeck and in fact, he has only superficially challenged two of the statutory aggravating factors. With regard to mitigation, the court observed, after reviewing mental mitigation:

> . . . The court has reviewed the evidence independently and is not reasonably convinced that the defendant was under the influence of extreme mental or emotional disturbance at the time of the commission of the capital felony and, therefore, rejects this as a mitigating circumstance. However, as is set forth hereinafter, this evidence was considered to establish the mitigating circumstance in subparagraph (f) below.

(TR 3166).

With regard to whether Dillbeck could appreciate the criminality of his conduct, the court observed:

> Evidence was presented by the defendant with regard to this mitigating circumstance, the jury was instructed on it and there was sufficient evidence upon which the jury could have been reasonably convinced that this mitigating circumstance was established. The court has made an independent review of the evidence and is reasonably convinced that it was established. . . . It is difficult to allocate the evidence as to this mitigating circumstance from its applicability to the

> mitigating circumstance in Fla.Stat. 921.141(6)(b). It would appear and the court finds that the defendant's capacity to conform his conduct to the requirements of law was substantially impaired. The court is not convinced that the capacity of the defendant to appreciate the criminality of his conduct was substantially impaired.

(TR 3167).

With regard to nonstatutory mitigating circumstances, the court reviewed a sentencing memorandum from defense and methodically reviewed each aspect presented therein. With regard to whether Dillbeck suffered an abused and deprived childhood, the court observed that although Dillbeck's first four and a half years of life were "shocking", the years that followed when he was with the Dillbecks from age six to age fifteen, demonstrated "almost overwhelming love". Dillbeck's sister testified that "she was in the same circumstance until she was seven years of age and endured similar abuse as the defendant, testifying also that she was thrown against an object by the mother, which split her head open." The court observed that the sister appeared to be "well adjusted". In sum, the court concluded:

> From a review of all of the evidence regarding the defendant's childhood, this circumstance simply does not weigh heavily as a mitigating circumstance. Knight v. State, 512 So.2d 922 (Fla. 1987); Remeta v. State, 522 So.2d 825 (Fla. 1988).

(TR 3168).

With regard to whether Dillbeck suffered from brain damage due to his mother's consumption of alcohol prenatally, the court held:

> The existence of the condition known as fetal alcohol affect was established by the

> testimony; however, the impression given to the court by those who testified about it was that the conclusions reached by them were tenuous and made in the early stages of their research so that while the physical effects of fetal alcohol syndrome are well documented, the extent of the mental effects of the fetal alcohol affect can vary widely and sufficient testing has not been developed to document the degree of disability. The stated conclusion was that there is a lack of impulse control, but the court is not persuaded that this impacted the defendant's actions to any substantial degree.

(TR 3169).

With regard to whether Dillbeck suffers from a mental disease or illness, the court observed:

> The court is reasonably convinced that the defendant suffers from some mental disorder as all must who commit acts of this violent nature, but the court finds that it is not of such significance as to weigh heavily as a nonstatutory mitigating circumstance.

(TR 3169).

With regard to Dillbeck's mental illness and whether his brain damage can be treated, the court, after noting that he heard Dr. Berland and Dr. Woods' testimony, stated:

> The court is not convinced that this is a nonstatutory mitigating circumstance that is entitled to any substantial weight.

(TR 3170).

Regarding whether nonstatutory mitigation was established because Dillbeck served time at Sumter Correctional Institution, the court found said institutionalization not a mitigating factor. (TR 3171). With regard to Dillbeck's "good, well behaved institutional behavior", the court observved the State conceded this nonstatutory mitigating circumstance and the court is convinced it exists. The court further observed however:

> The court believes that this is of no practical mitigation because it appears to the court that it detracts from the other mitigating factors found in the defendant's behalf. It is obvious that most of the defendant's good behavior was a conscious effort to further his plans which included escape resulting in this offense.

(TR 3171).

As to the love and support of Dillbeck's family, the court found the family's testimony heart-rending. The court further observed:

> It is obvious, however, that the love that the defendant returned to his adoptive parents was not sufficient to overcome his intentional criminal action and the obvious knowledge of the pain that would be caused to them by it. While great empathy is felt for the defendant's parents, only slight mitigation results to the defendant from it.

(TR 3171).

Terminally, as to Dillbeck's remorse for the crime, the court, after hearing all the evidence, observed:

> There is very little evidence to support the mitigating factor in the simple statement from the defendant on the witness stand or at the sentencing hearing to that effect is not persuasive to the court that this should be given any substantial weight.

(TR 3171).

In conclusion, the court found that although there was compelling evidence of mitigating circumstances, specifically with regard to the fetal alcohol affect which resulted in Dillbeck's "borderline normal intelligence level" and Dillbeck's "lack of impulse control", the court opined that when considering that mitigation with other evidence "it simply becomes insignificant in the overall picture". (TR 3172). The court further concluded:

> The claim of lack of impulse control does not stand when considering defendant's exemplary record of only two disciplinary reports in eleven years of incarceration, a large portion of which was spent in the most violent institution in the state corrections system. Surely, if defendant had any difficulty in controlling his impulses, his prison record would be substantially different.
>
> A review of all the evidence, the testimony and demeanor of the witnesses causes the evidence in mitigation to pale into insignificance when considering the enormity of the proved aggravating factors and compels the sentence in accordance with the recommendation of the jury.

(TR 3172).

Without attempting to regurgitate the plethora of evidence in aggravation and the paucity of evidence characterized as mitigation, the State would submit that the death penalty is the appropriate sentence in the instant case.

ISSUE X

> WHETHER THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THE STATE HAD TO PROVE THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGHED THE MITIGATING CIRCUMSTANCES THEREBY REQUIRING DILLBECK TO PROVE THAT DEATH WAS NOT THE APPROPRIATE PUNISHMENT, IN VIOLATION OF ARTICLE I, SECTIONS IX AND XVII OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Dillbeck's burden-shifting argument is the same argument that has been raised by a plethora of other capital defendants and rejected uniformly by this Court on every occasion. See for example Robinson v. State, 574 So.2d 108, 113, n.6 (Fla. 1991). Dillbeck is entitled to no relief as to this issue.

CONCLUSION

Based on the foregoing, Dillbeck's first degree murder conviction and the imposition of the death penalty should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. David A. Davis, Esq., Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 3rd day of June, 1992.

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