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FILED
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JUL 24 1991
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

GERALD WAYNE BUNNEY,

Petitioner,

vs.

Case Number 78,141

STATE OF FLORIDA,

Respondent.

ON PETITION TO REVIEW THE DECISION
OF THE SECOND DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

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The Case and Facts

Gerald Bunney was convicted of first degree murder and kidnapping. He appealed his conviction and sentence to the Second District Court of Appeal. The district court affirmed, but certified that its decision passed on a question of great public importance.

The facts.

At trial the victim's mother, Donna Jones, testified that in September 1988 she and her young daughters Tonya McGrew, aged 5, and Jennifer McGrew, were living in a trailer at a mobile home park on Nebraska Avenue in Tampa. *R.55* Residing with them was a young woman named Lois Zeigler. Ms. Jones worked nights at a convenience store, and Ms. Zeigler had agreed to babysit in exchange for room and board. *R.55-57, 71*

Ms. Jones was acquainted with Mr. Bunney through a mutual friend who worked at the convenience store. On several occasions Mr. Bunney had visited the trailer to see Lois Zeigler, and he had played with the children. *R.57-58*

Ms. Zeigler, who also had met Mr. Bunney through Ms. Jones's friend, had known him about four weeks. *R.71-72* He had dropped by the trailer to see her three or four times and he'd asked her out, but she had declined. *R.73* On the last such occasion, in early September 1988, Mr. Bunney had driven Ms. Zeigler and the children to do the household's laundry. He asked her out again, but again she said no, he was not her type. *R.83* When Mr. Bunney pressed, she told him he was fat and ugly.

She'd not seen him after that day. *R.84*

May McWaters, a shop owner at Tampa's Ybor Square, knew Mr. Bunney from his work as a security guard there. She testified that she had run into him at a lounge on the evening of Friday, September 23, 1988. *R.108-109* Mr. Bunney came to her table and they chatted. Ms. McWaters recalled that Mr. Bunney was an amiable fellow, but that night he was angry over being fired from his security job.[1] Mr. Bunney was drinking, she said, but did not appear to be intoxicated. He left the lounge at about 2:30 a.m. *R.110- 111*

That night Ms. Zeigler was out and Ms. Jones was home with the children. *R.58-59* She checked on them in their room at about 1:30 or 2:00 a.m., then fell asleep as she lay on the living room couch watching television. *R.59-60* When she awoke and checked the children at about 9:00 a.m., only Jennifer was there. *R.60*

Ms. Jones searched the trailer for Tonya, then telephoned her sister, who alerted the Hillsborough County Sheriff's Department. *R.61-62* Sheriff's deputies searched for Tonya in the trailer park and its vicinity well into Saturday night, without success. *R.64, 67-68*

The next morning, Donald Pennington repossessed Mr. Bunney's car. Mr. Pennington was manager of operations for the

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[1] In fact, though Mr. Bunney's supervisor had recently complained to him about his job performance, Mr. Bunney had not been fired. *R.124-125, 128, 141-142*

private security firm that employed Mr. Bunney, and he was Mr. Bunney's direct supervisor. *R.121-122, 123* That summer he had sold Mr. Bunney a used automobile, with the purchase price to be paid in installments. *R.123* Mr. Bunney had fallen behind in the payments. *R.124*

Early on Sunday, September 25, 1988, Mr. Pennington repossessed the car from the driveway of the home of Mr. Bunney's parents, with whom Mr. Bunney lived. Mr. Pennington testified that as he drove the car away he saw Mr. Bunney run from the house in an effort to stop him. *R.124-125*

Mr. Pennington left the automobile at his sister's house so that Mr. Bunney could not find it, and returned to his apartment. *R. 126* Later that morning Mr. Bunney appeared at the apartment and tried to convince Mr. Pennington to return the car. Mr. Pennington advised that he would give Mr. Bunney ten days to pay what he owed on it. *R.128-129*

> Q. What did he say in response to that?
>
> A. He said, "By then, it will be too late."
>
> Q. When he said, "By then, it will be too late," what did you tell him at that time?
>
> A. I asked him, I said, "Well, what's it going to be, a boy or a girl?" as if he had got someone pregnant.
>
> Q. Go ahead.
>
> A. And he said, "No, this is serious." At that point, I started from small offenses, like shoplifting, battery, assault, and worked my way up, and every time I would say something, he would say, "No, no, no." I got up to--I asked him if he killed someone; then he got real quiet.
>
> * * * * * *

A. After he got real quiet, I thought it was still like a ploy to try to get the car back. And, after a couple more minutes he said, you know, that the body was in the trunk.

Q. Did he tell you whose body was in the trunk?

A. He told me, at the time, that it was a six-year old girl that he had taken from a trailer.

R.129-130

Mr. Pennington suggested that the two of them go get the vehicle, and they set out in Mr. Pennington's car. *R.132* En route Mr. Pennington, who was driving, noticed a sheriff's patrol car. He followed it for awhile, then motioned it over. *R.132-133*

When the patrol car stopped, Mr. Pennington got out and related to the deputy what Mr. Bunney had told him. *R.133* After hearing Mr. Pennington's story, the deputy approached Mr. Pennington's car and asked Mr. Bunney to step out.

As he arrived in my location at the right rear of the vehicle, I asked him, "What is this guy"--and I pointed towards Mr. Pennington or nodded towards him, I believe--"What is this guy talking about?" Jerry replied to me, "I did it."

R.155

Other deputies were called to the scene, and Mr. Pennington guided them to Mr. Bunney's car. *R.133-134* When they opened the trunk, Tonya McGrew's body lay inside. *R.86-91, 93* An autopsy performed that day revealed that she had died by asphyxiation due to strangulation. *R.101*

Mr. Bunney was interviewed by a sheriff's detective later that morning. A videotape of the interview was shown to the jury at Mr. Bunney's trial. *R.195-234* In it, Mr. Bunney re-

counted that at about 1:30 or 2:00 a.m. on the night Tonya disappeared he had dropped by the trailer to see Lois Zeigler. When no one answered his knock at the living room door, he entered the trailer through another, unlocked, door. *R.199-200*

He saw Ms. Jones asleep on the couch, but Lois was nowhere to be found. *R.200-201* He checked to see if she was sleeping in the girls' room. "She wasn't there. And, like I said, the next thing I know, you know, I don't see her. The next thing I know, I pick up Tonya[.]" *R.202*

Mr. Bunney placed the child, half-asleep, on the front passenger seat of his car, and drove north from the trailer park. *R.205, 207-209* Eventually, he pulled off the road and parked. *R.209*

Q. Okay. Then what did you do? You pulled off somewhere up there, right?

A. Right, and I'm not really sure. I can say one thing, that I also neglected to--

Q. Sure.

A. --to say, is during--during the course of me being there, getting her and driving, there was like--I wouldn't say something funny in my head, but it was like static all around me.

Q. Uh-huh.

A. You know, so, that was something I neglected to say.

Q. Well, what does that mean? I--clarify that for me.

A. All right, you know how your foot or hand goes to sleep and when it starts to wake back up, how it feels, the shock?

Q. Yeah.

A. That's what was going through my head.

Q. Okay.

A. And, also, I forgot to tell you, one part of my medical history--well, I guess I would still be considered an epileptic to a certain extent. I've been off medication for, like, four years.

Q. Uh-huh.

A. I used to take Dilantin.

Q. Okay.

A. But, I used to have fainting spells and dizzy spells.

Q. Okay.

A. You know, nothing really extremely major.

Q. Do you take any prescription medication right now?

A. Just--well, I do. I--I take some of my mom's Darvon for headaches, you know, something like that, you know, or for a toothache, but it's not one of these everyday, you know--

R.209-210

After Mr. Bunney pulled off the road, he sat a few minutes and watched Tonya sleeping on the car seat.

A. And she's--she's just laying there, you know, just sleeping away and, well, she woke up a little bit, and next thing, you know, I'm choking her.

Q. How do you choke her, Jerry?

A. Like this (indicating).

Q. Around what, her neck?

A. Yes.

* * * * * *

A. And as I was--as I was choking her, it's like I said, I was trying to figure out why I'm doing it. I couldn't stop.

Q. Did she wake up?

A. Yes, she did.

Q. Did she say anything to you or make any statements or--

A. No, she--like I said, I didn't give her a chance to. But, as--when I'm doing it, I'm sitting there, why am I doing it, and I couldn't stop. I mean, it was like--it was like I was upset or something. You know, it was total rage, I guess, you know, but it wasn't about her, it wasn't about her family, Lois, nobody, you know, of the general family. I just--you know, that's the only thing I can remember, is I felt anger.

Q. Okay. Towards her?

A. No, not toward her. That's what I was trying to figure out, why I couldn't let go.

Q. Okay.

A. Because I didn't want to hurt her.

Q. Okay.

A. And, all of a sudden, my hands were locked.

R.213-215

When Mr. Bunney realized what he had done, he did not know what course to take. He could think only to put the child's body in the trunk of the car and drive around until he could sort out where to put her, or whether to call the police, or what. *R.216-217*

A. I--I just drove around trying to--trying to find a place where I could put her and think, you know, of what to do, you know, if to call the sheriff's department and tell them what I had done or get ahold of a friend, or something that might know what to do. And I just--I could--I could not think clearly for the life of me. I mean, it's just--

R.217

Mr. Bunney drove for the rest of the night. Finally, near dawn on Saturday, he returned home to his parents' house.

A. And I went in my house, and I got undressed and I laid down.

Q. Where was Tonya now? Still in the trunk?

A. Yes. As I said, I couldn't figure out what to do with her.

Q. Okay.

A. I figured, you know, the body would be safe. I didn't want no animals or anything could get to it, you know, and it would give me time enough to think what I could do. And so, I laid down and got back up that morning about 10:00, maybe, something like that, and I opened up the trunk and--at first, I thought it was a nightmare. I thought I had dreamed it all.

Q. Uh-huh.

A. And, the first think I did, I ran out to the car and opened it up. I was hesitant, but I opened it up. I looked in there and I saw her and I knew it wasn't a nightmare. And, I went driving off; I went to go see--I went to two friends. I went to see my girlfriend.

R.220-221

As Mr. Bunney sat visiting his friends, his thoughts never strayed from Tonya. He wanted to tell his friends what he had done, but he couldn't bring himself to. *R.221-222* That night, Saturday, he spent driving in circles again, trying to decide what to do.

A. And, I'm still thinking, what am I doing? I'm driving, I'm driving and I'm driving, and I got this little baby in the back of the trunk that's dead, that's thrashing around right in the back--in the back of the trunk.

Q. You got a baby bouncing around back there?

A. No, I was just figuring she probably was, you know, because of some of the bumps I was hitting.

Q. Yeah.

A. I mean, I'm like--I'm going out of my mind.

Q. Yeah.

A. And, I got back home this morning about, oh--

Q. This morning, the 25th, Sunday morning?

A. Right. I got home, I think it was right about 2:30.

Q. Okay.

A. I think, about 2:30, quarter to three, maybe. And, I laid down, and I'm like, you know, I mean, it's just flying at me--it's getting to the point, it's like I'm trying to go pick up the phone to call the sheriff's department, and I can't. So, I doze off for a second and the next thing I know, I hear my car start up.

Q. No kiddin'. Whoa--

A. I'm like--I'm like what? I'm dreamin'. So, I come haulin' butt out of my bedroom; I don't have any clothes on, except my underwear, come haulin' butt and my Firebird's going down the dirt road, like, about--like about 60 miles an hour up the dirt road with Major Pennington.

Q. Who is Major Pennington?

A. My boss.

R.224-225

The charges.

Mr. Bunney was indicted on two counts, the first for kidnapping Tonya "with the intent to inflict bodily harm or terrorize" her; the second for murdering her from a premeditated design or while engaged in the felony of kidnapping. *R.639*

The trial.

1. The defense.

The state presented the above-described evidence in its case-in-chief. Prior to trial the court, over defense counsel's strenuous objection, granted the State's motion in limine prohibiting the defense to present eyewitness and expert testimony

regarding Mr. Bunney's epilepsy on the basis of this Court's decision in Chestnut v. State, 538 So.2d 820 (Fla. 1989). *R.35-38*

After the State rested its case and the defense motion for acquittal was denied, the defense was permitted to proffer what the excluded testimony would have shown. *R.234, 235-236, 238, 240*

Three of Mr. Bunney's friends, Linda Yanchunis, her boy-friend Randy McAlpine, and Luke King, would have testified that on numerous occasions they had observed Mr. Bunney "pause in his speech, essentially blackout and then continue talking, and when he continued talking, he was disoriented, had difficulty knowing were he left off." These are symptoms of *petit mal* seizures. *R.240-241*

Mr. Bunney's adoptive mother, Doris Bunney, also would have testified:

> She will testify that when she received Gerald at the age of three months from the Department of Rehabilitative Services, that he was asthmatic. She will testify that he was always a slow learner. She would testify that in his childhood, he was hyperactive and as a child he was, I believe int he first grade, he was treated through the public school system with a drug by the name of Ritalin, Your Honor.
>
> She will testify that because the public school insisted on treating him with Ritalin that he was taken from the public school and placed in a Christian school. That the Christian school was essentially a one room school house and that the defendant remained in the Christian school for the balance of his education.
>
> She will testify, in addition, Your Honor, that at about the age of fourteen or fifteen, that the defendant began to have what were later diagnosed to be epileptic seizures, that he would blackout, that he would have seizures where he would

fall down and, on many occasions, he struck his head severely and caused injury to himself, striking his head.

She would say that the defendant was treated and he was treated with a drug by the name of Dilantin, Your Honor. She will also testify, via family history, that the mother was--the defendant's natural mother was a chronic alcoholic, was apparently an alcoholic during her pregnancy, that at the time she received Gerald from HRS, that she was institutionalized, and at the time of the HRS placement with Mrs. Bunney, that the natural mother was in one of the Florida State hospitals, mental hospitals, Your Honor. She would further testify that the mother was diagnosed to be a paranoid schizophrenic.

R.241-242

The last defense witness would have been Dr. Michael Maher, a forensic psychiatrist. *R.242*

Dr. Maher would testify that he's reviewed all of the HRS records concerning Gerald Bunney's dependency. He reviewed all the police reports, all of Gerald Bunney's school records, numerous depositions. He has reviewed and considered,in his opinion, the psychological testifying of Dr. Harry Krop, K-r-o-p, a clinical psychologist, Your Honor; in addition, that he conducted clinical interviews with the defendant and the defendant's mother.

On the basis of the information which was supplied to him, he would render the opinion, at the time of the offense, the defendant, within the realm of medical certainty, was not able to form the intent to premeditate--pardon me--was unable to form premeditation to kill, and he would further opine that he was unable to form the specific intent required for the offense of Kidnapping, Your Honor.

Dr. Maher bases this on the psychological testing of Dr. Harry Krop. That psychological testing, Your Honor, would indicate the defendant is borderline retarded. It would indicate that the defendant has organic brain damage and the particular type of brain damage that the defendant has, probably, is a result of fetal alcohol syndrome, Your Honor.

Your Honor, Dr. Maher would further testify that Ritalin, when given to brain damaged children, often increases the brain damage. This could have resulted in increasing the severity and depth and breadth of Mr. Bunney's brain damage.

He would, Dr. Krop--pardon me--Dr. Maher, would further testify that the static and numbness that the defendant talked

about on the videotape and in his statement to the police is consistent with a pre- or post-seizure activity.

* * * * * *

Your Honor, further, Dr. Maher would testify that based on the Health and Rehabilitative Services records which were supplied to him, would show very clearly, Your Honor, that the mother was a chronic alcoholic during her pregnancy. Those HRS records also indicated that Mr. Bunney was taken from his mother when his mother was passed out in a bar.

Dr. Maher would testify that Gerald Bunney suffers from the fetal alcohol syndrome, which, of course, resulted in brain damage from the time of his birth.

Based on Dr. Krop's report, which was supplied to Dr. Maher, Dr. Maher would testify that the defendant has a mental age of thirteen and because of his brain damage, he has impaired judgment and reasoning abilities, that the static, the numbness in his head that he opines is a result of some sort of seizure activity. Dr. Maher would be in a much better position to explain this.

And, based on all the information he has, he would opine that the defendant's statements to the police, in other words, what the defendant describes on that videotape, are consistent with a pre- or post-epileptic seizure. On the basis of this, he will opine that the defendant could not, did not, beyond or within the realm of medical certainty, could not form the intent to premeditate, as I mentioned earlier, nor did he have the specific intent necessary for the crime of Kidnapping.

* * * * * *

The doctor would further opine that because of his brain damage and the impulsivity that the defendant essentially testified to and the burst of anger that the defendant refers to, all are consistent with the activities of a brain damaged individual.

R.242-245

The trial judge reaffirmed his exclusion of the testimony, and the defense rested. *R.249, 251*

2. Closing argument.

Prior to trial, and again before closing arguments, the

defense moved the court to preclude the prosecutor in his argument from straying outside the evidence or reasonable inferences therefrom, and from making arguments calculated to excite the jurors' passions. Specifically, the defense was concerned with the prosecutor's intention to suggest that Mr. Bunney had planned to sexually molest the child when he took her from the trailer. The prosecutor responded: "I think the State should be allowed to draw all reasonable inferences from the evidence and the one that Mr. Alldredge has spoken to, I will be drawing that reasonable inference." *R.262* The motions were denied. *R.257-260, 654, 655-656*

Thereafter, over defense objections and motions for mistrial, the prosecutor was permitted to include the following in his closing argument to the jury:

> He told Detective McDermott later how it happened, and he knew why it happened. He just didn't want to tell Detective McDermott why it happened. I snapped. I had no reason. I don't know why.

R.280

> The main point of contention by Mr. Alldredge: Why? From the opening statement, why? We don't know why. Again, I don't have to prove to you why. Mr. Alldredge has continued to harp on that: Why? Why?
>
> What about this for a reason why? She knew him. What's he going to do? Take her back home, drop her off so she can tell her mother, Jerry picked me up in the middle of the night and took me out somewhere. What about that for a reason why? She knew him.
>
> He had no intention of taking her back. She knew him. Is that reasonable? Is that a reasonable inference you can draw from the evidence as to maybe why? You bet it is. And, why? What about this? What about getting back at Lois? You're fat and you're ugly. He's angry. He goes over there at 2:00 in

the morning. Angry about his job, according to Miss McWaters. He had been told earlier by his boss about his poor performance. Frustrated about Lois not going out with him. Angry and frustrated. So, he takes Tonya, takes his frustrations and his anger out on Tonya.

R.285

Now, he says, he's got static. He's had a few drinks. Couldn't that be a little buzz? Feeling good when he leaves the bar, maybe? Wants to go by and see Lois. He wants to go by and see Lois at 2:00 a.m.

How is Lois going to be dressed, possibly, at 2:00 a.m.? Ready to go out? Good chance, she's in her night clothes.

Where's Lois going to be at 2:00 in the morning? In bed? Possibly. Why does he want to go see Lois at 2:00 in the morning, a girl, who he has asked out about three or four times, a girl who, it's obvious, he's sexually attracted to?

MR. ALLDREDGE: Objection, Your Honor, move for a mistrial.

THE COURT: Objection, overruled. Motion for mistrial is denied.

MR. BENITO: Why does he want to see Lois at 2:00 in the morning? What are his plans for Lois when he gets over there? Why is he sneaking in at 2:00 in the morning to see Lois? He gets in there, though, see, and Lois isn't there. So, his original plans for Lois, whatever they might be, he cannot carry out. So, he takes Tonya instead.

Remember what he said in his taped statement? She was sleeping curled up on the front seat. All right. If he wanted to kill her, why didn't he just strangle her immediately out there in the front? Why drive her five miles away, to Grand Central Station, as Mr. Alldredge would have you believe? Why drive her to this desolate area five miles away?

She's lying on the front seat, curled up, half asleep. Why couldn't he just, if he wanted to kill her, why couldn't he just reach over and grab her at that time and choke her?

Recall what he said on the taped statement. He turned her over on her back. He's in his driver's seat. She's in the passenger's seat. He turns her over on her back. Her head's against the door. The lower portion of her body, clad in her little nightgown and underwear, is right here. (indicating).

What are his plans at that time? What are the plans of this man who, about half an hour earlier, had went over to see Lois

Zeigler, who went over to see Lois Zeigler who he had asked out four times? What are his plans for that little girl? And before he can carry out any plans to terrorize her, is it reasonable to infer that she screamed and he grabber her and he choked her, and, he killed her?

MR. ALLDREDGE: Excuse me. Your Honor, I would object at this point. I would move for a mistrial. I would ask the opportunity to supplement the record for appeal, Your Honor. It's urgent that I do so.

THE COURT: Motion denied. What the lawyers say is not evidence.

MR. ALLDREDGE: Your Honor--

THE COURT: You have the right to draw reasonable inferences and make your own argument, and you have rebuttal.

MR. ALLDREDGE: Your Honor, the record on appeal is going to remain silent as to the position of Mr. Benito's hands. I would like the record supplemented to show that Mr. Benito's hands were at essentially his pubic level. Your Honor, I think it's vital for the record to show that.

R.286-288

3. The jury deliberations.

When sending the jury to deliberate the trial judge advised the two alternate jurors that they were in "temporary recess". Thus, the judge told them, if the jury were to find Mr. Bunney guilty of first degree murder they would still be alternate jurors for purposes of the penalty phase of the trial. In the meantime, he said, they were free to leave the courtroom so long as they remained in the vicinity of the courthouse and kept the bailiff advised of their whereabouts. *R.334*

About two hours after the jurors retired they asked to be furnished the videotape of Mr. Bunney's statement to the detective in the jury room. *R.336-337* Over defense objections, the

judge elected instead to bring the jury back to the courtroom to view the video. *R.337-342*

Also over defense objections, the judge required that the alternates be seated with the jurors when they viewed the video. *R.342-343, 344-347*

The verdict, judgment, and sentence.

The jury found Mr. Bunney guilty of kidnapping and murder in the first degree. *R.353, 773* At the conclusion of the penalty phase trial, the jury recommended that on the murder charge Mr. Bunney be sentenced to life imprisonment without possibility of parole for 25 years. *R.618, 774* The judge followed the recommendation and imposed that sentence, consecutive to Mr. Bunney's sentence on the kidnapping conviction. *R.784*

On the latter the judge sentenced Mr. Bunney to life in prison. *R.782* This was a departure from the guidelines, which called for a sentence of 5 1/2 to 7 years. As his reason for the departure, the judge noted: "Scoresheet fails to take into consideration defendant also stands convicted of murder in the first degree arising out of the same criminal episode." *R.785*

The district court's decision.

On appeal Mr. Bunney challenged (1) the trial judge's exclusion of evidence regarding his epileptic seizure, (2) the prosecutor's speculation during closing argument that Mr. Bunney had intended to sexually molest the child, (3) the trial judge's insistence that the alternates join the jurors when reviewing

Mr. Bunney's videotaped statement, and (4) the sentencing guideline departure based on his murder conviction.

In its May 24, 1991 opinion the district court of appeal addressed only the first and fourth issues, and affirmed as to both. As to the latter, however, it certified that its decision passed on the following question of great public importance:

> IN SENTENCING FOR A FELONY WHERE THERE IS A CONTEMPORANEOUS CONVICTION OF AN UNSCORED CAPITAL FELONY, IS IT PROPER TO DEPART BASED ON THE DEFENDANT'S CAPITAL CONVICTION WHEN THE APPLICABLE GUIDELINES PROVIDE THAT VICTIM INJURY IS SCOREABLE?

Opinion, p.3

Mr. Bunney commenced this review proceeding on June 18.[2]

Summary of Argument

I. Mr. Bunney's right to present evidence in his defense was violated by the exclusion of evidence tending to show that he acted while in the throes of an epileptic seizure. If Chestnut v. State, was applicable to Mr. Bunney's case, it should be revisited because it was decided for policy reasons that are legislative. By excluding evidence that the defendant did not in fact have the requisite specific intent to commit first degree murder, the Chestnut majority effectively alters the statutory codification of the law of homicide as established by the legislature.

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[2]Mr. Bunney was represented by the Public Defender for the Thirteenth Judicial Circuit at trial, and the Public Defender for the Tenth Judicial Circuit initially represented him on appeal. The undersigned was appointed as his counsel in the fall of 1990.

In any event, Chestnut did not apply to Mr. Bunney's case. As the First District recently recognized, epilepsy is a physical condition, not a mental defect, and evidence of it is therefore admissible under Chestnut. Moreover, Chestnut ruled that evidence of a general inability to form a specific intent is inadmissible. It is not authority for excluding evidence that *at the time of the offense* Mr. Bunney lacked the requisite specific intent because he was suffering an epileptic seizure.

II. Mr. Bunney was deprived of a fair trial by the prosecutor's argument that Mr. Bunney planned to sexually molest the child when he took her from the trailer. There was absolutely no evidence to support the assertion, and it was made solely for the purpose of inflaming the jury.

III. The trial judge committed fundamental error by insisting that the alternate jurors sit with the jury when it reviewed Mr. Bunney's videotaped statement in the course of its deliberations. Both trial attorneys acknowledged that Mr. Bunney's demeanor on the tape was of vital importance, and both urged the jurors to examine it with care. By ordering the alternates' intrusion into the deliberative process at that crucial point, the judge increased the likelihood that the jurors' finding of innocence or guilt would be influenced by the alternates' attitudes--their "facial expressions, gestures or the like".

IV. It is not proper to depart from a guideline sentence on the basis of an unscored capital felony when the scoresheet includes points for the victim's death. Such violates the

important rule that a departure may not be founded on a factor already taken into account by the guidelines. That rule was not offended under the circumstances present in either of the authorities cited by the district court of appeal.

Argument

I. MR. BUNNEY WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW BY THE EXCLUSION OF RELEVANT EVIDENCE THAT WAS VITAL TO HIS DEFENSE AGAINST BOTH CHARGES.

An accused's right to present evidence in his defense is a minimum requirement of the due process guarantee. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973).

In this case, Mr. Bunney never contested that he had taken Tonya from her home, or that he had killed her. What was at issue, however, was his state of mind, or intent, when he did those things.

And, indeed, Mr. Bunney's intent was the central issue with respect to both charges against him. Kidnapping, charged in Count I of the indictment, is a specific intent crime. State v. Sanborn, 533 So.2d 1169 (Fla. 1988). To prove it as charged in this case, the State was required to show that Mr. Bunney confined, abducted or imprisoned Tonya against her will and without lawful authority with the intention specifically to "[i]nflict bodily harm upon or to terrorize" her. Section 787.01(1)(a)3, Florida Statutes. *R.633* In the absence of that intention on Mr. Bunney's part, he would have been guilty only of the lesser

included offense of false imprisonment. Sanborn, supra; Section 787.02(1)(a), Florida Statutes.

Premeditated first degree murder is also a specific intent crime, it being the State's burden to prove that the accused killed from a premeditated design. Section 782.04(1)(a)1, Florida Statutes. Capital felony murder, alleged as an alternative theory against Mr. Bunney in this case, does not require a specific intent to kill, but is nevertheless a specific intent crime insofar as the underlying felony is such. See, Chestnut v. State, 538 So.2d 820, 824 (Fla. 1989). That was the case here: as an alternative basis for Count II, Mr. Bunney was accused of killing Tonya while perpetrating or attempting to perpetrate "the felony of kidnapping"--a specific intent crime. *R.633*

For these reasons, proof that Mr. Bunney had the specific intention to kill Tonya, or to inflict bodily harm or terrorize her, was vital to the State's case. Conversely, proof that Mr. Bunney did not act with those intentions was vital to the defense.

Mr. Bunney acted alone, and without eyewitnesses. Therefore, the only first-hand account of his actions was his videotaped statement to the sheriff's detective. In that statement, Mr. Bunney asserted that he did not know why he did what he did, nor had he at the time; he'd felt angry, but did not intend to harm Tonya. Rather, he had acted "all of a sudden", "before you know it." Mr. Bunney also related that in the course of his crime there had been "static" in his head.

We know, from the proffer of Dr. Maher's testimony, that Mr. Bunney described an epileptic episode known as a *petit mal* seizure. We know, also from the defense proffer, that Mr. Bunney's friends had observed him in the throes of epileptic activity in the weeks preceding the crime. And we know, again from Dr. Maher, that in the course of an epileptic episode Mr. Bunney could not, did not, form a specific intention to kill, harm, or terrorize Tonya McGrew.

Of course, this was important information. It explained and corroborated Mr. Bunney's statement to the detective. It proved that he was not guilty of the crimes as charged. But the jury was not permitted to know these things during the guilt phase of the proceedings.[3] The judge excluded this evidence and the district court upheld its exclusion, citing Chestnut, *supra*. This was error.

Chestnut held that, in the absence of an insanity or voluntary intoxication defense, evidence of an abnormal mental condition was inadmissible to prove that the defendant had a "diminished capacity", and therefore could not have formed the intent necessary to proof of the crime. In Chestnut, a murder case, the defendant sought to disprove intent with evidence that he was of low intelligence; that some years earlier he had been kicked in the head by a bull, sustaining a fractured skull and brain damage which caused a seizure disorder; and that he had an

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[3]The jurors did receive this evidence during the penalty phase trial, and recommended against imposing the death penalty.

impaired verbal memory and a passive personality that rendered him easily led. Chestnut, 538 So.2d at 821.

Holding this evidence inadmissible, the Supreme Court majority was loath to rule that a person's mental abnormalities short of insanity could exempt him from the presumption that all persons are capable of the *mens rea* necessary to commit premeditated homicide.

> It could be said that many, if not most, crimes are committed by persons with mental aberrations. If such mental deficiencies are sufficient to meet the definition of insanity, these persons should be acquitted on that ground and treated for their disease. Persons with less serious mental deficiencies should be held accountable for their crimes just as everyone else.

Chestnut, 538 So.2d at 825.

This was a hotly debated decision by a bare majority of the Court. Mr. Bunney weighs in with the Chestnut dissenters for obvious reasons, and for reasons in addition to those expressed in Justice Overton's opinion.

The Chestnut decision was driven primarily, if not exclusively, by a policy favoring public safety--the majority was concerned that a dangerous accused would go free. The majority noted that a jury could find a first-degree murder defendant guilty of a lesser homicide, but that there are other crimes that do not have lesser included offenses requiring only general intent.

> [I]n the case of robbery, which was held to be a specific intent crime in *Bell v. State*, 394 So.2d 979 (Fla. 1981), the application of diminished capacity could result in an absolute acquittal of any crime whatsoever. This is so because the only necessarily lesser included offense of robbery is petit

> theft and that, too, is a specific intent crime. *State v. Allen*, 362 So.2d 10 (Fla.1978). Apparently, the same would be true for battery, *Mellins v. State*, 395 So.2d 1207 (Fla. 4th DCA), *review denied*, 402 So.2d 613 (Fla.1981). Since burglary is also a specific intent crime, *Presley v. State*, 388 So.2d 1385 (Fla. 2d DCA 1980), one acquitted of that offense could only be convicted, if at all, of trespass. Unlike the case where one is found guilty by reason of insanity, there would be no authority to commit these persons for treatment except through the use of civil remedies and its concomitant burdens.

Chestnut, 538 So.2d at 824.

But those policy concerns are singularly *legislative*. Even insofar as Florida adheres to common law definitions of crimes, that is the product of legislative enactments. Sections 2.01 and 775.01, Florida Statutes. And in those enactments the legislature reserved to *itself* the power to deviate from the common law. *Id.*

It has done so in the case of homicide. At common law there were two kinds of unlawful homicide. A killing with "malice aforethought" was murder. All other inexcusable homicides were termed manslaughter. *Perkins on Criminal Law 2d*, pp.34, 51.

The "malice aforethought" necessary to establish murder was malice in the legal sense; that is to say, it could be "express", as in the case of an intentional killing, or "implied by law", as where death was the unintended result of conduct in wanton or willful disregard of an unreasonable risk. *Perkins* at 35-36, 48-49.

Eventually, in order to restrict imposition of the death penalty to only the most culpable, states began enacting stat-

utes to subdivide murder into degrees, generally according to the nature or level of the malice involved. 2 *Wharton's Criminal Law, 14th ed.*, s.138.[4]

Florida first codified the law of homicide in 1868 with enactment of Ch.1637, Laws of Florida (1868). The statute established classifications of murder that in pertinent part remain substantially unchanged today.

A killing "perpetrated from a premeditated design to effect the death of the person killed, or any human being" was and is murder in the first degree. Second degree murder was and is a homicide "perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual[.]" Sec. 2, Sub-Chap. 3, Ch. 1637, Laws of Florida (1868); s. 782.04(1)(a)1 & (2), Florida Statutes (1987).[5]

Under the 1868 statute, manslaughter was "the killing of

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[4]The first state to do so was Pennsylvania, in 1794:

> All murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate or premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree.

Wharton's, s.138.

[5]In addition, both statutes also established the category of third degree murder, inapplicable here. Also, under the current section 782.04, unlawful killings committed in the course of certain felonies are murders in the first, second, or third degree as specified in the statute.

one human being, by the act, procurement or omission of another, in cases where such killing shall not be murder, according to the provisions of this chapter[.]" Sec. 3, Sub-Chap. 3, Ch. 1637, Laws of Florida (1868). Compare, s.782.07, Florida Statutes (1987).

By codifying the law of homicide into degrees based on what in fact was the accused's state of mind at the time of the offense, and accordingly prescribing punishments of varying severity, the legislature struck what it considered the appropriate balance between public safety and relative culpability. The person who kills with the specific intention to do so is deemed the most culpable, and therefore is subjected to the most restrictive or severe penalty. The person who, *in fact*, does not kill with the specific intention to do so is *less* culpable, and therefore is subjected to a lesser penalty. In both instances, the public safety is protected, because both killers are confined.

In Chestnut the majority overrode these legislative policy determinations. Under the statute an accused who did not kill from a premeditated design is not guilty of first degree murder, period. But by excluding evidence of that fact, the Chestnut majority placed in the category of first degree murderers a class of defendants the legislature did not include when establishing the statutory criteria for that offense.

The Court's concern about other crimes for which there are no lesser included offenses involving general intent underscored

the essentially legislative nature of its reasoning. As to these the Court noted that "[u]nlike the case where one is found not guilty by reason of insanity, there would be no authority to commit these persons for treatment except through the use of civil remedies and its concomitant burdens." Chestnut 538 So.2d at 824.

Nevertheless, those remedies are in place, and they embody legislative and/or constitutional choices about what burdens should be born by those who would involuntarily incarcerate a person for treatment of a mental disorder. Surely those burdens are not so great that their avoidance would justify preventing an accused from presenting evidence that he is innocent of the crime charged against him.

Whatever the merits of the Chestnut decision, it should not have been applied to Mr. Bunney's case for two reasons. First, as the First District recently noted, epilepsy is not a mental defect, but is a physical condition that affects consciousness. For this reason, evidence of epilepsy is not inadmissible under Chestnut. Wise v. State, ---So.2d---, 16 FLW D1475 (Fla. 1st DCA 1991).

> *Chestnut v. State* is inapplicable because it is limited to evidence of mental deficiency or psychiatric impairment. It specifically concerns an extension of the recognized M'Naughten and insanity defense [...][.] The instant case, unlike *Chestnut*, involves a physical defect or condition which has a potential result, loss of consciousness. This is a situation wholly distinguishable from one involving a diminished capacity defense. A diminished capacity defense concerns the defendant's ability to understand the wrongfulness of his acts. The instant case presents a question of the defendant's consciousness of his acts themselves, not of his understanding

> of their wrongful nature. Wise did not seek to prove the existence of any mental illness or psychiatric condition, ut instead that a physical condition [epilepsy] may have caused him to blackout at the time of the assault in question.

Wise, 16 FLW at D1476.

Indeed, the Wise court pointed out,

> *Chestnut* itself notes that one of the primary cases the court relied upon, *Bethea v. U.S.*, 365 A.2d 64 (D.C.App. 1976) distinguishes between "partial or relative insanity" (i.e. diminished capacity) and "conditions such as intoxication, medication, epilepsy, infancy or senility" which are "in varying degrees, susceptible to quantification or objective demonstration, and to lay understanding. *Id.* at 823.

Wise, 16 FLW at D1476.

Another critical distinction between the instant case and Chestnut is that here the defense did not seek to prove merely that Mr. Bunney has diminished mental faculties, or that his mental deficiencies rendered him generally incapable of forming the state of mind necessary to commit a specific intent crime. Rather, unlike Chestnut, Mr. Bunney sought to prove that *at the time he acted* he was afflicted by an epileptic seizure.

The difference is the same as that between claiming to have been intoxicated when committing the offense and claiming merely to be an alcoholic. Chestnut fell into the latter category; Mr. Bunney is in the former.

Notably, when holding Chestnut's evidence of general incapacity inadmissible the Chestnut Court reaffirmed its holding in Gurganus v. State, 451 So.2d 817 (Fla. 1984), which "reaffirmed the long-standing rule in Florida that evidence of voluntary intoxication is admissible in cases involving specific intent."

Chestnut, 538 So.2d at 822.

In Gurganus, a murder case, the Supreme Court held that expert psychological testimony was (1) inadmissible with respect to the defendant's insanity defense, because the experts could not opine whether the defendant appreciated the wrongful nature of his acts; and (2) inadmissible with respect to whether the defendant's acts were more consistent with a depraved mind than with premeditation, because that determination was exclusively for the jury. Gurganus, 451 So.2d at 820-821.

But on a third basis, the Court found error in the exclusion of the psychologists' testimony.

> As discussed earlier, Gurganus intended to use the testimony ***as evidence of his intoxication and resulting inability to entertain a specific intent at the time of the offense.*** To set up the proper foundation for the expert testimony the defense question the psychologists on the basis of a hypothetical set of facts, the most important of which was the hypothetical fact of Gurganus' consumption of Fiorinal capsules combined with alcohol. The record certainly contained sufficient facts from which the jury could have properly inferred Gurganus' consumption of the drugs and alcohol and, therefore, questions and opinions regarding his state of mind at the time of the offense based on such hypothetical facts were proper. [citations omitted]
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> * * * * * *
>
> When specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant. [citations omitted] As such it is proper for an expert to testify "as to the effect of a given quantity of intoxicants" on the accused's mind when there is sufficient evidence in the record to show or support an inference of consumption of intoxicants. *Cirack*[*v. State*], 201 So.2d at 709.

Gurganus, 451 So.2d at 822-823 (Emphasis added).

In the case *sub judice* there was sufficient evidence,

either admitted or proffered, to show that at the time of the crimes charged against Mr. Bunney he was suffering an epileptic episode. Under Gurganus, it was proper for the defense to submit that evidence, and it was proper for an expert to testify as to the effect of the epileptic activity on Mr. Bunney's ability to form a specific intent.

Chestnut did not change this. Though the Court disavowed Gurganus's *dicta* that evidence of ***any*** condition affecting the accused's ability to form a specific intent was relevant, nowhere in Chestnut did the Court hold that ***only*** evidence of voluntary intoxication was permissible. To the contrary, as pointed out above, the Court recognized a number of conditions which could properly lead a jury to conclude that the accused was unable to form the specific intent required for a conviction.

> [T]here are significant evidentiary distinctions between psychiatric abnormality and the recognized incapacitating circumstances. 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.

Chestnut, 538 So.2d at 823, quoting Beathea v. United States, 365 A.2d 64, 88 (D.C.1976)(Emphasis added).

By preventing Mr. Bunney from presenting relevant evidence that at the time of his crimes he was afflicted by this "recognized incapacitating circumstance", *i.e.*, an epileptic seizure, the trial judge deprived him of due process and a fair trial.

II. MR. BUNNEY WAS DEPRIVED OF A FAIR TRIAL BY THE PROSECUTOR'S IMPROPER SPECULATION THAT MR. BUNNEY INTENDED TO SEXUALLY MOLEST THE VICTIM.

The exclusion of evidence that Mr. Bunney acted in the course of an epileptic seizure was doubly injurious to his defense: aside from preventing Mr. Bunney's effort to prove directly that he did not have the specific intent to harm or kill the child, it gave the prosecutor an excuse to improperly speculate that Mr. Bunney acted from a particularly sinister motivation.

It is firmly established that in argument to the jury a prosecutor may not bolster his case by references or speculations that are not supported by the evidence. Huff v. State, 437 So.2d 1087, 1090 (Fla. 1983). But in Mr. Bunney's case the prosecutor's closing argument violated that proscription in an especially pernicious way: with no evidence whatever to support the charge, the prosecutor made a calculated and intentional suggestion to the jury that Mr. Bunney had gone to the trailer to have sex with Lois Zeigler, and that when he discovered she was not home he decided to have sex with Tonya instead.

There was not a single shred of evidence to support that inflammatory speculation, even as an inference. That this ploy was intended to inflame and prejudice the jurors against Mr. Bunney was underscored by the prosecutor's own observation that he was not required to prove a motive in the case. *R.282*

Under the circumstances, Mr. Bunney is entitled to a new trial. *Compare,* Beagles v. State, 273 So.2d 796, 799 (Fla. 1st

DCA 1973)(Notwithstanding evidence that sperm were found in murder victim's vagina, it was reversible error to permit prosecutor to argue that defendant had raped victim before murdering her; new trial ordered).

III. THE TRIAL JUDGE COMMITTED FUNDAMENTAL ERROR BY INSERTING THE ALTERNATE JURORS INTO THE JURY'S DELIBERATIVE PROCESS.

It is a very basic principle that jurors are to deliberate their verdict without outside influence. That is the rationale for the last sentence of Fla.R.Crim.P. 3.280(a), regarding alternate jurors:

> Except as hereinafter provided regarding capital cases, an alternate juror, who does not replace a principal juror, shall be discharged at the same time the jury retires to consider its verdict.

This is a mandatory requirement, the violation of which is fundamental error. Fischer v. State, 429 So.2d 1309 (Fla. 1st DCA 1983); Berry v. State, 298 So.2d 491 (Fla. 4th DCA 1974). Such is the case even where, as in Berry, the alternate juror merely observes the jury's deliberation and does not participate in it. As the Fischer court noted, "[t]he attitude of the alternate juror could have been conveyed to the jurors by facial expressions, gestures or the like, and may have had some effect upon the decision of one or more juror." Fischer, 429 So.2d at 1311.

The second portion of Rule 3.280, which addresses the procedure in capital cases, does not alter the principle.

> (b) At the conclusion of the guilt or innocence phase of the trial, each alternate juror will be excused with instructions

> to remain in the courtroom. The jury will then retire to consider its verdict, and each alternate will be excused with appropriate instructions that he may have to return for an additional hearing should the defendant be convicted of a capital offense.

Thus subsection (b) provides a mechanism for keeping the alternates available to participate, if need be, in the sentencing recommendation phase of a capital proceeding. But their exclusion from the jury's deliberation on guilt or innocence is maintained, as it must be.

In the instant case the trial judge insisted, over vociferous defense objections, that the alternates sit with the jurors when, during their deliberations, they reviewed the videotape of Mr. Bunney's statement to the detective. This was fundamental error, made worse by the specific nature of the jurors' activity at the time.

As previously mentioned, the only real issue in the case was Mr. Bunney's state of mind at the time of the crimes. On this point in closing arguments both the defense and the prosecution stressed the importance of Mr. Bunney's demeanor during his videotaped statement, and they urged the jurors to pay special attention to that singular piece of evidence. *R.270-272, 299-300, 302-304, 311*

Thus it is no exaggeration to observe that Mr. Bunney's fate directly rested on the jurors' perceptions of his demeanor during his statement. The alternates' court-ordered intrusion into the deliberative process, especially at a time when the jurors' assessment of Mr. Bunney's guilt or innocence of the

specific intent crimes charged could most be affected by the alternates' attitudes--their "facial expressions, gestures or the like" while the tape was playing--was fundamental error.

IV. SINCE THE SENTENCING SCORESHEET FOR MR. BUNNEY'S KIDNAPPING OFFENSE INCLUDED POINTS FOR THE VICTIM'S DEATH, IT WAS IMPROPER TO IMPOSE A DEPARTURE SENTENCE BASED ON THE UNSCORED CAPITAL FELONY.

Recall that the trial judge departed from the guideline sentence for Mr. Bunney's kidnapping offense because, he wrote, the scoresheet "fails to take into consideration defendant also stands convicted of murder in the first degree arising out of the same criminal episode." *R.785* In its opinion the district court pointed out that in Hansbrough v. State, 509 So.2d 1081 (Fla. 1987), and Livingston v. State, 565 SO.2d 1288 (Fla. 1988), this Court held that a contemporaneous conviction of an unscored capital felony is a valid reason to depart from the guideline sentence.

But in neither of those cases did the departure offend the important principle that a factor already taken into account by the guidelines cannot be employed as a reason for departure. Mathis v. State, 515 So.2d 214, 216 (Fla. 1987); Gortman v. State, 547 So.2d 285 (Fla. 2d DCA 1989).

In Hansbrough the defendant was convicted of robbing and murdering his victim. He challenged, *inter alia*, the departure sentence imposed for the robbery. At that time, points for victim injury could be assessed only when such injury was an element of the crime. Hansbrough, 509 So.2d at 1087. As the

Court noted, Hansbrough's first-degree murder conviction had not been taken into account by the guideline, and was therefore a proper basis for imposing a departure sentence for the robbery. *Id.*

The guidelines were amended in 1987 to permit assessment of points for victim injury regardless of whether such injury is an element of the crime. Florida Rule of Criminal Procedure Re Sentencing Guidelines Rules (3.701 and 3.988), 509 So.2d 1088 (Fla. 1987).

In Livingston the defendant was convicted of first degree murder in the death of one victim, and the attempted murder of *another*. On his challenge to the departure sentence imposed for the attempted murder charge, this Court noted that the defendant's contemporaneous conviction of the unscored capital felony was a valid reason for departure, citing Hansbrough. But since the murder victim was not the victim of the attempted murder, the "victim injury" points assessed on the attempted murder scoresheet would not have included points for the murder victim's death. Thus, again, departing on the basis of the murder was proper because the scoresheet failed to take it into account.

Here, on the other hand, the scoresheet *did* take the victim's death into account. Twenty-four points were added to Mr. Bunney's total for this very factor. *R.785* Therefore, it was improper of the judge to depart from the guideline sentence on the basis of the murder conviction.

In its opinion the district court posited that Mr. Bunney's position could lead to an anomalous result:

> For example, if defendant had been convicted of second degree murder rather than capital murder, his scoresheet on the kidnapping offense would include points for "victim injury or death," thereby resulting in his receiving a longer sentence than if he had been convicted of capital murder.

Opinion, p.2 n.1.

Not so, for the court overlooked that the guideline sentence encompasses all of a defendant's offenses at conviction. In either case Mr. Bunney would be sentenced both for the kidnapping and the *murder conviction,* as well. As it stands, he has been given a departure sentence of life imprisonment for kidnapping, followed by a consecutive life sentence with no possibility of parole for 25 years for the capital murder. In Mr. Bunney's view, the kidnapping sentence should instead be only between 5 1/2 and 7 years, plus the sentence for murder.

In the district court's hypothetical, Mr. Bunney would be sentenced according to a Category One scoresheet.[6] He would receive 150 points for the primary offense of second degree murder, a first degree felony punishable by life. The kidnapping, also a first degree felony punishable by life, would be scored as an additional offense at conviction, adding 45 points. With 21 points added for victim injury, Mr. Bunney's total would be 216. The total guideline sentence for both the murder and

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[6]As between that and the Category Nine scoresheet, the first would result in the most severe sanction. Fla.R.Crim.P. 3.701d.3.b).

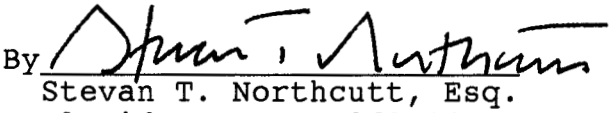
the kidnapping would be 12 to 17 years. This result can hardly be considered anomalous.

Conclusion

For the reasons described, Mr. Bunney asks the Court to reverse his convictions and sentences and remand for a new trial. At the least, he urges the Court to answer the certified question in the negative, set aside his sentence for kidnapping, and remand with directions that he be re-sentenced for that offense within the guideline range.[7]

Respectfully submitted,

LEVINE, HIRSCH, SEGALL
& NORTHCUTT, P.A.

By 

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[7]Since the trial judge gave only the improper reason for departing from the guideline sentence on the kidnapping charge, the State obviously cannot show that the absence of the invalid reason would not have affected Mr. Bunney's departure sentence. *See* Albritton v. State, 476 So.2d 158 (Fla. 1985).

Certificate of Service

I certify that a true copy of the foregoing was furnished by U.S. Mail to the office of the Attorney General, ATTN: Stephen A. Baker, Assistant Attorney General, 2002 N. Lois Avenue, Suite 700, Tampa, Florida 33607 on July 22, 1991.

Stevan T. Northcutt, Esq.