IN THE SUPREME COURT OF FLORIDA

DONALD DAVID DILBECK,

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

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT
FLA. BAR NO. 271543

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INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

This lengthy brief raises several issues of importance for this court to consider. The most significant (at least from an administration of justice standpoint) is whether Rule 3.220 Fla. R. Crim. P. applies to the sentencing portion of a capital trial. Donald Dilbeck is the defendant in this case. The record on appeal consists of 17 volumes and references to it will be indicated by the letter "T."

II STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Leon County on July 10, 1990 charged Donald Dilbeck with one count of first degree murder, armed robbery, and armed burglary, to which he pled not guilty (T 2867-68, 2881). The pre-trial activity in the case proceeded in the normal course of such affairs, with the State and defendant filing several pertinent motions or requests relevant to this appeal:

1. Motion for a Special Verdict Form (T 3033). The court apparently granted Dilbeck's request that the jury be able to indicate if the murder was committed with premeditation or during the course of a felony or both (T 3088).

2. Motion in Limine filed by the state to prevent the defendant's expert witness, Dr. Robert Berland from testifying in the guilt phase of the trial about Dilbeck's mental conditions less that insanity (T 3055-56). Conceded with objection (T2840, 2847).

3. Motion in Limine filed by the state to prevent introduction, during the penalty phase of the trial, of evidence relating to the defendant's mother's insanity and the nature of the various prisons Dilbeck had been housed at (T 3058-59). Granted in part.

Dilbeck proceeded to trial before Judge F.E. Steinmeyer, and the jury convicted him as charged (T 3084-87). It also found that he had committed the murder with premeditation and during the course of a felony (T 3088).

The court then heard evidence and argument during the penalty phase, and the jury, by a vote of 8-4 recommended death (T 3089). The court accordingly sentenced the defendant to that penalty finding in aggravation:

1. That the capital felony was committed by a person under sentnce of imprisonment.

2. The defendant was previously convicted of another capital felony.

3. The capital felony was committed while the defendant was engaged in the commission of or flight after committing a robbery, and burglary.

4. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

5. The capital felony was especially heinous, atrocious, or cruel (T 3160-64).

In mitigation, the court found:

1. The capacity of the defendant to conform his conduct to requirements of the law was substantially impaired.

2. The defendant suffered an abused and deprived childhood.

3. The defendant suffered from brain damage due to his mother's consumption of three to four six-packs of beer a day throughout her pregnancy.

4. The defendant suffers from a mental illness.

5. The defendant's mental illness and brain damage can be treated. This was found but not given "any substantial weight."

6. The defendant entered one of Florida's most violent prisons at an unusually early age.

7. The defendant has been a good, well-behaved inmate.

8. The defendant has the love and support of his family (T 3167-71).

As to the other offenses, the court sentenced Dilbeck two consecutive terms of life in prison for the armed robbery and armed burglary convictions (T 3157-58).

This appeal follows.

III STATEMENT OF THE FACTS

The events giving rise to Donald Dilbeck's murder of Faye Vann in Tallahassee on June 24, 1990 began before his birth. Donald and Audrey Hosey already had a two year old daughter when the wife discovered that she was pregnant. Apparently, she had a drinking problem before and during the time she carried the child who would become Donald Dilbeck because she drank eighteen to twenty-four cans of beer every day (T 2261). She also had severe mental problems, and eventually her husband left her after she had beat him with a baby bottle and ripped all his clothes with a knife (T 2262-63). He might be the next object of her knife assaults, and he did not want to be killed as he slept (T 2263).

After Audrey's husband left, the two children had to fend for themselves as best they could because Hosey would not take care of them (T 2253). She resorted to prostitution and may have been a lesbian (T 2416-17, 2253-54), and her daughter said she had sexually molested her and physically beaten her[1] and her brother up. Neighbors confirmed the mother's odd behavior (T 2413-16), and the children suffered from her increasing insanity. Hosey would have the children pray constantly, and if they stopped, she beat them (T

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[1]Cindy was hospitalized twice for injuries she received at the hands of her mother (T 2254).

2251). As part of this ritual, she stuffed Donald's and his sister's mouths with cotton and taped them so they could not spit out the cotton (T 2288).

Fortunately, the two children were taken from their natural mother when Donald was 4 1/2 years old (T 1704) and placed in a foster home. Cindy was soon adopted, but the family that chose her did not want the boy (T 2249-50). Another couple, the Dilbecks, adopted him when he was six years old (T 2551).

By all accounts this elderly couple deeply loved Donald, and he became the center of their lives (T 2549). All was not well with the boy, and when he was thirteen, he began heavily using speed and marijuana. By the time he was 15, his sister, whom he had fortuitously found four years earlier, wanted nothing to do with him because he was using drugs (T 2248).

By 1979, the Dilbecks were living in Indiana. Donald was 15 and one night in March of that year, while high on "speed," he broke into a car parked in the front of Philip Reeder's house, ostensibly to steal a "CB" radio (T 2275). Reeder caught the boy, and he planned only to take him inside his house, give him a warning, and let him go (T 2576). As he was escorting him, Dilbeck took out his knife and stabbed the man in the chest and fled (T 2580). Several days later, the police took a picture of him, and the defendant, apparently reacting to this development, stole a car and fled to Florida (T 2276).

Two days later, Deputy Hall of the Lee County Sheriff's Office found Dilbeck in the car parked on the beach (T 2208). He questioned the boy and eventually demanded some identification (T 2208). Stalling for time, Dilbeck opened the trunk, ostensibly to get his driver's license (which he did not have) and the policeman saw a pipe used to smoke marijuana (T 2277). He told the youth he would have to arrest him, at which he hit the officer and ran. He was soon tackled, and during the ensuing struggle, the defendant got the policeman's gun and shot him twice (T 2278). He was arrested a short time later.

Dilbeck pled guilty to first degree murder and was sentenced to life in prison without the possibility of parole for twenty-five years (T 2187). He spent several years at Sumpter Correctional Institution, which at that time was the most violent prison in the state. Dilbeck was raped several times, and the abuse eventually ended when he became the lover of a man thirty years old (T 2280-81). He was sixteen years old at this time (T 2205).

He was eventually transferred to Avon Park Correctional Institution and finally to the Gretna Vocational Center in Quincy (T 2304, 2306). Throughout his stay in the state's prisons he had received only a couple of disciplinary reports, and various prison officials uniformly rated him as among the very best adjusted inmates (T 2419-20).

Dilbeck, however, wanted to escape, and over five years earlier, he had tried but failed to do so (T 2421). When transferred to the Gretna Vocational Center in the early part of 1990, he was training to be a cook, and he later moved to the unit that catered to public functions outside of the institution (T 1973-74). He had been trusted enough so that by 22 June 1990 he had helped at several events (T 1974). On that date, one of the guards was not watching Dilbeck, and he slipped away (T 1974).

It took him two days to reach Tallahassee, and during that time he slept only three hours and ate only a couple of doughnuts (T 1977-78). When he got to town, tired, hungry, and with blistered feet (T 1978), he called a friend in Orlando who had promised to help him if he escaped (T 1975). Despite many repeated efforts, no one answered the telephone (T 1978). Dilbeck had decided he would kidnap someone who was driving a car and take them to a deserted road so he could learn to drive (he had not driven in eleven years) (T 1980).

By this time, it was about 3 p.m., and Dilbeck was near Gayfer's Department Store in the Tallahassee Mall. It was a Sunday, the store was busy, as evidenced by the parking lot which was half full (T 1669). As he stood outside he saw Faye Vann park her car and several people get out and go inside (T 1654-65).

He went to her and told the woman that she was going to take him for a ride (T 1981). She refused and began to honk

the car's horn. Dilbeck tried to stop her, and as he did so, his hat fell into the car (T 1981). He opened the door, and she grabbed his hair (T 1981). He got in the car and as the two people struggled, he stabbed Vann several times with a small paring knife he had bought that morning (T 1978-79, 1981). She was cut in the stomach, neck, and face (T 1913-1917). The fatal blow was to the neck in which Dilbeck cut a major vein or artery (T 1931-32). The blood went down her windpipe, and Vann drowned in her own blood (T 1933).

Dilbeck tried to drive her car, but after hitting other vehicles, he abandoned the effort and fled (T 1672, 1724). Several minutes earlier, a security officer had seen the struggle, and she alerted her boss, who investigated the matter. As Dilbeck left the car, the man told the defendant to come with him, but instead he ran behind a nearby store. The guard climbed the hill behind it, and as Dilbeck came up, looking lost and scared, he again told him to come with him. Instead, the defendant told him to get out of the way or he would kill him, and he hit the man and fled across Monroe Street (T 1727, 1734).

By this time, the police had been alerted, and the security guard got into a car and followed Dilbeck. He eventually wound up in a drainage ditch running back and forth, yelling, "I already killed one of ya'll, a cop. Kill me. I'm going to the chair anyway." (T 2228) He apparently scrambled out of the culvert and was arrested a short time later

(T 1770). He was taken to the county jail, and when he got there he was so exhausted that he had to be wheeled inside (T 1785). He was also so thirsty that he drank ten glasses of water (T 1798).

IV SUMMARY OF THE ARGUMENT

Dilbeck presents 10 issues, 3 guilt phase and 7 penalty penalty phase, for this court to consider. The first deals with the routine problem of the impartiality of the prospective jurors and the court's rulings regarding whether they could be fair and impartial. One juror said that she would automatically vote death if the defendant was found guilty of murdering a policeman. Although this case does not involve that scenario, Dilbeck had earlier committed such a crime. There was a reasonable fear that this prospective juror could not have been fair. Another juror had a bias against psychologists. He should have been excused because Dilbeck should not have had to overcome that prejudice for the juror to consider his experts. Finally, a third prospective juror said he would follow the law as long as it did not conflict with God's law. He could give no assurances that he would ignore it if it conflicted with what the court instructed him. He should have been excused.

Dilbeck wanted to present evidence that because of his mental defects he could not have formed the necessary premeditated intent to commit a first degree murder. The trial court, relying upon this courts ruling in Chestnut v. State, 538 So.2d 820 (Fla. 1989) precluded him from doing that. In this issue, the defendant asks this court to reconsider its ruling in that case. As argued, such evidence was logically relevant and constitutionally allowed.

The state, over defense objection, was allowed to have its psychologist examine Dilbeck for purposes of the penalty phase. The court said that such examination was required by fundamental fairness. The rules of discovery, however, in general or Rule 3.220(f) in particular do not authorize such ruling. Moreover, the analogy with the insanity plea is faulty, and there is nothing fundamentally unfair with denying the state the right to examine the defendant. It has other, effective means of destroying the weight of the defense expert's testimony.

The State's expert, Dr. Harry McClaren, presented almost thirty reasons to justify his conclusion that Dilbeck had goal oriented behavior. Such testimony should not have been allowed because it provided no clarification of conflicting and confusing evidence. All it amounted to was a closing argument from the witness stand. Likewise, the issue of Dilbeck's ability to have goal oriented behavior was much too broad, and even if narrowed to the time of the murder, lacked any relevancy to the issues to be decided in the penalty phase of the trial.

The court instructed the jury that it could consider Dilbeck's flight as evidence of guilt. Merely fleeing from the scene of a crime does not inevitably become flight. More fundamentally, such an instruction is untenable in light of this court's rejection of the standard jury instruction on circumstantial evidence. For the same reasons this court

rejected that guidance to the jury, it should reject this instruction on this special form of circumstantial evidence.

The trial court gave the jury the standard instruction on the aggravating factor especially heinous, atrocious, and cruel. That was constitutionally defective because it provided no guidance for it.

In any event, this murder was not especially heinous, atrocious, and cruel. Although stabbings often are such, in this case, Dilbeck's extensive mental disabilities prevented him from "enjoying" the killing, a requirement for this aggravating factor to apply.

The court also found that Dilbeck committed the murder to effectuate an escape. The defendant, however, had completed that two days earlier and forty miles away from where the murder occurred. When he killed Faye Vann, he was fleeing, not escaping.

Dilbeck has overwhelming mitigation, which upon a proportionality review, dictates a life sentence. He is brain damaged resulting from Fetal Alcohol Effects. This means he lacks any ability to make judgments and he has no impulse control. As a child his mother abused him physically and perhaps sexually to a degree the trial court acknowledged was shocking. Finally, at the age of 16 he was put in the most violent prison in Florida where he was routinely raped and assaulted.

Such terrible mitigation explains this boy better than the aggravation, and it explains why he has done what he has been convicted of committing. He is a dangerous man, but his prison record shows that he is an exemplary prisoner. He is not one of those who should be sentenced to death.

Finally, the court instructed the jury that death was the appropriate sentence if the mitigation did not outweigh the aggravation. That was an erroneous instruction because the eight jurors who recommended death could have done so because the mitigation and aggravation had equal weight. That is not the law in Florida, which requires the aggravation to outweigh the mitigation, the implication being that if they do not life is the appropriate sentence. What the court told the jury was the opposite: if the mitigation did not outweigh the aggravation, death should be recommended.

V ARGUMENT

ISSUE I

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

Challenging a trial court's exercise of its discretion in excusing or refusing to remove prospective jurors is not an easy task because the appellant must show that the court manifestly abused its discretion in acting or not. Davis v. State, 461 So.2d 67 (Fla. 1984). To prevail in this case, Dilbeck must use the test this court articulated for juror competency in Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984):

> Can the juror lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law as given to him by the court.

Applying that standard, courts should use the rule adopted in Singer v. State, 109 So.2d 7 (Fla. 1959) when a prospective juror's competency to serve has been challenged:

> [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be excused on motion of a party, or the court on its own motion.

Id., at 23-23; accord, Moore v. State, 525 So.2d 870 (Fla. 1988); Hill v. State, 477 So.2d 553 (Fla. 1985). Jurors, in short, must not only be impartial, they should be "beyond even the suspicion of partiality." O'Connor v. State, 9 Fla. 215,

222 (1860). If any question remains regarding a juror's fairness, the court should excuse him. Sydleman v. Benson, 463 So.2d 533 (Fla. 4th DCA 1985).

In Hill, prospective juror Johnson said he would vote for a death sentence if the defendant had committed a premeditated and felony murder. This court reversed Hill's sentence of death because a reasonable doubt existed that this juror had the state of mind necessary to render and impartial sentencing recommendation. In Thomas v. State, 403 So.2d 371 (Fla. 1981), a juror, as in Hill, said that under no circumstances could he recommend a life sentence if the defendant was guilty. This court reversed, relying upon the rule established in Singer.

On a constitutional level, in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court receded from the strict standard lower courts had applied in evaluating the excusal for cause of death scrupled jurors and reinterpreted the standard originally announced in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Witherspoon required a showing of unmistakable clarity that the juror's beliefs would cause him to automatically vote for life without considering a death sentence. In Witt, the Supreme Court adopted language from its decision in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), and restated the standard:

> We therefore take this opportunity to clarify our decision in Witherspoon, and to reaffirm the above quoted standard from Adams as the proper standard for

> determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions his oath." We note that in dispensing with Witherspoon's reference to "automatic" decision-making, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity."

Witt, at 424. (footnote omitted)

This standard also applies to prospective jurors, who as in this case, favor the death penalty to the point that they would impose it regardless of whatever mitigation was presented. Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80, 88 (1988); Hill v. State, 477 So.2d 553 (Fla. 1985); Thomas v. State, 403 So.2d 371 (Fla. 1981). Under either standard, the trial court erred in not excusing several prospective jurors Dilbeck challenged for cause.

HORACINE LAWRENCE

Ms. Lawrence said, in response to defense counsel's questioning, that she would have automatically recommended death if Dilbeck had killed a policeman.

> Q. If the case presented to you was one where a police officer was killed, if you felt like the mitigating outweighed the aggravating, could you ever recommend a sentence of life?
>
> A. Uh-uh. It would have to be death.
>
> Q. If a police officer was murdered, in your view, you would have to vote for death?
>
> A. Yes.

(T 61).

Counsel objected to Ms. Lawrence, relying upon Witt in that her views "would substantially interfere with [her] decision." (T 64) The court denied the objection because this case did not involve that scenario. Additionally, "You asked her specifically the questions concerning this case and she did indicate to you that could vote for a life sentence under the scenario of this case." (T 66)

Dilbeck's lawyer had posed a series of hypotheticals for Lawrence (and the other members of the venire to consider). He asked each prospective juror if they could recommend a life sentence, assuming the mitigating circumstances outweighed the aggravating factors, if the defendant

> a. had raped the victim.
> b. had raped and murdered the victim.
> c. had committed a brutal murder.
> d. had murdered a policeman
> e. had committed a prior second degree murder.
> f. had committed a prior first degree murder, been sentenced to life in prison and then killed someone else.

(T 60-62).

To all of these hypotheticals, except for the one involving the policeman, Lawrence arguably could have recommended a life sentence (T 60-62).[2] Of course, as the

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[2]Actually, regarding the second degree murder and the brutal murder, she said she could "possibly" recommend life, but it would not be easy (T 60-62).

court recognized, this case did not involve a police homicide, but in the penalty phase of the trial, Ms. Lawrence certainly would have heard, and the jury did learn, in great detail of Dilbeck's prior murder of a Ft. Myers sheriff's deputy. The natural and reasonable fear arises that Ms. Lawrence would have concluded that if Dilbeck had avoided a death sentence once for killing a policeman, she was going to make sure he was punished for it in this case. Had death been imposed as this very strong death penalty advocate (T 56) wanted the first time, she would not have to make a recommendation now. That fear was a reasonable basis for believing she could not have rendered an impartial recommendation based upon the law and evidence.

Additionally, her conditional "possibly" answers were not the type of responses which the trial court could have used to justify his belief in this prospective juror's impartiality and fairness. In Robinson v. State, 506 So.2d 1070 (Fla. 5th DCA 1987), several prospective jurors promised to try to be fair and impartial although they were unsure of their ability to be so. Such equivocation raised a reasonable doubt of those person's ability to be fair. Accord, Imbimbo v. State, 555 So.2d 954 (Fla. 4th DCA 1990).

So here, Ms. Lawrence's answers lacked the unequivocal commitment to impartiality demanded by Singer and Hill. Likewise, under Witt, there was a substantial likelihood that her views would have impaired her performance as a juror.

Thus, under the law of this state as well as that established by the United States Supreme Court, the court should have excused this prospective juror for cause.

DR. BARNETT HARRISON

Dr. Harrison was in a somewhat different position that the other jurors. He was a retired medical doctor who had strong opinions regarding what psychologists and psychiatrists had to say.

> I have had a lot of experience with those birds for the last 42 years and, frankly, I take everything they saw with a grain of salt. There may be some exceptions, but I may have a real problem with that.

When asked if he could "divorce [himself] from that experience in evaluating the testimony of a psychologist" the prospective juror said, "Oh, I will try to do that, yes. But, I think I have a bias." He also did not know if he could disregard that bias (T 1472-73).

Dr. Harrison also knew the pathologist in this case, Dr. Tom Wood. Defense counsel asked him if he would "tend to give any more credence to what Dr. Wood would say than some doctor you don't know?" To which he responded: "Yes, because I know him." (T 1495)

Dilbeck's counsel moved to excuse the medical doctor because of his proclaimed bias against mental health experts and his bias towards Dr. Wood (T 1496). The court, after determining that Dr. Wood's testimony would not be controversial, denied the challenge saying that "I think that

if it were a witness about which the testimony would be controverted, I would feel more strongly about releasing Dr. Harrison." (T 1497) The defendant then used a peremptory challenge to excuse the prospective juror (T 1498).

As to Dr. Harrison's bias against mental health experts, this court in Hill said, "A juror is not impartial when one side must overcome a preconceived opinion in order to prevail." The state responded to Dilbeck's challenge that it too was going to use a psychologist, so Dr. Harrison's bias cut both ways, thereby nullifying, in a crude way, his bias (T 1496). In short, this juror would disregard whatever the expert witnesses would say. Citizens are not chosen as jurors, however, so they can then flatly reject testimony because it is of a particular genre. They can, of course, reject what they hear, but a defendant should not have to bear some special burden of persuasion to convince a juror that in this case, he should not only listen to but give credence to what the psychologist or psychiatrist might say. It should not matter that the state has to do the same thing. In this case, it was not the one who exercised it peremptory challenge against Dr. Harrison. Dilbeck did, and the court erred in requiring him to do so.

Likewise, the court should have excused the doctor because of his bias towards Dr. Wood. In Mann v. State, 571 So.2d 551 (Fla. 3rd DCA 1990), a prospective juror said she would "probably tend to side with" the police. Mann was charged with

attempted first-degree murder, robbery, and two counts of unlawful possession of a firearm. Other than their normal participation in a criminal investigation and apprehension, there is no evidence the police in that case were victims or witnesses to the charged crimes. The trial court denied the defendant's challenge of this particular member of the venire, but the Third District reversed (upon the state conceding error on appeal) relying upon this court's opinion in Hill.

Dr. Wood's noncontroversial testimony should not have any bearing on the fitness of a potential juror to sit. There was a reasonable basis to believe he was not impartial, and the court should have excused him. Not only would he not have been impartial, there would have lingered the strong suspicion of his bias toward the state. O'Connor, supra.

DARREN HEADRICK

Mr. Headrick strongly believed in the Biblical justification for death penalty. "I believe that the death penalty was enacted by God in the Bible. . . I think it is what the penalty should be for first degree murder. Someone who takes someone else's life should have their life taken." (T 988) When probed about any conflicts between following the law or his beliefs, he further said, "Well, my personal religious beliefs come first. Those beliefs are that someone who is convicted of first degree murder should receive the death penalty." Further questioning revealed that he would

resolve any conflict between the law of God and man in favor of the law of God (T 993).

When pressed further by defense counsel, he admitted he could vote for life, but he qualified it by saying "I would do my best to try. I can't guarantee anything, . . . But, in my mind, I would make an effort, yes." Finally, he said, "If he knows right from wrong, that would certainly lean toward a death penalty, but again, the circumstances would also enter into that decision." (T 1000) Counsel moved to excuse Mr. Headrick for cause, but the court denied that motion saying that he "gave me the impression that he understood what the law was as explained to him and that he would follow that law." (T 1003)

Clearly, Mr. Headrick will follow the law, but what that law is, is in doubt. Whenever his version of the law of God merged with the law of man, he would follow the "law." But if the two diverged, he would not hesitate to abandon what the court would tell him and follow what he perceived God had said. What he had told man was abundantly clear: death for those who murder. Throughout this lengthy voir dire of this man, he repeatedly said that his personal views would enter into this case, "no matter what." Despite an occasional answer that may have indicated his grudging willingness to weigh the aggravating factors against whatever mitigation he thought was present, the message could not have been louder that he

believed that if Dilbeck was guilty of first degree murder, he should die for that crime.

> It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?

Johnson v. Reynolds, 97 Fla. 591, 121 So. 793, 796 (1929).

At best, Mr. Headrick said he would promise to follow the law. Such ambiguity should have disqualified him from sitting on this jury. Robinson, Imbimbo, supra. At worst, he clearly said that he would do what he believed "God's law" commanded regardless of what the court instructed. Such willingness to ignore the "law of man" meant that he was unqualified to sit as a juror in this case because his responses abundantly exhibit that an unwillingness to discharge his duties as required by law and his oath as a juror. Witt, Hill, supra. From the totality of what Headrick said, the court should have granted Dilbeck's challenge for cause, and the court erred in not doing so.

ISSUE II

THE COURT ERRED IN REFUSING TO LET DILBECK ELICIT EVIDENCE OF HIS LACK OF SPECIFIC INTENT 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.

This issue focuses upon this court's opinion in Chestnut v. State, 538 So.2d 820 (Fla. 1989). In that case, evidence of an abnormal mental condition not constituting legal insanity was inadmissible, as a matter of law, to prove Chestnut did not have the required specific intent for the crime charged or some lesser degree of crime. Evidence relevant to the defense of a lack of specific intent was excluded without regard to the quality of the evidence.

In this case, the State filed a Motion in Limine seeking to prevent Dilbeck from introducing any evidence that he lacked a premeditated intent to kill because of his mental condition (T 3058-59). The defendant's lawyer conceded that Chestnut controlled, and the court accordingly granted the State's request (T 2840). During trial, Dilbeck proffered the evidence he would have presented to establish his lack of premeditation, and the court reconfirmed its pre-trial ruling (T 1968).[3] The expert witnesses Dilbeck sought to have testify would have said the following:

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[3]The proffered testimony was used during the penalty phase of the trial.

1. Dilbeck is brain damaged on both sides of his brain (T 1951, 2431).[4]

2. This defect caused him to think differently than normal people, particularly in matters requiring higher intellectual functioning (T 1951).

3. It also caused mood disturbances of the manic and hypomanic type. He had a highly energized impulsive condition (T 1947).

4. Besides being impulsive, he had an impaired judgment, could not make reasoned decisions, was potentially explosive, all of which came to the surface when placed in a stressful or frightening situation (T 1951-56, 1698, 1713).

5. In addition, he had psychotic thinking, paranoid beliefs, and auditory and visual hallucinations (T 1949-50).

6. He had cognitive deficits, and his lack of memory placed him in the lowest one percent of the population (T 2439).

7. He does not understand and process what is going on in social and interpersonal situations, especially when they are fast moving, leaving him exposed to having psychotic episodes (T 2452).

8. Finally, Dilbeck showed abnormalities on neurobehaviorial tests suggesting that he suffered from Fetal Alcohol Effects, a milder form of Fetal Alcohol Syndrome (T 1696).

This evidence, if believed by the jury, particularly that about the defendant's impulsive nature when placed under stress, would have justified them returning a conviction for

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[4]Dr. McClaren, the State's expert, also agreed that Dilbeck was brain damaged (T 2592, 2626).

second degree murder. Thus, if Dilbeck is to win on this issue, this court must distinguish his case from Chestnut or otherwise retreat from its holding.

In Chestnut as here, the defendants had not filed a notice of intent to rely upon the defense of insanity.[5] Dilbeck admitted killing Faye Vann, and his strategy was to admit he had committed the homicide but did not have the premeditated intent necessary for a first degree murder when he did so. Indeed, the first and last words of his closing arguments emphasize this defense:

> MR. MURRELL [defense counsel]: Ladies and gentlemen, the question before you now is has the State proven beyond a reasonable doubt that this killing was committed from a premeditated design.

(T 2040).

> It is very clear, there wasn't any reflection, no deliberation, no weighing of the consequences. If there was no reflection, then there was no premeditation.

(T 2083).

In short, Dilbeck committed only a second degree murder. What seriously damaged this strategy was the court prohibiting him from presenting to the jury any evidence about his mental state as it related to his specific intent when he killed Vann

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[5]Failure to file such notice should not preclude further review of this issue since the State obviously had actual notice of Dilbeck's anticipated defense and hired Dr. McClaren to conduct a mental examination of the defendant.

and justifying that decision solely upon this court's ruling in Chestnut. Without any evidence that Dilbeck's mental condition affected his ability to form a specific intent, counsel, during closing argument, could not forcefully argue Dilbeck lacked the specific intent to kill because of his mental defects (T 1781-1796). Thus, the issue squarely before this court is the continuing viability of Chestnut.

What This Court said in Chestnut

In Chestnut, the defense was characterized as one of diminished capacity, yet the court did not define what that term meant or how it related to a defendant's mental condition and his ability to form the required mens rea necessary to be found guilty of the charged crime. Given the confusion that abounds in this area of the law,[6] such inadvertence can only create a quagmire of doctrine determined by labels and which is bereft of any logical or constitutional support.

Courts and commentators throughout the United States have used "diminished capacity" or "diminished responsibility" in at least three different ways. First, both terms have meant that the defendant lacked the requisite mens rea necessary to commit a specific intent crime. Second, they have indicated that the

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[6]See, generally, Stehpen J. Morse, "Undiminished Confusion in Diminish Capacity" 75 The Journal of Criminal Law and Criminology 1; Joshua Dressler, "Commentary: Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse" 75 The Journal of Criminal Law and Criminology 953.

defendant lacked a full moral culpability because he had acted under some "psychiatric compulsion" or "inability or failure to engage in normal reflection." Finally, the third use differentiates between diminished responsibility and diminished capacity. "Diminished capacity" refers to the defendant suffering from an abnormality of the mind that substantial impairs his mental responsibility whereas "diminished responsibility" means the defendant lacked the requisite specific intent to commit a crime. United States v. Cameron, 907 F.2d 1051, 1062 (11th Cir. 1990).

As discussed in Chestnut, diminished capacity found fertile ground in California during the 1950's and after flowering there, it spread to many other states.[7] But to understand what the limits of that term are as California defined it and to understand why Dilbeck is not asking this court to adopt that standard, one must examine the California murder statute. California, unlike Florida, required a criminal defendant to have more than simple premeditation before a jury could convict him of first degree murder.

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[7]The doctrine finally mutated to the point where the specific mental state of the defendant became an irrelevancy, and his general mental condition somehow ameliorated but did not excuse the severity of his criminal conduct. Lewin, "Psychiatric Evidence" at 1087. The California legislature finally abolished this nonsense, specifically eliminating the diminished capacity defense but explicitly allowing evidence of a mental disease to show a defendant's lack of mens rea. Pohlot, supra, at 905.

> [T]he use by the Legislature of `wilful, deliberate, and premeditated' in conjunction indicates its intent to require as an essential element of first degree murder (of that category) substantially more reflection; i.e., more understanding and comprehension of the character of the act than the mere amount of thought necessary to form the intention to kill.

People v. Geodecke, 423 P.2d 777 (Calif. 1967)

This California creation, known as the Wells-Gorshen rule declared that:

> even though a defendant be legally sane according to the M'Naughton test, if he was suffering from a mental illness that prevented his acting with malice aforethought or with premeditation and deliberation, he cannot be convicted of murder of the first degree. People v. Gorshen, 336 P.2d 492; . . . People v. Wells, 202 P.2d 53 (Calif).

Id. at 781 (some case cites omitted.)

California's definition of first degree murder thus required the state to establish more that what Florida prosecutors need to prove. The former must present evidence that the defendant had more understanding and comprehension of what he was about to do than simply premeditating the homicide. In this state, only a conscious decision to kill need be shown. There is no requirement, at least in the guilt phase of the trial, for some heightened level of specific intent.[8]

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[8]See, Wayne R. LaFave and Austin W. Scott, Jr, Substantive Criminal Law 2 vols. (St. Paul, Minn.: West, 1986) 1:527-28.

In California, because more than the specific intent to kill was required, the courts allowed evidence of a diminished capacity to be introduced. That is, the defendant could readily admit that he fully intended to murder the victim but that because of his diminished capacity he did not also have the requisite malice to do so. By state law, the accused would then be guilty of only a lesser homicide.

Under that state court's ruling, diminished capacity became a junior form of insanity in that regardless of the defendant's actual intent, he could be found guilty of a crime less than first degree murder based upon some generalized form of fairness or humanitarianism.[9] That is, insanity totally excuses a person from committing a homicide because he suffered from a mental disease which precluded him from knowing that what he did was wrong. Most defendants, however, actually intend to commit the crime they eventually are charged with, yet society holds them not responsible for their acts because their mental illness prevents them from knowing or appreciating the consequences of what they have done. Insanity, in short, has nothing to do with a defendant's mens rea, but is instead a societal judgment that those seriously and severely mentally ill should be held blameless for what they have done.

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[9]United States v. Pohlot, 827 F.2d 889, 905 (3rd Cir. 1987); Travis H.D. Lewin, "Psychiatric Evidence in Criminal Cases for Purposes other than the Defense of Insanity" 26 Syracuse Law Review 1051, 1087.

Diminished capacity, as the Wells-Gorshen rule provides, similarly recognizes that a mental illness may prevent a defendant from fully satisfying the California mens rea requirement. That rule is applicable only to the extra mental effort required of the defendant. It has no pertinence to the premeditation requirement. Geodecke, supra, at 781. See, United States v. Pohlot, 827 F.2d 889, 898 (3rd Cir. 1987).

California's diminished capacity, therefore, is irrelevant in Florida because this state demands only premeditation before a defendant can be found guilty of first degree murder. Said another way, the diminished capacity doctrine is a matter of substantive law, just as the defense of insanity is. The Mens rea approach, on the other hand is a rule of evidence.[10] Pohlot, supra, at 897. This court's opinion in Chestnut apparently did not realize this distinction because it equated the mens rea required in Florida with the diminished capacity defense articulated by the Wells-Gorshen rule. That distinction is important here because even critics of California's approach have readily conceded that evidence relevant to the defendant's lack of premeditation should be admitted,[11] and Abraham Goldstein's criticism of diminished

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[10]Peter W. Low, John Calvin Jefferies, Jr., Richard J. Bonnie, Criminal Law: Cases and Materials (Mineola, NY: Foundation Press, 1982), pp. 808-809.

[11]Stephen J. Morse, "Undiminished Confusion in Diminished (Footnote Continued)

capacity, which this court relied on in Chestnut, must be understood as an attack upon the California rule and not as one castigating the admissibility of evidence showing the defendant did not have the necessary intent to commit a first degree murder.[12]

In Chestnut, this court quoted with approval State v. Wilcox, 70 Ohio St.2d 182, 186, 436 N.E.2d 523, 525 (1982), which criticized the diminished capacity defense:

> At this juncture, however, it appears that enthusiasm for the diminished capacity defense is on the wane and that there is, if anything, a developing movement away from diminished capacity although the authorities at this point are still quite mixed in their views. See . . . generally, Annotation 22 A.L.R.3d 1228.

As just argued, "diminished capacity" is an irrelevancy in Florida, so what the Ohio court said has no bearing here. On the other hand, if what the court meant was that courts nationwide are "quite mixed" regarding the admissibility of evidence to show a lack of premeditation, it is wrong.[13]

(Footnote Continued)
Capacity," 75 The Journal of Criminal Law & Criminology 1 (1984).

[12]Abraham S. Goldstein, The Insanity Defense (New Haven, Conn.: Yale University Press, 1967), pp. 199-202.

[13]26 States, either by statute or case law, admit such evidence. 16 others (including Florida) do not, and 8 have no law on the issue. "Standard 7-6.2. Admissibility of other evidence of mental condition." ABA Criminal Justice Mental Health Standards 2d Ed. (Boston: Little, Brown, 1986), 1986 Supplement. See also, Mental or Emotional Condition as
(Footnote Continued)

Increasingly, the consensus from legislative, judicial, and academic quarters has been to admit any evidence of a mental condition that has relevance to show the defendant did or did not have the required mens rea to commit a first degree murder. Typically, two reasons justify admitting this evidence: logical relevancy and the defendant's constitutional right to present evidence in his behalf.

1. Logical relevancy.

The obvious argument for admitting evidence of Dilbeck's mental condition to show his lack of specific intent is that of logical relevancy. If the State must prove the defendant had the premeditated intent to kill then the defendant must have the opportunity to rebut the evidence admitted to establish that essential element of first degree murder. Accordingly, any evidence tending to show a state of mind in which the defendant acted impulsively rather than with deliberation should be admitted. The compelling logic of this simple proposition has found widespread acceptance by legislatures and courts.

Immediately after John Hinckley's acquittal by reason of insanity, the United State Congress reconsidered the

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(Footnote Continued)
Diminishing Responsibility for Crime, 22 ALR 3d 1228; Admissibility of Expert Testimony as to Whether Accused had Specific Intent Necessary for Conviction, 16 ALR 4th 666.

federal insanity defense. Insanity Defense Reform Act of 1984. recodified at 18 U.S.C. §17. Although the act fundamentally altered the definition of that affirmative defense and how it was established, Congress specifically rejected legislation which would have prevented an accused person from presenting evidence of mental abnormality as it affected his mens rea. The House Judiciary Committee's Report recognized that whatever Congress may say about the insanity defense, "Mental disorders will remain relevant, of course, to the issue of the existence of a mental state required for the offense, such as the specific intent required for certain crimes. H.R. Rep. No. 98-577, 98th Cong. 1st Sess. 15. Cited in United States v. Pohlot, 827 F.2d 889, 898 (3rd Cir. 1987) (emphasis in the court's opinion.) Significantly, federal appellate courts which have considered the meaning of the new insanity statute have uniformly held that expert testimony regarding a defendant's ability to form the necessary specific intent to commit the charged crime was relevant and admissible evidence. Pohlot, supra; United States v. Cameron, 907 F.2d 1051, 1064 (11th Cir. 1990).

Also subsequent to the Hinckley verdict, the American Bar Association's Criminal Justice Mental Health Standards reflected that national organization's same conclusion.

STANDARD 7-6.2 ADMISSIBILITY OF OTHER EVIDENCE OF MENTAL CONDITION.

> EVIDENCE, INCLUDING EXPERT TESTIMONY, CONCERNING THE DEFENDANT'S MENTAL CONDITION AT THE TIME OF THE ALLEGED OFFENSE WHICH TENDS TO SHOW THE DEFENDANT DID OR DID NOT HAVE THE MENTAL STATE REQUIRED FOR THE OFFENSE CHARGED SHOULD BE ADMISSIBLE.
>
> Commentary
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> This standard is simply an evidentiary principle based on a rule of "logical relevance." . . . [E]vidence, including properly qualified expert testimony, which has any tendency to show the defendant did or did not have the mental state for the offense charged, should be admissible.

Years earlier, the American Law Institute's Model Penal Code had reached a similar result:

> Section 4.02 Evidence of Mental Disease or Defect Admissible When Relevant to Element of the Offense.
>
> (1) Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense.
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> Comment
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> It has been more commonly recognized, however, that there exist degrees of mental disease or defect that fall short of that required for invoking the defense of irresponsibility, but that may properly be put in evidence as tending to show that the defendant lacked the specific mens rea required for the commission of the offense charged. Under the Model Code, evidence that the defendant suffered from a mental disease or defect is uniformly admissible, insofar as it is relevant to the possession

of a material state of mind.[14]

Other scholarly consideration of the admissibility of the defendant's mental condition as it affected his ability to premeditate also supports admitting such evidence. LaFave and Scott, for example, have said:

> The logic of the partial responsibility doctrine would seem to be unassailable. The reception of evidence of the defendant's abnormal mental condition, totally apart from the defense of insanity, is certainly appropriate whenever that evidence is relevant to the issue of whether he had the mental state which is a necessary element of the crime charged. Were it otherwise, major crimes specifically requiring a certain bad state of mind would, in effect, be strict liability offenses as applied to abnormal defendants.[15]

Unassailable or not, this court in Chestnut rejected admitting evidence of a defendant's mental condition as it related to his ability to premeditate for the three reasons usually advanced to exclude such evidence: 1) The distinctions in mental states are too fine for mental health experts to make. 2) If recognized, dangerous felons will be released into society. 3) The possibility of compromise

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[14]American Law Institute, Model Penal Code and Commentaries (Official Draft and Revised Comments) 4 parts (Philadelphia: American Law Institute, 1985) 1:216.

[15]LaFave and Scott, Substantive Criminal Law, supra, 1:530.

verdicts is enhanced.[16] Upon examination, none of these legitimate concerns justifies excluding relevant evidence.

Regarding the first reason, this court relied upon the leading case rejecting "diminished capacity" evidence, Bethea v. United States, 365 A.2d 64, 88 (D.C. 1976). The court in that case said "Unlike the notion of partial or relative insanity, conditions such as intoxication, medication, epilepsy, infancy, or senility are, in varying degrees, susceptible to quantification or objective demonstration, and to lay understanding." Then, curiously it quoted from Wahrlich v. Arizona, 479 F.2d 1137, 1138 (9th Cir. 1973) that courts should exclude relevant expert testimony in this area because "The esoterics of psychiatry are not within the ordinary ken."

This latter quote is particularly puzzling because the purpose of expert testimony is to bring within the ken of ordinary people the mysteries of science. Moreover, whatever the overall validity of the Bethea court's claim of the lack of objectivity or quantification in matters of the mind may have been in the early seventies, the field has made tremendous strides since then.

> In the last decade, a number of converging factors have prompted a profound change in psychological assessment procedures for individuals suspected of having psychiatric difficulties and/or diagnosable conditions.

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[16]The Mentally Disabled and the Law, Revised edition, ed. Samuel J. Brackel and Ronald S. Rock (Chicago: University of Chicago Press, 1971), pp. 395-96.

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> With the introduction of the Diagnostic and Statistical Manual of Mental Disorders (Third Edition) (DSM-III; American Psychiatric Association 1980), diagnosis has become more behaviorally explicit and reliable.[17]

The various experts Dilbeck wanted to use in this case nicely illustrate this progress. Dr. Berland administered two well researched and verified tests: the Minnesota Multiphasic Personality Inventory (MMPI) and the Wechsler Adult Intelligence Scale (WAIS) (T 1946). Dr. Thomas, a geneticist, testified about the Defendant's fetal alcohol effects and gave specific and objective factors that can be used to determine if the defendant was suffering from his mother's alcoholism while she was pregnant (T 1690-93). Finally, Dr. Wood, a neuro-psychologist gave him "a half dozen or ten different kinds of tests." (T 2436) Based upon the results of these examinations, he could confidently place Dilbeck in the lowest one percent of the population (T 2439) "If you allow for the fact that he has a normal IQ, this is a really very much worse performance than you would have expected. It's more like one or two out of a thousand than one out of a hundred." (T 2439-40)

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[17]John A. Talbott, Robert E. Hales, Stuart C. Yudofsky, Textbook of Psychiatry (Washington, D.C.: American Psychiatric Press, 1988), p. 225.

Also, while the mental health field may not be an exact science, the requirement to testify about various levels of intent is no more demanding than that expected in other areas of the law. Psychologists and psychiatrists routinely testify about the competency of defendants to stand trial, to be sentenced, and to be executed. They also testify about a testator's mental state when a will was executed or the nature of the deal struck when a contract was agreed upon. Distinguishing the mental states in a criminal context, and specifically in a homicide case, should provide no significantly greater difficulty.[18]

> Whatever the strengths or weaknesses of the art of the study of the mind, they do not increase or decrease merely because the legals issues change. Whatever skepticism we may have for psychiatry, it is best handled through instructions to the fact finder on credibility and the weight to be given to the expert, rather than to resolve the uncertainty by total exclusion.[19]

The Bethea court's efforts to distinguish mental condition from voluntary intoxication has a particularly hollow ring in Florida. Here lay witnesses can testify about the extent of a defendant's intoxication. C.f., Garner v. State, 28 Fla. 113, 9 So. 835 (1891). What they say does not have to be

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[18]Morse, "Undiminished Confusion," supra, at p. 10.

[19]Travis H.D. Lewin, "Psychiatric Evidence in Criminal Cases for Purposes other than the Defense of Insanity," 26 Syracuse Law Review 1051, 1097.

objectively or quantifiably established, and the defendant can even deny he was drunk. Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981). Such flimsy and incredible evidence does not preclude him from raising the partial defense of voluntary intoxication, and can, in fact, justify an instruction on the ameliorative effects of voluntary intoxication upon the jury's deliberations.

In contrast, in this case there is no evidence Dilbeck voluntarily became brain damaged. From what the evidence shows, he suffered his brain damage from what his mother may have done to him before and after his birth (T 1951, 1696, 2253-57). He may have also suffered further damage while at Sumpter Correctional Institution (T 2280). Nevertheless, the jury never learned of this during the guilt phase despite the wealth of objective evidence establishing his mental problems.

It defies logic to let a defendant raise a defense that he could not intend to commit a crime because he was drunk (a fact he may deny) but not let him raise a defense that he could not formulate a specific intent because he was involuntarily brain damaged.

Second at least where a first degree murder charge is concerned, the likelihood of a dangerous felon being released in Florida is not great. If a jury was persuaded that the defendant lacked the necessary intent to premeditate, it would convict him of second degree murder, for which he could be sentenced to at least life in prison. Section 782.04 Fla.

Stat. (1989). In this case, the jury would have done so, since it returned a specific verdict that Dilbeck premeditated the murder (T 3088).

When viewed from a more philosophical level, this reason has more ominous ramifications. Said another way, regardless of what the evidence could prove, the defendant, because he is a dangerous person, can be convicted of any crime simply as a way to keep him off the streets. Under that rationale, this court would approve the state charging every "dangerous" person with murder but deny them the right to present a defense such as "I wasn't there," or "No one was killed." Such policy confuses the purpose of a trial with the needs of society. A criminal trial is not the vehicle to jail innocent persons who are nevertheless dangerous. There are other ways to do that, such as the procedures defined in the Baker Act and Myers Act.

If the law wants to punish the more culpable, it would not let the person who deliberately became drunk raise an intoxication defense. That voluntary intoxication is a recognized partial defense to a specific intent crime requires that evidence of organic brain damage also be allowed as a partial defense to a specific intent crime.

Finally, compromise verdicts need not be an unmitigated evil, especially if the choice more closely reflects the actual level of the defendant's culpability rather than the extreme selections of guilt of the higher crime or complete

acquittal.[20] These legitimate, practical concerns have a further problem in that they may unconstitutionally limit a dependents right to a fair trial by limiting the evidence he wants to present in his defense.

2. The Constitutional Right to Present a Defense

A series of cases from the U.S. Supreme Court clearly indicate that courts should jealously protect a defendant's right to present a defense. Although not the first case in this area, Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) is a milestone because it established that the federal constitution has a vital interest in insuring that criminal defendants enjoy fair trials. A State rule declaring an entire class of witnesses incompetent, as a matter of law, to testify had to be measured against the constitutional standard established by the Sixth and Fourteenth Amendments to the United States Constitution.

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

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[20]LaFave and Scott, Substantive Criminal Law, supra, p. 532. Lewin, "Psychiatric Evidence," p. 1095.

Id. at 19.

Two problems faced the Supreme Court in Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). In that case the trial court had prevented Chambers from calling a person who had admitted but later denied committing a murder Chambers had been charged with. To have allowed Chambers to call and cross-examine this witness would have violated Mississippi's voucher rule. The court also prevented Chambers from calling three witnesses who would have said this other person had admitted shooting the victim. That testimony, the court said, was hearsay.

The Supreme Court rejected the exclusion of the testimony of the man Chambers alleged had shot the victim because Chambers could not vouch for him. The court, noting the importance of cross-examination, said that the legitimate State interest in excluding relevant defense evidence must be "closely examined," to see if it justifies the significant diminution of the defendant's right to present his defense. Id. at 295.

In Chambers' case, the trial court erred in applying the rule excluding the testimony of the actual perpetrator. The Supreme Court did not reject the voucher rule outright; it did reject the simple, mechanical "per se" approach to the problem. The trial court had not evaluated the purpose of the rule in light of the particular facts of Chambers' case. Id.

Likewise, the trial court had mechanically applied the hearsay rule to preclude Chambers from presenting his defense that someone other than he had done the shooting. Again, where constitutional rights directly affecting the ascertainment of guilt are implicated, a state rule may not be mechanically invoked. That was especially true in Chambers' case where the hearsay testimony was crucial to his defense. Id. at 302.

In short, where the defendant's right to present a defense is involved, a court must closely examine the justification for the rule which limits his ability to present a defense. Rules applied mechanically, or "as a matter of law," which exclude critical defense evidence are strongly discouraged and should be applied with surgical precision.

Other, more recent opinions have further defined the scope of the defendant's right to present a defense. In Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), the court said the trial court could not exclude, as irrelevant, testimony concerning the circumstances in which Crane confesses to a killing. Although the trial court had ruled Crane's confession voluntary as a matter of law, Crane wanted to present evidence showing the conditions in which he confessed. That evidence would form the basis for the argument that the confession lacked validity and credibility because of the circumstances under which Crane confessed. The Supreme Court said the trial court erred in excluding this evidence. "[T]he Constitution guarantees criminal defendants a

`meaningful opportunity to present a complete defense.'" Id. at 90 L.Ed.2d 645. Again, crucial to the court's analysis was that the evidence was relevant and competent and was "central to the defendant's claim of innocence." Id. Absent a valid justification for this per se rule of exclusion, the evidence should have been admitted.

In Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), the Arkansas Supreme Court held that the use of hypnotically refreshed testimony of the defendant was "per se" inadmissible because it was unreliable. The United States Supreme Court rejected that holding, noting that the State "may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony." Id. 90 L.Ed.2d at 48.

Again, crucial to the court's ruling was the Arkansas' "per se" or mechanical application of a rule, particularly when so applying the rule excluded evidence vital to the defense. This was significant in Rock because, as the Supreme Court candidly noted, hypnotically refreshed testimony ran a substantial risk of unreliability. Morgan v. State, 537 So.2d 973 (Fla. 1989) (Shaw, concurring in result only). Evidence which has marginal competency should nevertheless be admitted where it is necessary to protect a defendant's right to present a complete defense.

This court's per-se exclusion of any evidence showing a defect in the defendant's mental ability to form the specific

intent to commit a murder (or any other specific intent crime), thus, should be re-examined in light of the Supreme Court's opinions discussed. The Chestnut rule excludes all evidence of a defendant's mental state short of insanity without regards to the nature of the evidence or its importance to the defendant's case. Even the well documented, unrefuted and unchallenged evidence of Dilbeck's brain damage was excluded under the Chestnut rationale.

Washington v. Texas, and particularly the more recent cases, have strongly rejected this mechanistic, per-se, approach. Significantly, the Supreme Court did not reject the rule which the trial court used to exclude the evidence. Instead, the court simply rejected the unthinking, mechanical application of it. The Sixth amendment and Due Process clause analysis may accept in the abstract the validity of a state rule prohibiting admitting certain evidence, but when the rule is applied to prevent a defendant from presenting a complete defense, the Constitution requires a close scrutiny of the justification for the rule before it can be used to preclude crucial defense evidence.

The trial court in this case followed this court's lead in Chestnut, and excluded the evidence of Dilbeck's brain damage, and other evidence of his mental deficiencies, because it went to his ability to form the specific intent to kill. It did so without regard to the circumstances of the case, or the importance of the evidence not Dilbeck's case. It also never

examined the justification for the rule excluding this testimony as it applied to this case.

The justification for excluding evidence of mental deficiency as it relates to a defendant's lack of specific intent to commit a crime has nothing to do with the relevance or competency of the proffered evidence. Instead, it is simply a judicial determination that persons with mental defects, who are a danger to themselves or others, should not be released into society.

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

Chestnut, at 825.

While that justification may be reasonable in the abstract, as applied to this case it is inapplicable. The evidence was relevant to refute evidence of Dilbeck's specific intent to commit a murder of the first degree. If the defendant could have successfully argued his mental deficiencies negated the required state of mind, he would not have "obtain[ed] immediate freedom to pry on the public once again." Instead, he would have been found guilty of second degree murder, a general intent crime. Thus, the sole

justification used to exclude the evidence in Chestnut was inapplicable to this case.

Moreover, the evidence was crucial to Dilbeck's defense. Dilbeck had only one defense: He did not commit this homicide with premeditation. He wanted to argue, but the court precluded him, that if he was not insane his mental deficiencies precluded him from forming the specific intent necessary to kill. That was a straightforward defense, and it would not have been confusing.[21] That Dilbeck lacked the specific intent was especially important because both the defense and state experts agreed Dilbeck was brain damaged.

Thus, the obvious defense was that Dilbeck's mental abnormalities caused him to perceive the world differently, and he stabbed Vann out of an impulse rather than with some specific desire to kill her.

Such a defense, if accepted by the jury, would have resulted in a conviction for second degree murder, and it would not have released Dilbeck onto the streets. Moreover, if the jury had acquitted Dilbeck of Vann's murder, he still would have spent the rest of his life in prison in life. Hence whatever theoretical validity exists for excluding evidence that a defendant's mental condition prevented him from forming

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[21]At least it was not any more confusing than the notion of lesser included offenses or the State's right to charge premeditated or felony murder.

the required mens rea has no justification when applied to this case.

In Chestnut this court, citing Muench v. Israel, 715 F.2d 1124 (7th Cir. 1983), rejected any constitutional limitations to its ruling. In that case, the court limited its opinion in Hughes v. Matthews, 715 F.2d 1250 (7th Cir. 1978) in which the court, relying upon Washington v. Texas and Chambers v. Mississippi, had said Wisconsin's rule excluding evidence of mental deficiency at the guilt determination stage of the trial violated the Sixth and Fourteenth Amendments.

> In Hughes we determined that when evidence is considered relevant and competent under state law, a criminal defendant may not be precluded from presenting it in his defense if the policy considerations advanced in support of exclusion are inapplicable in the context of the situation.

Muench at 1137.

The court in Muench, interpreting subsequent Wisconsin Supreme Court opinions on this issue, simply said that the Wisconsin Supreme Court had held that psychological evidence of mental abnormalities was neither relevant or competent evidence on the issue of the defendant's specific intent. Muench, at 1143. It and this court in Chestnut rejected any constitutional limitation on excluding such evidence by relying upon Fisher v. United States, 328 U.S. 463, 66 S.Ct. 1318 (1946).

In that case, the trial court refused to instruct the jury that it could consider evidence of Fisher's borderline mental

deficiency in deciding whether he had killed a co-worker with premeditation. The nation's high court affirmed that ruling upon the ground that to allow such an instruction would "involve a fundamental change in the common law theory of responsibility" Id. at 476, and it was reluctant to make such a change because "The administration of criminal law in matters not affect by constitutional limitations or a general federal law is a matter peculiarly of local concern." Id. Neither the majority or the dissenters considered the issue raised in constitutional terms, especially the defendant's right to present a defense. Instead, that case stands for the simple proposition that the Supreme Court will defer to local courts to resolve local matters, and in this case, the requested instruction involved an issue which that court considered beyond its interests.

Of course, in fairness to the Supreme Court, Washington and Chambers would not be decided for at least twenty years. Yet one panel on the Eleventh Circuit Court of Appeals, having the benefit of those decisions, said they did not control. "We conclude that the circumstances in this type of case differ sufficiently from Washington and Chambers that those cases do not control." Campbell v. Wainwright, 738 F.2d 1573, 1582 (11th Cir. 1984). In fairness to the panel in that decision, it did not have the benefit of the Supreme Court's decisions in Crane and Rock, which clearly have signalled that per-se rules of law excluding relevant evidence the defendant seeks to

introduce in his defense must be closely scrutinized. Pohlot, supra, at 901.

Thus, the court's holding in Muench, and this court's ruling in Chestnut, especially regarding excluding the evidence because it was not competent, are suspect in light of the several United States Supreme Court's rulings from Washington to Rock.

The trial court's ruling in this case is suspect for the same reason. Surely evidence of Dilbeck's mental state was as competent as hypnosis evidence which use this court has recognized as "an evolving issue." Morgan, supra, 14 FLW at 25. If the United States Supreme Court said hypnotically refreshed testimony is admissible, then the jury should have learned of Dilbeck's mental condition.

Moreover, unlike the Wisconsin Supreme Court, this court has not excluded evidence of organic brain damage as it affects a person's ability to form a specific intent to kill on relevancy and competency grounds. Instead, it has rejected such evidence because admitting it may result in dangerous persons being released into society. That justification is inapplicable in this case because Dilbeck was already under a life sentence when he killed Vann, and had the jury found he lacked the requisite premeditation for first degree murder, it could have easily found him guilty of second degree murder.

Thus, the trial court in this case, erred when it refused to let Dilbeck present evidence that his organic brain damage

and other mental aberrations as they affected his ability to formulate the specific intent to kill.

ISSUE III

THE COURT ERRED IN REQUIRING DILBECK TO SUBMIT TO A PSYCHOLOGICAL EXAMINATION BY THE STATE'S MENTAL HEALTH EXPERT.

The State, knowing that Dilbeck planned to present expert evidence during the penalty phase of the trial regarding his mental condition at the time of the murder, sought to have its psychologist examine the defendant (T 2821). It based its argument almost exclusively on the authority of the recent addition to Rule 3.220 which allows the prosecution to get "other discovery" as justice may require. "Upon a showing of materiality, the court may require such other discovery to the parties as justice may require." Rule 3.220(f) Fla. R. Crim. P. Under earlier versions of the discovery rule, only the defendant was allowed such additional discovery, and this change provided a balance enabling the prosecution to gather additional evidence if necessary.

The state extensively argued that Dilbeck had no Fifth or Sixth Amendment rights to assert against the state's request (T 2821-34), which was unnecessary since the defendant's lawyer conceded that there would be no "Fifth or Six Amendment violation." (T 2827) Underlying its arguments the prosecution contended that fundamental fairness required "the defendant to submit to a psychiatric examination by the State's expert or be precluded from calling experts of his own." (T 2835)

In response, Dilbeck simply argued that "There is no provision in the Florida law that would authorize an

examination of Mr. Dilbeck." (T 2835) Accepting for argument's sake the validity of the State's claims, he further said that it should be made to the legislature or the criminal rules committee (T 2846).

The court, realizing that Dilbeck could not introduce evidence of his mental condition during the guilt phase of the trial, denied the state's motion to the extent that its expert could not interview the defendant before the sentencing phase began. On the other hand, it allowed the examination "if there is a penalty phase." (T 2848) It did so because it felt "that it is an issue of fundamental fairness." (T 2848) Accordingly, the state's expert, Dr. Harry McClaren met with Dilbeck and testified at the sentencing hearing regarding the defendant's mental status.

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. It is that because under the discovery rule before the addition of 3.220(f) the state had no right to demand additional discovery. That right applied only to the defense. Rule 3.220(a)(5) Fla. R. Crim. P. (1989). A strong argument could therefore have been made that since discovery, especially by the state, was created by rule, those directives had to be strictly construed. Unless a privilege had been expressly granted, a court could not fashion one to satisfy its notions of fairness. E.g. Heath v. Becktell, 327 So.2d 3 (Fla. 1976) (Discovery rules did not

provide for clerks of court to issue subpoenas duces tecum upon request of the defense.) Downing v. State, 536 So.2d 189 (Fla. 1988) (Police reports are not per se discoverable.) A more fundamental question, however, must be answered before the scope of Rule 3.220(f) can be examined. Does Rule 3.220 apply at all to the sentencing phase of a capital trial?

A. THE APPLICABILITY OF RULE 3.220 TO THE SENTENCING PHASE OF A CAPITAL TRIAL

It is amazing that after almost twenty years of death penalty litigation, the issue of whether the discovery rule applies in the sentencing phase should surface. One would have thought it would have been resolved years ago, but apparently it has not. In Maxwell v. State, 443 So.2d 967 (Fla. 1983), this court avoided the question by cryptically saying, "As far as any procedural rights in the sentencing process which appellant may have had under Rule 3.220(a) are concerned, we find that there was no prejudice." Id. at 970. The court, in a footnote to a more recent opinion, recognized the unsettled state of affairs:

> [B]ecause there is not a rule of criminal procedure that specifically authorizes a state's expert to examine a defendant facing the death penalty when the defendant intends to establish either statutory or nonstatutory mental mitigation factors during the penalty phase of the trial, the matter has been brought to the attention of the Florida Criminal Rules Committee for consideration."

Daniel Burns v. State, Case No. 72,638 (Fla. May 16, 1991) 16 FLW S389.

That the discovery rules do not specifically provide for sentencing phase discovery is not surprising since those provisions were adopted by this court before the current capital penalty procedures were adopted. Consequently, the rules focuses on guilt phase issues. For example, the defendant is required to disclose matters which generally prove his identification, such as fingerprints, blood specimens, and the like. Rule 3.220 (c). The prosecutor, for his part, must reveal "The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and any defense with respect thereto. Rule 3.220(b)(1)(i) (emphasis supplied.) There is no mention regarding any discovery of evidence relevant to the penalty phase.

The sentencing proceeding, as far as the rules of criminal procedure are concerned, is separate from the guilt determination portion of the trial. Rule 3.780 Fla. R. Crim. P. focuses exclusively upon the "Sentencing Hearing for Capital Cases." Section 921.141(1) Fla. Stat. (1989) is tilted SEPARATE PROCEEDINGS ON ISSUE OF PENALTY", and while the sentencing may take place immediately after the guilt phase of the trial, the hearing focuses upon issues either irrelevant during the guilt phase or otherwise inadmissible. Typically, the penalty phase questions are limited solely to the statutorily defined aggravating factors and the mitigation. The aggravation defines death worthy crimes, and it is

irrelevant at the earlier preceding. State v. Dixon, 283 So.2d 1 (Fla. 1973). Likewise, the defendant's mental condition less than insanity has no relevance in determining his guilt, Chestnut v. State, 538 So.2d 820 (Fla. 1989), but is admissible during the penalty phase. The defendant's character or propensities are irrelevant in deciding his guilt, but is admissible to fix the appropriate sentence. Sympathy for the victim has no place in the deciding if the defendant committed a crime, but in death sentencing it can be admitted. Payne v. Tennessee, 501 U.S. ___, 111 S.Ct. ___, 115 L.Ed.2d 720 (1991).

There is, in short, a clear separation of issues between the guilt and penalty phases of a trial, as illustrated by this court's repeated ruling that doubt as to guilt is irrelevant to the penalty. Burr v. State, 466 So.2d 1051 (Fla. 1985). If Rule 3.220 applies to the sentencing phase of the trial, one would expect it to explicitly detail the discovery obligations of the state and defense as it had done for these parties for guilt phase evidence. That the rule, as currently provided, never intended to apply to the penalty phase, becomes clearer in light of the significantly different issues each portion of the trial resolves.

Finally, if the defendant has no due process or rule created rights of discovery concerning the aggravating circumstances the state intends to prove, Maxwell, supra, why should the state, which has no due process "rights" at all, be able to examine the defendant to rebut a mitigating factor he

may choose to present? No legal basis exists for concluding that the rules of criminal discovery apply to the sentencing phase of a capital trial.

B. DOES RULE 3.220(f) REMEDY THIS DEFICIENCY

The prosecution primarily argued that Rule 3.220(f) allowed the state to get the discovery it needed for the sentencing hearing (T 2821). The issue thus is whether this new provision to the rules of discovery somehow did what the rule in general did not.

This addition arose as part of the general claim in 1989 that defense counsel were abusing the discovery process, particularly the discovery deposition procedure. The commentary accompanying Rule 3.220(f) merely says that

> Paragraph (f) was previously numbered (a)(5) and has been modified to permit the prosecutor, as well as the defense attorney, to seek additional discovery.

In Re Amendment to the Florida Rule of Criminal Procedure 3.220 (Discovery) 550 So.2d 1097 (Fla. 1989). Neither the court's opinion adopting the changes or additions to Rule 3.220 or the concurring or the dissenting opinions mention anything about 3.220(f) applying to the sentencing phase of a capital trial. In fact, nowhere is there any indication that any of the modifications applied to the sentencing of persons to death. Surely, if this court or the drafters of the rule changes had meant for the rules of discovery and especially the most recent alterations to effect death penalty procedures, it would have somewhere said so. That the rule, the commentary to it, and

this court never indicated in any manner that 3.220(f) opened discovery to the penalty phase of the trial augurs well that it was never intended to do so.

That "catch-all" addition to the rules of discovery also does not answer the questions that arise because of its vagueness. For example, the rule places no limits on the extent or scope of such discovery as Rules 3.220(b),(c) do. It also does not provide when discovery can be made. Does the right exist before trial, before the sentencing phase begins, or after the defendant has testified, assuming he does so? There is also no recognition of the constitutional problems involved. C.f. Parkin v. State, 238 So.2d 817 (Fla. 1970). All is left to the sentencing court to fashion a rule it believes is appropriate to the situation. Trial courts, however, lack the jurisdiction to create procedural rules of such magnitude. Only this court can do so. While lower courts can construe rules, they cannot as the trial court in this case did, create them. See, Ser-Nestler v. General Finance Loan Company, 167 So.2d 230 (Fla. 1964). What the trial court did exhibits the problems with construing 3.220(f) so as to permit sentencing discovery.

FUNDAMENTAL FAIRNESS

Does the state, however, have a compelling argument that it should be able to have its psychologist examine the defendant if he is going to present his experts? Afterall, if the prosecution's psychologist can examine a defendant who has

claimed he was insane when he committed a crime, should not the same rationale apply at sentencing when he wants to present his mental experts to show he had some mental infirmity which could mitigate a death sentence? The answer is no.

When a defendant pleads insanity, he is saying that he committed the charged crime, but that he was so severely mentally unbalanced he did not realize that what he did was wrong. In the case of a first degree murder, he may have fully premeditated the homicide, but society does not condemn him because of his mental illness. If the Fifth Amendment prohibits compelled confessions then there is no constitutional limit to allowing the state to examine the defendant because by claiming he was insane, he has voluntarily admitted committing the crime. There is, in short, nothing for the Fifth Amendment to protect because the accused has in effect waived that right by confessing his guilt to the crime.

This court recognized the distinction between a defense of insanity and a denial of the requisite mental intent in Parkin v. State, 238 So.2d 817, 820-821 (Fla. 1970)

> There is a differentiation of the issue of insanity from that of guilt-in-fact. The insanity plea and the guilty plea raise separate issues on which different kinds of evidence may be introduced. . . . Self-incrimination is not directly an issue in cases such as this, simply because the question to be resolved is not guilt or innocence, but the presence or absence of mental illness.

A person who relies upon a mental condition less than insanity has not similarly confessed. To the contrary, he has

claimed that because of his mental condition, he lacked the requisite mens rea. His situation is no different than if he suffered no mental infirmity and simply claimed he did not intend to commit the charged crime. In the case of murder, he may admit that he killed the victim, but claimed he did so with a reckless disregard for human life (second degree murder) or by culpable negligence (manslaughter). See, Hickson v. State, Case No. 91-2800 (Fla. 1st DCA November 13, 1991) 16 FLW D2898 (State not entitled to depose the defendant when she asserts a battered spouse syndrome.)

Such is not the case when the defendant relies upon a mental state less than insanity to mitigate a death sentence. There the defendant offers his mental condition to reduce a death sentence precisely because it directly affects his intent to commit the crime he has been convicted of committing. Such opinion is directly relevant to several aggravating factors such as cold, calculated, and premeditated; especially heinous, atrocious, and cruel, and to avoid lawful arrest. What he tells a psychologist or other similar type of expert about the facts of the crime has direct bearing on his intent. For example, in this case, Dr. McClaren relied in part upon what Dilbeck had told him about to show the defendant's goal

oriented behavior.[22] The court admitted these statements even though they were very incriminating (T 2613).

The court in Parkin also limited the state's expert's opinion to whether or not the defendant was sane. The state could not inquire about the facts of the charged offense given to the psychologist by the defendant, unless the defense had, in some way, opened the door, justifying further inquiry by the prosecution. Finally, the court reiterated that the burden of proving insanity remained with the state.

The State's argument is that, well, the defendant wants to use an expert to show his mental infirmity, and we cannot rebut that unless our expert personally examines the defendant. Dilbeck, however, is not claiming the prosecution cannot have an expert, that this professional cannot review the relevant reports and other data, or that he cannot testify about the defendant's mental status. He simply cannot, within our constitutional framework, examine the defendant. While it might be nice or even desirable for the state's psychologist to interview him there is no constitutional requirement for a personal examination of the defendant. Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). In Barefoot, the defendant complained about the state's use of two

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[22]Specifically, Dilbeck told Dr. McClaren that he had used the money he had to buy a knife rather than alcohol, he had traveled through the woods to avoid detection, and he bought the knife to use for robbery and kidnapping (T 2611-12).

psychologists who had never seen the defendant, but instead rendered an opinion regarding his future dangerousness (an aggravating factor in Texas) based upon a hypothetical question posed to them by the prosecutor. The Supreme Court found no constitutional impediment to admitting this testimony. "Expert testimony, whether in the form of an opinion based on hypothetical questions or otherwise, is commonly admitted as evidence where it might help the factfinder do its assigned job." Id. at 903.

There are, in short, other ways to rebut the defense expert than through a personal examination of the defendant. To see this, consider what information the opposing psychologist has. He has, first, the report of the defendant's expert. Rule 3.220(d)(2)(ii). Second, he typically has access to all of the prior reports, school and prison records, and other mental tests given to the defendant for preparation of his defense in the charged crime or for some other offense or purpose. In short, he has at least as much information as the defense expert, less of course the personal interview of the defendant.

Yet, if the purpose of calling a state expert is to cast doubt upon the validity of the defense expert's evaluation that can certainly be done through the traditional means available to the state. It can, for example, cross-examine the defense witness to develop any flaws in his examination. Second, it can pose hypothetical questions, based upon the facts of the

case and the defendant's mental condition, to further weaken his credibility. Moreover, the state can pose the same hypotheticals to its own experts, who can then render an opinion.

In short, the state is fully entitled to hire its own witnesses to refute the defendant's expert. These people will have everything available to them that the defendant's psychologist had. The only thing it will not have is an examination of the defendant, which is legally unnecessary.

This case supports this argument. Dr. McClaren had been involved in the case since the morning after the homicide and began to receive information about it soon thereafter (T 2588). He had all the evidence Dr. Berland possessed. He had the prison records, the psychological test results, and he was aware of the facts of the case, having read the depositions of various witnesses (T 2588). He also had the evaluation that Dr. Berland had performed of Dilbeck (T 2588). On the stand, he said that he had given the defendant the revised Minnesota Multiphasic Personality Inventory and Wechsler Adult Inventory Scale-Revised (T 2591). Dr. Berland had also administered earlier versions of these examinations (T 2345). The state also extensively cross-examined Dr. Berland, probing and challenging in detail the various conclusions this witness had made (T 2393-2408).

From what Dr. McClaren had to say, there was virtually nothing he testified about that could not have been obtained

without examining Dilbeck. Most of his testimony, in fact, dealt with generalizations regarding people like Dilbeck (T 2597-2598, 2601) and his interpretation on the evidence the jury had already heard. (See Issue VI)

Thus, whether in the abstract or in this case, there is and was no requirement that the state's experts personally examine the defendant in order to give an effective opinion regarding the defendant's mental condition.

Rule 3.220, either generally or specifically through Rule 3.220(f) is not applicable to sentencing proceedings. Even if it is, the defendant's Fifth Amendment right against compelled statements prevents the state's experts from examining the defendant. The court in this case, therefore erred when it permitted Dr. McClaren to personally examine the defendant.

ISSUE IV

THE COURT ERRED IN INSTRUCTING THE JURY THAT THEY COULD CONSIDER, AS EVIDENCE OF GUILT, THE DEFENDANT'S FLIGHT.

During the charge conference at the guilt phase of the trial, the state requested the court instruct the jury that it could consider Dilbeck's flight as evidence of guilt (T 2030). After defense objection (T 2030-31), the court gave a modified instruction:

> Now, the flight of a person accused of a crime is a circumstance that may be considered by you with all the other testimony and circumstances and should be given such weight as you consider proper.
>
> The rule is when a suspected person in any manner endeavors to escape by fight, concealment, or other indications of a desire to evade prosecution, such may be shown in evidence as one of a series of circumstances from which it may be inferred that he committed a crime.

(T 2094-95).

There are two problems here. First, the evidence of Dilbeck fleeing the parking lot after stabbing Vann does not constitute flight. "Merely fleeing the scene of a crime does not support a flight instruction." Wright v. State, Case No. 71,534 (Fla. August 29, 1991) 16 FLW S597.

Second, on a more fundamental basis, there is no justification for giving such an instruction at all. Instructions on flight and the inferences justified by them, of course, are not new and generally the courts of this state have approved instructing juries on flight where appropriate

Williams v. State, 268 So.2d 566 (Fla. 3d DCA 1972); Proffitt v. State, 315 So.2d 461 (Fla. 1975). But see, Merritt v. State, 523 So.2d 573 (Fla. 1988); Silas v. State, 431 So.2d 239 (Fla. 1st DCA 1983); Felder v. State, 496 So.2d 215 (Fla. 1st DCA 1986). But those cases which have approved a flight instruction have done so by relying upon pre-1981 cases. e.g. Brown v. State, 526 So.2d 903 (Fla. 1988); Harrell v. State, 486 So.2d 7 (Fla. 3d DCA 1986).

1981 is a watershed year because in that year the Florida Supreme Court approved dropping a circumstantial evidence instruction from the standard Jury Instructions. In the Matter of the Use by the Trial Courts of the Standard Jury Instructions, etc., 431 So.2d 594 (Fla. 1981). The Court in that case said:

> We noted that the Criminal Law Section of the Florida Bar approved the instructions as proposed except for the elimination of the instruction on circumstantial evidence. We find that the circumstantial evidence instruction is unnecessary. The special treatment afforded circumstantial evidence has previous been eliminated in our civil standard jury instructions and in the federal courts. Holland v. United States, 348 U.S. 121 (1954). The Criminal Law Section's criticism of this deletion rests upon the assumption that an instruction on reasonable doubt is inadequate and that an accompanying instruction on circumstantial evidence is necessary. The United States Supreme Court has not only rejected this view but has gone even further, stating:
> [T] better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect...

> Id. at 139-40 (1954). The elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge, in his or her discretion, feels that such is necessary under the peculiar facts of a specific case. However, the giving of the proposed instructions on reasonable doubt and burden of proof, in our opinion, renders an instruction on circumstantial evidence unnecessary.

Id. at 595.

An instruction on flight, of course, is not part of the standard jury instructions, but the rationale this court used to remove the circumstantial evidence instruction from the standard instructions applies with equal force to a flight instruction. All the flight instruction does is confuse the jury. Silas, supra.

In Palmer v. State, 323 So.2d 612 (Fla. 1st DCA 1975) the First District considered the reasonableness of a jury instruction on the inferences that can be made when a person is found in possession of recently stolen goods and offers no explanation for how he acquired them. What the court said there applies as well to a jury instruction on flight:

> If the propriety of such an instruction were a fresh issue today, we might doubt that sensible jurors need telling of an inference that is said to arise unaided from their own reason, experience and common understanding. And if the evidence is such that the inference has not occurred to the jury after argument of counsel, we might doubt that it is the trial judge's business to summon up the inference either by a wink and nod or by an overt instruction. But the giving of such a charge in a proper case was approved long ago,... and recently.

Id. at 615-616 (citations and footnote omitted).

The rationale of this court's 1981 opinion is clear: Instructions on circumstantial evidence are unnecessary and do not help the jury resolve the issues before them. Because flight is also circumstantial evidence, the court should not have given a special instruction highlighting that evidence in this case.

This court should reverse the trial court's judgment and sentence and remand for new trial.

ISSUE V

THE COURT ERRED IN PERMITTING DR. HARRY MCCLAREN, A PSYCHOLOGIST TESTIFYING FOR THE STATE, TO TESTIFY ABOUT THE REASONS HE BELIEVED DILBECK 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.

As part of its case during the penalty phase of this trial, the state called Dr. Harry McClaren, a forensic psychologist. He had examined Dilbeck, and "within a fairly short period of time was able to come up with between twenty-five and thirty reasons" to explain why the defendant was "able to engage in purposeful goal oriented behavior" in June 1990 (T 2602). Dilbeck's lawyer objected to the witness's anticipated testimony because it was "nothing more than a closing argument for Mr. Kirwin [the prosecutor]. I mean, he's got a chart--I mean there is nothing scientific about this. . . But secondly, I would object because it relies on statements given to him by the defendant about the offense and under Parkin [v. State, 238 So.2d 817 (Fla. 1970)], he may not be permitted to testify to that. Parkin says it would violate the defendant's 5th Amendment right." (T 2603)

The court, after further discussion refused to let Dr. McClaren comment on only three of his points (T 2610), but justified letting the witness testify about the other matters because it provided the basis for his opinion (T 2609). The state then asked him if he was "able to come to a conclusion as

to whether or not the defendant was able to engage in purposeful goal oriented behavior in the time period surrounding the offense." (T 2615) The witness said yes, and then launched into a long monolog justifying that conclusion. Those reasons, as apparent from the record are:

1. Dilbeck is of average intelligence.
2. He has no history of mental illness.
3. He secured a transfer to the Quincy facility to escape.
4. He turned down an assignment to the cooking school so he could get more access to activities on the outside.
5. Dilbeck did not escape at the first opportunity.
6. Before he escaped, the defendant ran regularly.
7. He slipped away rather than impulsively bolting for freedom.
8. He chose his time for escape when the conditions, weather and darkness were most favorable.
9. After escaping he stole clothes to avoid detection.
10. He acquired sunglasses and a hat to further his disguise.
11. He got a Florida map.
12. On his way to Tallahassee, he traveled through the woods to avoid detection.
13. He bought a weapon rather than alcohol.
14. He bought a knife to rob and kidnap.
15. He did not use the knife on the first person he saw.
16. He selected a female, alone in her car.
17. He used the knife to attack the woman.
18. He attacked the woman "for the rational reason of obtaining a means of flight from the Tallahassee area where he was the subject of a manhunt."
19. He attacked the woman until she stopped resisting.
20. He tried to drive the stolen car.
21. After crashing the car, he fled.
22. He threatened to kill the security guard who confronted him.
23. After making a minimal assault upon him, Dilbeck chose to flee.
24. He fled into a wooded area.

25. He got rid of his bloody shirt.
26. He fled the police until cornered.
27. He surrendered only when cornered.
28. He understood what he had done by telling the police to kill him since he had previously killed another law enforcement officer.
29. He initially gave the police a false name, and when confronted with his real identity, "he maintains his composure and simply says, "Merry Christmas."

(T 2616-18).

Two problems surface. First, what was the relevancy of the state's question and Dr. McClaren's response in the sentencing phase of the trial. Second, assuming the question was relevant, the answer was nevertheless inadmissible because, as defense counsel asserted, it amounted to "nothing more than closing argument for [the state]." In short, the jury did not need this expert's testimony to reach the conclusion that Dilbeck could "engage in purposeful goal oriented behavior."

Two principles guide the proper use of expert testimony:

1. Such evidence is admissible when it is related to a subject that is beyond the understanding of the average layman. Or, in the language of Section 90.702 Fla. Stat. (1989), an expert may testify if his specialized knowledge "will assist the trier of fact in understanding the evidence or in determining a fact in issue." Said negatively, an expert may not testify on an issue that the jury can understand without his help. Johnson v. State, 393 So.2d 1069 (Fla. 1980) (No expert testimony allowable regarding the fallibility of eyewitness testimony.)

2. An expert cannot testify if his testimony merely restates what eyewitnesses have already said. On the other hand, if this special type of witness can take the observed facts and make sense out of conflicting evidence, he can present his clarifying opinion to the jury. Hogbein v. Silverstein, 358 So.2d 43 (Fla. 4th DCA 1978).

The reason courts have hobbled experts is the articulated fear that allowing them to roam unchecked upon the jury's pasture will usurp that body's role in resolving factual disputes and determining culpability or fault. Issues of intent are usually factual matters peculiarly within the jury's exclusive jurisdiction. Gurganus v. State, 451 So.2d 817 (Fla. 1984) (Expert could not testify whether the defendant had a depraved mind.) Drew v. State, 551 So.2d 563 (Fla. 4th DCA 1989) (Expert cannot testify that Drew intended only to frighten the victim.)

Thus, the state's question to Dr. McClaren was irrelevant because whether or not Dilbeck could engage in goal oriented purposeful activity was akin to asking him whether the defendant had the intent to do what he did. The jury had already answered that question in the guilt phase by convicting him of first degree murder, so it was not pertinent to any penalty issues. C.f., Burr v. State, 466 So.2d 1051 (Fla. 1988) (Doubt as to guilt is irrelevant in the penalty phase as a mitigating factor.) The issue was one the jury could have determined without any special assistance from this expert.

More significantly, however, the psychologist's testimony did not assist the jury. He only listed facts the jury knew. He made no effort, as the expert in Hogbein, supra, did to bring order out of the conflicting, confusing facts. There is heard from the jury no collective sigh, "Ah, yes. That explains it." Instead, Dr. McClaren merely reiterated what that body had already learned without providing the clarifying insights experts are required to provide. Why did it need this witness's enumeration of every inculpatory act the defendant had taken over the past two years? It or the prosecutor could, with equal ease, have made the same list to reach the same conclusion, and during its closing argument the state made repeated reference to the factors Dr. McClaren had found (T 2696-99).

More subtly, the question asked and the response given covered far more than was relevant to the proper focus during the penalty phase of this trial. That is, the question should have been, whether at the time he committed this murder, did Dilbeck have the ability to have a purposeful goal oriented activity? As to that issue, only points 17-19 have any direct relevance.[23] Points 1-16 only deal with the defendant's desire to escape confinement and have no relevance to his mental state

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[23]Item 18 is pure speculation on Dr. McClaren's part. There is no evidence that there was a "manhunt" in Tallahassee for Dilbeck, or that he was aware of it.

at the time of the murder. What he did days and months before he committed his latest crime had no bearing on his mental state at the time he kill Faye Vann. That is, Dilbeck, for purposes of this argument, concedes that he had planned to flee the prison for several years. But there is no evidence that such intent included murder within its scope.

Points 17 and 19, when isolated, illustrate Dilbeck's objection. The jury already knew that Dilbeck had "used a knife to attack the woman" and that "he attacked her until she stopped resisting." This expert never provided an explanation of why Dilbeck acted as he did. Such gaps in his testimony moreover, showed up with disturbing regularity at precisely the points where it could have been most helpful. For example, he admitted that Dilbeck was brain damaged (T 2626), yet he never said how the defendant's injury affected his mental processes. Similarly, he agreed that he was under "a lot of stress" when he attacked Vann, but he refused to say whether he was under "extreme" distress then. That was, the doctor said, a matter for the jury to decide (T 2618).

Dr. McClaren's testimony did not help clarify the issues, and it was unnecessary because this was an area in which this doctor's expertise was unneeded. The court erred in letting this witness testify.

ISSUE VI

THE COURT ERRED IN INSTRUCTING THE JURY FAILED ON THE ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL AGGRAVATING FACTOR BECAUSE THAT INSTRUCTION FAILED TO ADEQUATELY LIMIT AND GUIDE THEIR DELIBERATIONS.

Dilbeck's jury was not sufficiently instructed on the heinous, atrocious or cruel aggravating circumstance. The trial court instructed on the aggravating circumstances provided for in Section 921.141(5)(h) Florida Statutes as follows:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.

(T 2742). Additionally, the court defined the terms "heinous", "atrocious" and "cruel" as follows:

> Heinous means extremely wicked or shockingly evil.
>
> Atrocious means outrageously wicked and vile.
>
> Cruel means designed to inflict a high degree of pain, utter indifference to, or even enjoyment of, the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless[sic] or pitiless and unnecessarily torturous to the victim.

(T 2743-44). Although this explanation of the aggravating circumstance was taken from this Court's decision in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), and this court's opinion In re Standard Jury Instructions Criminal Cases-No. 90-1, 579 So.2d 75 (Fla. 1990), it was inadequate to guide and limit the

jury's sentencing function. The instructions given were unconstitutionally vague because they failed to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Amends. VIII, XIV U.S. Const.; Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Shell v. Mississippi, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 1 (1990).

In Maynard, the Supreme Court held that Oklahoma's "especially, heinous, atrocious or cruel" aggravating circumstance was unconstitutionally vague under the Eighth Amendment. The Court concluded that language of the circumstance failed to apprise the jury of the findings it must make to impose a death sentence. The jury was left with unchannelled discretion in reaching its sentencing decision. Relying on Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 998 (1980), the Court affirmed the decision of the Tenth Circuit Court of Appeals invalidating the death sentence.

> We think the Court of Appeals was quite right in holding that Godfrey controls this case. First, the language of the Oklahoma aggravating circumstance at issue -- "especially heinous, atrocious, or cruel" -- gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey. The State's contention that the addition of the word "especially" somehow guides the jury's discretion, even if the term "heinous," does not, is untenable. To say that something is "especially heinous" merely suggests that the jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that

> every unjustified, intentional taking of human life is "especially heinous." Godfrey, supra, at 428-429, 64 L.Ed.2d 398, 100 S.Ct. 1759. Likewise in Godfrey the addition of "outrageously or wantonly" to the term "vile" did not limit the overbreadth of the aggravating factor.

100 L.Ed.2d at 382.

Florida's "especially heinous, atrocious or cruel" aggravating circumstance is identical to Oklahoma's and suffers the same fatal flaw. Although this Court has attempted to narrow the class of cases to which the factor applies, e.g., Brown v. State, 526 So.2d 903, 906-907 (Fla. 1988); State v. Dixon, 283 So.2d at 9, the jury was not adequately instructed on the limitations imposed via this Court's opinions. The instructions, as given, could have lead the jurors to "believe that every unjustified, intentional taking of human life is `especially heinous'." Maynard, 100 L.Ed.2d at 382. Dilbeck's jury was left with no guidance and unchannelled discretion to determine the applicability of the aggravating circumstance.

In Shell v. Mississippi, the state court instructed the jury on Mississippi's heinous, atrocious or cruel aggravating circumstance using similar wording as the trial judge used in this case. The Mississippi court told the jury the same definitions of "heinous", "atrocious" and "cruel" as the trial judge told Dilbeck's jury. 112 L.Ed.2d at 4, Marshall, J., concurring. The Supreme Court remanded to the trial court stating, "Although the trial court in this case used a limiting instruction to define the `especially heinous, atrocious, or

cruel' factor, that instruction is not constitutionally sufficient." 112 L.Ed.2d at 4. Since the definitions employed here are similar to the ones used in Shell, the instructions to the defendant's jury in this case were likewise constitutionally inadequate.[24]

Proper jury instructions were critical in the penalty phase of his trial. Dilbeck was entitled to have a jury's recommendation based upon proper guidance from the court concerning the applicability of the aggravating circumstance. The deficient instructions deprived him of his rights as guaranteed by the Eighth and Fourteenth Amendments and Article I, Sections 9, 16 and 17 of the Florida Constitution. This Court must reverse his death sentence.

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[24]Justice Marshall, in his concurring opinion, suggested that limiting the meaning of "cruel" to "mental anguish" or "physical abuse" would have cured its constitutional vagueness.

ISSUE VII

THE 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.

Stabbing deaths often justify a finding by trial courts that the murder was especially heinous, atrocious, and cruel. They seem to best fit this court's definition of that aggravating factor as this court defined it in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973):

> [A] murder was especially heinous, atrocious, and cruel, if it was extremely wicked or shockingly evil, outrageously wicked and vile, and designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. The capital felony must, in short, have such additional acts as to set it apart from the norm of capital felonies. It must be one that is conscienceless or pitiless which is unnecessarily tortuous to the victim.

To the average person, every murder must seem heinous, atrocious, and cruel, but for this aggravating factor to be found it must be especially so. Viewed in this light, the killing of Faye Vann cannot be deemed extremely wicked or shockingly evil.

Instead, it reflected Dilbeck's frenzied mind. Killings that are the direct product of an emotional rage or mental illness are not especially heinous, atrocious, or cruel. Huckaby v. State, 343 So.2d 29 (Fla. 1977); Halliwell v. State, 323 So.2d 557 (Fla. 1975). Murderers under the sway of passion or illness are presumably unable to enjoy the suffering of

others and though the method of killing may be shocking, it is nevertheless not especially heinous, atrocious, or cruel because the mental or emotional turmoil caused the defendant's actions. Mann v. State, 420 So.2d 578 (Fla. 1982); Miller v. State, 332 So.2d 65 (Fla. 1976). In short, the defendant had no intention that the murder be deliberately and extraordinarily painful. Porter v. State, 531 So.2d 1256, 1261 (Fla. 1990).[25]

In this case, although Dilbeck repeatedly stabbed Vann there were no additional acts of cruelty indicating he enjoyed her suffering. For example, the victim was not also repeatedly beaten or kicked. Randolph v. State, 562 So.2d 331 (Fla. 1990). Nor was she slowly strangled. Hildwin v. State, 531 So.2d 124 (Fla. 1988). Instead, this killing was a frenzied attack by a man in an alien environment who had significant mental and emotional problems, most notably a lack of impulse control.[26] Thus, when Vann started honking the car horn, this escaped convict panicked and began stabbing her. The frenzied attack was not prompted by any desire to enjoy her suffering or

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[25]In Michael v. State, 437 So.2d 138 (Fla. 1983), this court held that evidence of a defendant's mental condition could not be used to argue against the application of aggravating factors but must be considered separately as mitigation. This court's ruling in Porter undermines the continuing viability of that holding. See also, Amazon v. State, 487 So.2d 8, 13 (Fla. 1986).

[26]One of the primary results of Fetal Alcohol Syndrome is the loss of impulse control (T 1698).

to delight in her anguish, but to stop her from attracting attention. It was Dilbeck's immediate reaction to Vann's alarming action. There is no evidence he meant for the victim's death to have been especially tortuous.

The court, therefore, erred in letting the jury consider this aggravating factor, and it compounded it by finding that it applied to this case. Further aggravating the court's mistake, it made no mention of Dilbeck's frenzied state of mind when he committed the murder as either negating the impact of the heinousness of the murder or significantly reducing its weight. Amazon v. State, 487 So.2d 8, 13 (Fla. 1986).

The court, therefore, erred in finding this aggravating factor, and it compounded that mistake by allowing the jury to consider it in recommending a sentence.

ISSUE VIII

THE COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD FIND THAT DILBECK COMMITTED THE MURDER WHILE TRYING TO EFFECTUATE AN ESCAPE.

During the charge conference for the penalty phase portion of the trial, the state argued that the aggravating factor "to avoid lawful arrest or effectuate an escape" applied because Dilbeck was escaping when he killed Faye Vann (T 2661-62). Dilbeck responded that when he left the custody of the guards at the Gretna facility he had escaped, and that what he did two days later and forty miles away could not be considered part of the escape.

The court agreed with the state and after the prosecution had argued that the defendant killed the victim while escaping (T 2663), it instructed the jury that it could consider this aggravating factor (T 2743). The court also found it applicable in this case:

> The defendant testified that a part of his plan to effect his escape from the Quincy Vocational Center and Work Camp work detail was to obtain transportation out of the Tallahassee area by force and that the murder occurred during his attempt to obtain transportation. Uncontroverted evidence established that the Defendant escaped from custody, that he intended to use deadly force to further his escape plan and that he, in fact, did use deadly force to further his escape from custody. The Defendant testified that he did not begin stabbing the victim until she began blowing the horn of the automobile to attract attention thereby making the dominant motive of the murder the elimination of a witness or a killing to avoid detection.

(T 3162-63).

The court erred in allowing the state to argue that the murder was part of the escape.

More precisely, the aggravating factor provides: "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." Section 921.141 Fla. Stat. (1989). The key phrase is "effecting an escape." Does it simply mean the events surrounding the actual leaving of custody, as Dilbeck argued, or can it be expanded to some undefined point as the state contended?

"Effecting" is a curious word to use, and it means "to bring about, to accomplish." Webster's New World Dictionary. Thus, the aggravating factor applies if the murder occurred for the purpose of bringing about or accomplishing an escape. The sense conveyed is almost that of an attempt. That is, the murder occurred as a result of the defendant's immediate, pressing desire to leave confinement.

The construction of "escape" also supports the notion that this aggravating factor focuses upon the events immediately surrounding the leaving of custody. In Ayendes v. State, 385 So.2d 699 (Fla. 1st DCA 1980), the court acknowledged that an escape is "technically completed upon an inmate's intentional act of leaving the established area of custody." In State v. Ramsey, 475 So.2d 671, 672 (Fla. 1985) this court held that confinement, for escape purposes, began when a person has been

arrested and his liberty restrained. In short, he is not free to leave. Conversely, a person has escaped when his liberty is no longer restrained.

Strictly construing this aggravating factor, Section 775.021(1) Fla. Stat. (1989), can only lead to the reasonable conclusion that to "effectuate an escape" refers to the events immediately surrounding the leaving of confinement or custody. After the defendant has escaped, he is fleeing so that if he commits a murder during his flight, it cannot be considered to have been done to accomplish an escape.

This rationale also makes good practical sense. In Ayendes, supra, the defendant had left Union Correctional Institution when he kidnapped the victim to facilitate the escape. The First District affirmed the kidnapping conviction because it found that Ayendes was still escaping from the prison when he kidnapped the victim. "The appellant . . . was still in geographical proximity to the prison, had not abandoned his flight, and was attempting to secure transportation from the area." Id. at 699. The court certainly stretched the definition of escape to its furthest limit because it confused escape or the leaving of lawful custody, with flight.

In this case, Dilbeck had left the Quincy Work Center two days earlier and was forty miles from there when he killed Faye Vann (T 1822). If he was still escaping at that time instead of fleeing, the question is when would he ever have escaped?

If the friend he was trying to contact, instead of living in Orlando, had been a migrant laborer, Dilbeck may have bounced around the southeast United States for months trying to find him. Would he still be escaping? In other words, is the defendant's subjective state of mind that he has finally arrived at his intended destination the criteria to establish for when a defendant has left lawful custody? If so, escapees will never be guilty of escape because they could simply say they wanted to go to China, Moscow, or Micanopy and never got there.

Obviously such cannot be the case, and just as plainly, when a defendant has left his lawful custody with the intent to do so, he has escaped. What he does after that is flight.

The state, in its closing argument, however, has advocated this nebulous, subjective definition of escape.

> Committed for the purpose-- actually should be effecting an escape from custody. The first part clearly doesn't apply. Remember, he had a plan. He wasn't away yet. He had gotten away from the vocational center by jumping from one of the catering details, but he wasn't away. He wasn't yet with Gary. Gary hadn't come to pick him up. so he made a plan, a plan to get himself away from this area, a plan to effect his escape from custody, a plan to get him out of danger to protect his freedom.[27]

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[27]The state here has conceded that Dilbeck did not commit the murder to avoid lawful arrest. Earlier in its argument, the state also acknowledged that he had escaped before he came to Tallahassee. "After he did escape, he procured a change of clothes to help avoid detection." (T 2697-98)

(T 2703).

There is no support in the law, logic, or experience to justify such a mushy definition of escape. Because the jury may have accepted what the prosecutor argued on this point, this court should reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE IX

UNDER A PROPORTIONALITY ANALYSIS, DILBECK DOES NOT DESERVE A DEATH SENTENCE.

At first blush, one questions how appellate counsel can argue that Dilbeck does not deserve to die. He was convicted of one murder in 1979, and while an escapee, he committed a second in a particularly gruesome manner. On the surface, he had parents, albeit adoptive ones, who loved him unselfishly for the nine years he lived with them. Surely, this man should die. Yet beneath the apparent justification, lies a darker, more troublesome picture of a young man cursed not simply from his youth, but before he was born. Dilbeck, unfortunately, is one of the vanguard of people this court will see in increasing numbers in the years to come who suffer from Fetal Alcohol Syndrome (FAS) or the milder, but still serious defect of Fetal Alcohol Effects (FAE).[28] His mother also abused him for the first 4 1/2 years of his life in a manner that the sentencing court described as "shocking." (T 3168) Finally, when he was sixteen, he was sent to the most violent prison in Florida where he was repeatedly raped and assaulted (T 2280). These

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[28]Dilbeck is in the vanguard because the FAS/FAE diagnosis is relatively new, but more significantly, the rash of "cocaine babies" born in this state share the same characteristics as those born to alcohol using mothers. Those children will be reaching the attention of the criminal justice system in the next several years.

attacks apparently ended when he became the sexual object of a man almost two times older than he was (T 2281).

Thus, Dilbeck has three major, overwhelming facts mitigating against a death sentence: 1) He suffers Fetal Alcohol Effects, 2) He was cruelly abused as an infant by his crazy mother, and 3) He spent several years as a teenager in the most violent prison in Florida. Other problems, such as his drug use as a child and teenager and his brain damage will emerge in the context of these three major events in this defendant's life.

FETAL ALCOHOL EFFECTS

Without contradiction, Dilbeck suffers from Fetal Alcohol Effects (FAE), a lesser form of Fetal Alcohol Syndrome (FAS) and the trial court so found (T 3169). FAS/FAE results from the mother drinking alcoholic beverages during pregnancy.[29] The brain, in crude terms, can be viewed as an inhibitor of a person's actions. That is, the mind, most of the time, prevents or guides humans from acting in certain ways. When a woman consumes alcohol, most often in large amounts, during all or at least crucial stages of her pregnancy, those portions of the brain which restrain impulses can be damaged. As a result, an adult man or woman, who may for all other purposes appear

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[29]Because it is not known if the fetus can survive undamaged any level of alcohol, the United States Surgeon General has recommended that pregnant women abstain from drinking any liquor during pregnancy.

normal and may behave as others, may be completely lacking in his or her ability to control their impulses or make appropriate judgment calls, especially when under pressure. Because of what the person's mother drank when she was pregnant, he or she may have the judgmental ability of a five year old for the rest of their lives. Nothing can correct this deficit, and it does not lessen with time.

Such is the case with Dilbeck. Although he lacked the physical deformities often associated with children afflicted with FAS, he had several of the characteristic mental aberrations found in fetal alcohol children. He had a low impulse control (T 1698), which meant he had poor judgment (T 1713). He could not understand what went on in his interpersonal relations, especially when they were intense and fast moving (T 2452). He had a low IQ of 81 (T 2368), which is above the retarded level, but is typical of many FAE persons.

Not surprising, he was a slow learner, largely due to his unusually poor memory (T 2441). Such a deficit meant more than that his mind does not hold much information (T 2441). It also signifies that he has a poor ability to deal with the information he perceives (T 2442).

These signs and symptoms thus exhibit what the defense and state experts unanimously concluded: that Dilbeck was brain damaged (T 2434).

At a clinical level, this is what several researchers have discovered about adolescents and adults with fetal alcohol related defects:

> Although there were one or two patients whose daily living skills were approximately age appropriate, none were age appropriate in terms of socialization or communication skills. The [Vineland Adaptive Behavior Scale] revealed that failure to consider consequences of action . . . and unresponsiveness to subtle social clues . . . were problems that were characteristic of those patients with FAS-FAE who technically were not retarded according to IQ scores.
>
> The maladaptive behaviors inventory of the VABS . . . indicated that 62% of the patients had a `significant' level of maladaptive behaviors and 38% had an 'intermediate level. Not one patient with FAS-FAE in this subgroup had a maladaptive behaviors score in the `insignificant' range.[30]

On a more personal and poignant level, Michael Dorris, in his book, The Broken Cord, describes what it means to be afflicted with FAS/FAE.[31] In the early 70's he adopted a two year old Native-American boy he discovered suffered from FAS.

> `The thing I kept returning to,' I said, `is bad judgment.' Seventeen years as part of our family does not counteract for Adam [his son] that instant of not seeing the big picture. He takes something that doesn't belong to him, or he gets goaded into going to his boss and saying cuss words he doesn't

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[30]Ann Pytkowicz, et. al. "Fetal Alcohol Syndrome in Adolescents and Adults," 265 Journal of the American Medical Association 1961, (April 17, 1991).

[31]Michael Dorris, The Broken Cord (New York: Harper & Row, 1989).

> understand. Try to explain to that man how bad judgment is not a matter of simple intelligence or an indicator of a rotten person, but just inability, absolute inability.
>
> `How can a person live without judgment?' Jeaneen wondered. `It's something that nobody really focuses on until you run into it. Then you realize how valuable it is.'
>
> * * *
>
> I sat down with Adam and said, `Don't let yourself be used by other people.' And he can understand it when I'm right there, but one of the reasons that we have always lived in a very controllable environment-in the country and now in a small town-is that he would be a sitting duck if he went to a school where there were drugs or drinking. He wouldn't last a day.[32]

Here is a man who for almost twenty years protected a young, defective man/child from the world, yet for all the care, the love, and the sacrifice, Adam is not ready, and will never be able to live independently in the world. He simply does not have the ability to imagine, to project himself into the future. All the love in the world cannot fix a defective brain.

> [A]s soon as the pressure was off, he seemed to slough whatever skills he had been assiduously taught. . . He existed in the present tense, with occasional reference to the past precedent. . . . The question of `why' has never had much meaning for Adam; the kind of cause-effect relationship it implies does not compute for him.[33]

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[32]Id. at 216-17.

[33]Id. at 200-201.

Thus, the trial court in this case completely missed the meaning of FAE when it said, regarding Dilbeck's "shocking" history of child abuse,

> "However, this must be considered in light of the almost overwhelming love that has been exhibited between the Defendant and his adoptive parents. He was with them from approximately age six to age fifteen. His adoptive parents actually gave up their established life in Indiana when he committed his first premeditated murder and moved to Florida near the institution in which the Defendant was located. . . Defendant's father testified that the Defendant was his whole life.

(T 3168).

For the child and and man afflicted with FAE, love, even the overwhelming affection found by the court in this case (T 3168), is not enough to overcome the deficient brain. Love can protect a child from the realities of the world for a season, but only if the father or friend is physically present to shelter his ward. If not, the child, as Dilbeck did, will wander.

Even if Dilbeck had been born with a normal intellect, the effects of the abuse may not have been overcome by the Dilbeck's affection. "[F]oster care placement alone [may] not [be] an adequate remedy for the psychological damage suffered

by abused children, but needs to be supplemented by treatment for the child and/or support for the foster parents."[34]

The evidence here supports the unfortunate conclusion that the Dilbecks could not protect their son. There is no evidence Dilbeck ever received any professional care for his inherited problems or the child abuse. Nor is there anything in this record that the parents had any special sensitivity to their adopted son's debilitating weaknesses. Charles Dilbeck, was a truck driver and, as is the nature of such work, it required him to be away from home on occasion (T 2544). The defendant, by the time he was 13, was using drugs, including speed and marijuana (T 2275, 2279).[35] He lacked structure in his life, which is the best method of coping with teenagers or adults with FAS/FAE.[36] This was dutifully acknowledged when Dilbeck was interviewed in 1979 by a prison psychologist who said, "The subject may well need psychiatric and psychological services to

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[34]Thomas J. Reidy, "The Aggressive Characteristics of Abused and Neglected Children," Traumatic Abuse and Neglect of Children at Home abridged ed. ed. Gertrude J. Williams and John Money (Baltimore: John Hopkins University Press, 1982), p. 218.

[35]For this brain damaged boy, drugs had an unusual effect, "He gets wild and he goes into an extended period of lack of sleep and intense agitation." (T 2457-58)

[36]A.P. Streissguth, Robin A. LaDue, and Sandra P. Randals, A Manual on Adolescents and Adults with Fetal Alcohol syndrome with Special Reference to American Indians (Washington, D.C.: Indian Health Service, 1986, 1988), p. 38.

handle his feelings of emotion as they relate to his anti-social behavior." (T 2454) Dilbeck never received any counseling or medication (T 2507).

After years of love, he still had difficulty understanding and handling interpersonal relationships, and as is typical of persons afflicted with FAE, he saw those about him as machines or objects to be moved rather than as people (T 2452, 2477). In short, he has never, despite all the love, concern, and devotion of his parents, been able to overcome his limitations in impulse control and judgment (T 2456). These deficits are not something he developed as an infant, child, or young man, but are problems his mother gave to him before he was born, and they will define who he is for the rest of his life.

Then, of course, after he was 16 the family structure was replaced by the predatory world of the state's prisons.

THE CHILD ABUSE

Dilbeck is like most FAE persons: he did not live with his natural parents for much of his life, and he was severally abused and neglected physically and possibly sexually as a child.[37] The court admitted that the defendant's early childhood was shocking (T 3168). Dilbeck's father described life with Audrey Hosey as "hell," which was an apt description (T 2262). This clearly insane woman threw her children against

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[37]Dorris, Broken Cord, p. 238; Streissguth, A Manual, p. 20-22.

things (T 2251), and she beat the defendant "all the time" with an electrical cord, "for anything, or nothing." (T 2288) She sexually abused his sister (T 2253), and hurt her so bad on at least two occasions to require her to go to the hospital (T 2254). Perhaps the most bizarre incidents occurred when she required the two young children to pray. If they stopped she beat them (T 2251). If they looked out the windows, she beat them (T 2251). She stuffed cotton into their mouths and then taped them so they would not remove it (T 2288).

A neighbor reported that Hosey neglected the children. She never changed their clothes and let them wander about. She never fed them, and the children would eat at neighbor's homes (T 2415).

This court has recognized that child abuse can mitigate a death sentence. Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990) ("The fact that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end."); Brown v. State, 526 So.2d 903, 908 (Fla. 1988) (Defendant's disadvantaged childhood and abusive parents are mitigation.) The devastating consequences of beatings extends for years and perhaps a lifetime, and some people never overcome the emotional and psychological scars acquired in infancy. How much more so for the child suffering from fetal alcohol effects. He already lacks the ability to understand

interpersonal relations, to process information in a changing situation. Such a defect can only exacerbate the disastrous life the child has had so far.

> Furthermore, some adolescents and adults with FAS/FAE have mental health problems that are additionally disabling and result from their early rearing in dysfunctional alcoholic families. The adverse impact of such families on children is only recently being recognized, but at the very minimum, we know that the risk for child neglect and physical and sexual abuse is elevated. The residuals of these early traumatic experiences are felt as deeply by the intellectually handicapped as by the intellectually normal. However, the intellectually handicapped have more difficulty conceptualizing and verbalizing their experiences, and more difficulty, in general, in learning from their past experiences.[38]

In Dilbeck's case, his life got even worse.

PRISON

When first jailed, at the age of 16, Dilbeck was sent to Sumpter Correctional Institution, which was at the time the most violent prison in the state (T 2512-2517). In 1980, it had almost three times as many assaults upon inmates as Union Correctional Institution, a prison which houses some of Florida's worst prisoners (T 2515). Sumpter remained the leading penal institution in the state for the next three years (T 2517).

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[38]Streissguth, A Manual, p. 37. (citation omitted.)

Prisons are predatory places in which only the strong survive. Vulnerabilities are weaknesses to be exploited. Thus, when a young boy, 16, arrives at a place the trial court in this case said he deserved to be at (T 3170-71), the assaults, the rapes, and other violence were predictable, perhaps inevitable.

Such atrocities are bad enough in isolation, but when compounded with his violently abusive childhood and permeating Fetal Alcohol Effects, it should be expected that Dilbeck saw violence as an acceptable way to solve his problems. Society does not condone what he did, but then neither should it punish him with death for what his mother and the prison system did to him.

COMPARABLE CASES

Dilbeck is an unusual if not unique defendant who has been sentenced to death. He has a prior conviction for murder which he committed when only 16, and that is a powerful aggravating factor when coupled with his escape status when he killed Faye Vann. On the other hand, as just discussed, he is significantly brain damaged, he suffers from Fetal Alcohol effects, he was violently abused as a child, and when 16 he was put in the most violent prison in Florida where he was repeatedly raped and assaulted. That is overwhelming mitigation. This extreme aggravation and mitigation thus makes any comparison with other cases somewhat tepid.

The closest case to this one is Fitzpatrick v. State, 527 So.2d 811 (Fla. 1988). The defendant there kidnapped three persons in a plan to rob a bank. Two police officers appeared at the office where Fitzpatrick was cornered, and during the ensuing confrontation, one of them was killed. In sentencing the defendant to death, the trial court found five aggravating factors, including that he had a prior conviction for a violent felony. It also found the two statutory mental mitigating factors. Although the jury had recommended death, this court reduced his sentence because "Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer." Id. at 812.

In Nibert v. State, 574 So.2d 1059 (Fla. 1990), the defendant stabbed a drinking buddy of his seventeen times, killing him. The jury recommended death, and the court imposed that sentence finding in aggravation only that the murder was especially heinous, atrocious, and cruel. It found in mitigation only that Nibert had an abused childhood. This court reduced the death sentence by disagreeing with the weight given to the defendant's child abuse, and finding additional mitigation including the defendant's extensive alcohol use, and evidence that at least one statutory mental mitigating factor applied.

In Livingston v. State, 565 So.2d 1288 (Fla. 1990), the defendant robbed a convenience store, and during the course of this crime he killed the clerk and tried to kill an assistant.

The jury recommended a death sentence, which the trial court imposed, but this court reduced it to life in prison. It did so because the mitigation of Livingston's abused childhood, youth, marginal intelligence, and drug use sufficiently outweighed the two valid aggravating factors.

In this case, the court found five aggravating factors, two of which Dilbeck has challenged. He has not contested the legitimacy of the determination that Dilbeck committed the murder while he was under sentence of imprisonment. It, however, has little weight because the defendant merely walked away from his custody without using any violence. In Songer v. State, 544 So.2d 1010 (Fla. 1989), this court said this aggravating factor had little weight in that case because Songer had walked away from a work-release center and did not break out of prison.

Of course, Dilbeck has a prior first degree murder conviction, but the facts surrounding that killing arguably show it to have been a second-degree murder. Moreover, the defendant at the time was only 16 years old, which, as in Livingston, significantly reduces the weight of that aggravating factor.

The court, in sentencing Dilbeck to death, found an extensive amount of mitigation, and significantly it held that the statutory mental mitigation, that the capacity of the defendant to conform his conduct to the requirements of the law was substantially impaired, applied. Additionally, it held

that Dilbeck had an abused childhood and was brain damaged and suffered from a mental illness (T3167-71).

In Nibert and Livingston the state and defense experts agreed on the extent of the defendants' disabilities, and that unanimity supported this court's sentence reductions. In this case, the experts all agreed that Dilbeck was brain damaged (T 2440, 2444, 2526, 1696, 2405, 2411). The defense experts not only were able to trace its cause and give it a name, but were further able to diagnose the defects Dilbeck suffered, namely the lack of impulse control and judgment. Dr. Frank Wood, one of the experts diagnosed Dilbeck as suffering from Schizophrenia spectrum disorder, which has the same symptoms as schizophrenia except for duration (T 2453). That disorder made the defendant "vulnerable to true psychotic episodes, occasions where he really does take leave of his senses. . . . So that we're talking about a disorder of a pressure cooker that's boiling, and of needing to be distanced from and to avoid complex interpersonal situations except those that one can control and when failing to do so, or being unable to do so, completely blowing up and becoming totally crazy." (T 2453) Dr. McClaren could find no evidence of schizophrenia even though when he re-administered the MMPI to Dilbeck, the defendant scored higher on the schizophrenic scale than he had when that test was given to him by a defense psychologist (T 2624-25). Nevertheless, the state witness said he was not schizophrenic (T 2593). Instead he had an anti-social

personality disorder. What appears is that the distinctions between the state and defense experts are more apparent than real, and on the crucial fact of Dilbeck's brain damage, they concur.

Thus, the uncontroverted evidence shows that Dilbeck had a horrible childhood, and he has little or no judgmental abilities, meaning that like Fitzpatrick, he is functioning on the level of a child. The murder in this case, like all of the defendant's prior criminal acts, have been impulsive explosions reflecting Dilbeck's lack of self-control. Because that defect is something over which he has no control, being born with it, this court should not condemn him to death because of it.

CONCLUSION

Dilbeck is an extra ordinarily dangerous man, and one who should never be set free. Yet that does not mean he deserves to die. Persons suffering from FAE function best in a structured setting, and Dilbeck's exemplary prison record proves this point. At the sentencing phase of the trial, it was introduced and consistently it showed that he was rated as an outstanding inmate (T2526-40). The solution thus is obvious. Dilbeck should spend the rest of his natural life in prison, and specifically in a high security institution.

ISSUE X

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THE STATE HAD TO PROVE THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGHED THE MITIGATING CIRCUMSTANCES, THEREBY REQUIRING DILBECK TO PROVE THAT DEATH WAS NOT THE APPROPRIATE PUNISHMENT, IN VIOLATION OF ARTICLE 1, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

At the penalty phase charge conference, counsel for Dilbeck requested several instructions that essentially asked that if the jury or individual jurors could not decide if the aggravating circumstances outweighed the mitigating, then they should recommend a life sentence (T 3355-3370). The court denied that request and specifically requested instruction number 6 (T 3370). That was error because what the court told the jury was:

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(T 2744).

It was error because of the eight jurors that recommended death in this case, some of them may have done so because the mitigating and the aggravating circumstances balanced each other, rather than that the aggravation outweighd the mitigation. That is, the mitigation may not have outweighed the aggravation, but then neither was it of lesser weight. Under the instruction given to the jury, the recommendation should have been death.

The United States Supreme Court has not viewed Florida's sentencing process as the court instructed in this case.

> As noted, Florida is a weighing state; the death penalty may be imposed only where specified aggravating circumstances outweigh all mitigating circumstances.

Parker v. Dugger, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 812, 824 (1991) (citations omitted).

Indeed, the nation's high court referred to two of this court's decisions to support that statement. McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981).

Of course, this is a subtle difference, and one that in any other situation may have been passed off as harmless error. Capital cases, as this court must weary of hearing, are different, and they require heightened levels of reliability. Errors which may have been ignored in a non-capital setting assume greater significance in a capital trial because so much more is involved. Thus, what the court told the jury in this case was error, and because it reduced the confidence we have in the correctness of the subsequently imposed death sentence, it is reversible error.

CONCLUSION

Based upon the arguments presented in this brief, Donald Dilbeck respectfully asks this court to grant the following relief: 1) reverse the trial court's judgment and sentence and remand for a new trial, 2) reverse the trial court's sentence and remand for a new sentencing hearing, or 3) reverse the trial court's sentence and remand for imposition of a sentence of life in prison without the possibility of parole for twenty-five years.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
Assistant Public Defender
Fla. Bar No. 271543
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida; and a copy has been mailed to appellant, DONALD DAVID DILBECK, #068610, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 27TH day of January, 1992.

DAVID A. DAVIS