IN THE SUPREME COURT OF FLORIDA

CHARLIE THOMPSON, :

Appellant, :

vs. : Case No. 81,039

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On September 17, 1986, the Hillsborough County Grand Jury indicted the Appellant, CHARLIE THOMPSON, for the first-degree murders and kidnappings of William Russell Swack and Nancy Walker which occurred on August 27, 1986. (R21-23)[1] The Grand Jury returned an amended indictment on January 14, 1987. (R24-26)

Appellant was originally tried, convicted, and sentenced to death for each of the murders with consecutive life sentences for each kidnapping in 1987. (R4-5) On July 20, 1989, this Court reversed and remanded for a new trial. Thompson v. State, 548 So. 2d 198 (Fla. 1989). (A1-8)

Appellant was again tried, convicted and sentenced to death for each murder with consecutive life sentences for each kidnapping in 1990. (R8-9) Again, on January 30, 1992, this Court reversed and remanded for a new trial. Thompson v. State, 595 So. 2d 16 (Fla. 1992). (A9-11)

Upon remand, Appellant was tried by jury for the third time before the Honorable Diana M. Allen, Circuit Judge, on October 5-9, 1992. (R16-17;T1,67,237,411,445) The jury found Appellant guilty as charged. (R158-160;T439) The court adjudicated Appellant guilty for all four charges. (T442) The jury recommended the death penalty for each murder by a 7 to 5 vote. (R168;T574-575,625)

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[1] References to the record on appeal are designated by "R" and the page number. Because the trial and sentencing transcript was not numbered consecutively with the record, references to the transcript are designated by "T" and the page number. References to the Appendix to this brief are designated by "A" and the page number.

On December 28, 1992, the court sentenced Appellant to death for each murder and to consecutive life sentences for each kidnapping. (R211-228;T607-618) Appellant filed a notice of appeal. (R233)

STATEMENT OF THE FACTS

A. Competency Proceedings

Defense counsel moved for a psychiatric and psychological examination of Appellant to determine his competency to stand trial. (R59-60) The court granted the motion and appointed Dr. Daniel Sprehe and Dr. Arturo Gonzalez to conduct the examination. (R63-67;T642-645) Both doctors filed reports finding Appellant competent. (R71-75) Defense counsel also filed a motion to appoint the diagnosis and evaluation team of the Department of Health and Rehabilitative Services (HRS) to examine Appellant, determine whether he is mentally retarded, and determine his competency to stand trial. (R76077) The court granted this motion. (R79-82;T655-660) HRS filed a report including an evaluation by Dr. Charles Logan finding Appellant to be mildly retarded and incompetent to stand trial. (R106-113)

The court conducted evidentiary hearings to determine Appellant's competency on October 2 and 5, 1992. (T672-692,724-774) Dr. Gonzalez testified that he examined Appellant in 1987 and again in July, 1992. (T675-677) Dr. Gonzalez found Appellant competent to stand trial, explaining his observations regarding the criteria for competency. (T678-682) However, Dr. Gonzalez did not conduct any psychological tests to determine Appellant's intelligence. (T680,684-686)

Dr. Sprehe testified that he examined Appellant in February, 1987, and on July 27, 1992. (T728-729) Dr. Sprehe also found Appellant to be competent and explained his observations regarding

the competency criteria. (T729-731) Dr. Sprehe did not conduct any tests to determine Appellant's intelligence. (T731-732)

Court reporter Linda Collier identified a transcript of Appellant's testimony from his 1987 trial. (T733-734) The court admitted and considered the transcript over defense counsel's relevancy objection. (T734-735)

Dr. Logan testified that he examined Appellant on August 31, 1992. (T736,739-740) He administered the Weschler Adult Intelligence Scale Revised and determined that Appellant was mildly retarded with an IQ of 56 and the social maturity of a 16 year old. (T740-741) Dr. Logan found Appellant incompetent to stand trial and explained his observations regarding the competency criteria. (T742-746,750-759)

Former prosecutor Michael Benito testified that he prosecuted Appellant at the two prior trials. (R759-760) There were no problems with Appellant's conduct at the first trial until the jury returned a guilty verdict. Appellant then became upset with his defense attorney, and spent the remainder of the trial in the holding cell. (T760-762) There were no problems at the second trial. (T761)

Craig Alldridge testified that he and Mr. O'Connor represented Appellant at his first trial. (T763-764) They had great difficulty with Appellant. One of O'Connor's primary functions was to keep Appellant in his seat and quiet. He wanted to stand up and address the court and the jury. (T764-765) After the verdict, Appellant got up and stumbled toward the jury saying, "New lawyers. New

lawyers." (T765) Appellant absented himself from the penalty phase. Both defense counsel and the judge attempted to explain the consequences of his actions, but Appellant refused to participate. (T766) They had even more difficulty with Appellant after the case was remanded for the second trial. The Public Defender's Office had to withdraw as counsel because Appellant would not cooperate with them. (T764-765)

The court found Appellant competent to stand trial. The court also found that Appellant was mildly retarded and took that into consideration in determining competency. (T773-774)

B. Trial Testimony

James McKeehan was the general superintendent at Myrtle Hill Memorial Park cemetery located at 50th Street and Buffalo in Tampa. (R148-149) McKeehan testified that William Russell Swack was a corporate officer and bookkeeper for the cemetery. (T150-151) Swack shared an office with his assistant, Nancy Walker. (T152)

McKeehan hired Appellant as a groundskeeper in March, 1985. (T161) Appellant injured his back while digging a grave and began collecting worker's compensation benefits through the cemetery office. (T161-162) Despite efforts by Swack and McKeehan to explain how the benefits were paid, Appellant persisted in the erroneous belief that the company owed him between $150 and $180 more than he had received. (T163-164) In May, 1986, Appellant told Kathleen Shannon that he felt the cemetery still owed him $150 for his back injury compensation claim. (T219-221) Appellant received his last benefit check on June 27, 1986, and McKeehan never saw him

again. Appellant was fired for failing to return to work on July 16, 1986. (T164)

Russell Swack's wife Debra testified that her husband was wearing a watch -- State's exhibit 16, a ring -- State's exhibit 17, a bracelet, a wedding band, and a necklace when he left for work on August 27, 1986. (T221-223) Swack dropped her off at her office in Brandon around 8:45 a.m. (T223-224)

McKeehan saw Swack and Walker in their office just before he left for an appointment around 10:00 a.m. on August 27. He noticed Swack's car in the parking lot. (T154-155) When McKeehan returned in about half an hour, Swack's car was gone, and his office door was closed and locked. (T155-156)

Scott Hoffman, the manager of the cemetery monument shop, also saw Swack and Walker in their office around 10:00 a.m. on August 27. (T179-180) Swack and Walker were busy with someone in their office. (T180) Hoffman knew Appellant. (T182) But he could not identify the person in the office because he was not paying attention and did not see the man's face or notice his clothing. He just saw the shadow or figure of a large person, about six feet to six feet two inches tall and 200 to 220 pounds. He assumed it was a man because of his size, but he did not notice whether the man was white, black, or Asian. (T180-184) Hoffman left the office, then returned in fifteen minutes and found the door was locked and Swack's car was gone. Hoffman never saw Swack or Walker again. (T181)

Vincent Olds testified that he discovered the bodies of a man and a woman, shown in State's exhibits 1 and 2, in a wooded area of Williams Park around 1:30 p.m. on August 27. (T94-97) Olds reported this to a county lawn maintenance crew who also viewed the bodies and called the police. (T97) Olds said no one touched the bodies while he was there. (T98) He did not hear any gunshots or see anyone running away or acting suspiciously, although people in the park scattered when the police arrived. (T98-99) Olds did not see Appellant at the park. (T99-100)

Tampa police officers secured the scene and gathered evidence, but they did not find any gun, knife, or other cutting instrument. (T100-103,125) They did not locate any physical evidence at the scene which could be connected to Appellant. (T104-105,124-126, 128,206) A plaster cast taken from the ground near the man's body had no evidentiary value. (T119,124,133-134,200-201)

Former homicide investigator Kenneth Burke identified State's exhibits 1 through 9, photos of the bodies of the white male victim and the white female victim. (T106-122) The bodies were in a wet and muddy area of thick underbrush. (T109) The man was lying on his back wearing only his underwear, shoes, and socks. His shirt was laid across his chest and his pants were beside the body. (T110,115) A pair of broken glasses were near the body. (T116) A tie was found 20 to 30 feet away. (T118) The body was dirty and had both puncture wounds and a gunshot wound next to the left eye. (T116-117,128) The man was wearing a bracelet on his right wrist and a necklace. There was a ligature mark on his neck which

appeared to correspond to the necklace. (T121-122,126-127) An area of white skin on his left wrist indicated he had been wearing a watch. There were no rings on his fingers. (T122) There were blood droppings on the leaves and foliage around the man's body. (T118) The court sustained defense counsel's objection when Burke said the ground around the man's body was scuffed up as if there had been a violent struggle. (T111)

Burke testified that the woman's body was fully clothed. She way lying on her stomach with her head cradled on her crossed arms. (T110,112-113) Her sunglasses were on top of her head. (T113-114) Her mouth was open and resting on her forearm. (T114) She was wearing a pearl necklace and gold earrings. (T120) There was a gunshot wound about an inch into her hairline towards the back of the left side of her head. (T120-121)

The police found Swack's blue Cadillac, shown in State's exhibit 11, in the Williams Park parking lot. The car was impounded, searched, and sent to the Pinellas County Sheriff's Department to be checked for fingerprints, blood, hairs, and fibers. (T122-123, 126,136-138,143-145,186,201) No physical evidence was recovered from the car which could be connected to Appellant. (T201-202,208-209)

Upon finding Swack's car, the police contacted McKeehan at the cemetery. McKeehan identified the car and the bodies. (T144-145, 157-158,186-187) At trial, the parties stipulated to the identities of the deceased as William Russell Swack and Nancy Walker. (T244-245)

Det. Childers went to the cemetery office with McKeehan and another detective. (T159,187-188) When the door to Swack's office was unlocked, they found Walker's purse under her desk, her glasses on her desk, and her typewriter was still turned on. On Swack's desk, they found a pack of cigarettes and a lighter, and his adding machine was turned on. (T159,188-189) McKeehan checked the vault and found it unlocked. A bookkeeping ledger was in the vault. Nothing appeared to be missing. (T160) Childers said the ledger was on Swack's desk. (T189) There were no signs of a struggle in the office. (T161,189)

Dr. Charles Diggs, an associate medical examiner, went to Williams Park to examine the bodies on August 27. (T245-252,263) Dr. Diggs performed autopsies on August 28. (T253,263) He found nine knife wounds on Swack's body. He could not determine the order in which they occurred, but all were inflicted while Swack was alive, as indicated by bleeding from the wounds. (T253-260) Two shallow neck wounds were not lethal. (T254-255) A chest wound near the left nipple penetrated the left lung, caused bleeding in the chest cavity, and would have been lethal, although not immediately. (T255-256) Another chest wound was superficial. (T257) Two knife wounds to the left side of the abdomen penetrated the abdominal cavity and caused internal bleeding. They would have been fatal without treatment. (T257-258) Another wound to the right side of the abdomen also penetrated the abdominal cavity and would have been fatal. (T259) There was a superficial wound to the right shoulder and a non-lethal wound behind the right ear. (T259-

260) Swack also had a gunshot wound at the corner of his left eye. Soot and stippling around the wound showed that it was fired at very close range. Swack was alive when he was shot. The gunshot would have immediately incapacitated him. (T261-263) Dr. Diggs concluded that the knife wounds were inflicted during a struggle which preceded the shooting. (T262-263) The gunshot wound and the multiple stab wounds were the cause of death. (T263)

Dr. Diggs removed Walker's clothing and found dirt and debris on her back and beneath her underwear. (T264) There was a bite mark on her arm where her mouth was resting. Bruising indicated that the bite occurred while she was alive. (T265-267) There was a single gunshot wound to the back of her head. Blood flowing down the left side of her neck showed that she was alive and lying face down when she was shot. (T264-269) The gunshot wound went through the upper brain stem and would have been immediately lethal. (T270) Dr. Diggs could not determine the precise time of death for either Walker or Swack. (T271)

On August 28, Det. Childers returned to the cemetery and interviewed some of the employees, including Herman Smith. (T190-191) No one had seen Appellant at Myrtle Hill on August 27. (T204) Between 4:00 and 4:30 p.m. on August 28, Childers received information that a black male attempted to cash a Myrtle Hill Cemetery check for $1500 at a Tampa bar, Clementi's Lounge. (T192) Childers examined the ledger on Swack's desk, State's exhibit 12, and found that the last entry was a check in Swack's handwriting dated August 27, 1986, payable to Appellant for $1500. McKeehan made a xerox

copy of the ledger entry, State's exhibit 12A. McKeehan found a carbon copy of the check, State's exhibit 13, in the back of the ledger. (T165-171,192-194) Childers left the ledger with McKeehan and asked him not to use it, but an interim clerk make an additional entry on August 29. (T168-170,193)

Childers interviewed witnesses at Clementi's Lounge and showed them a photo pack containing photos of Herman Smith and Appellant. The witnesses identified Smith as the man who had the check. Their description of a five foot eight or nine inches tall, slim black male did not match Appellant. (T194-196) On August 29, Childers interviewed Smith, then released him when he denied trying to cash the check. (T196-107,204)

Herman Smith testified that he was the grounds supervisor at Myrtle Hill. (T307) Smith said he was at work all day on August 27 and did not leave the cemetery. (T308) He denied trying to cash the check at Clementi's Lounge. (T310) He denied that Appellant or anyone else had given him the check to try to cash it. He had never seen the check. (T308-310)

During cross-examination, the following exchange occurred between defense counsel and Smith:

> Q. . . . On August 27th 1986, did you at any point in time while you were working on that day see Charlie Thompson on the grounds of the Myrtle Hill Cemetery?
>
> A. My crew have told me he was at that time. I got to explain myself.
>
> Q. No, sir. Just tell me this: "[sic] Did you, sir, see Thompson on August 27th at the cemetery? Did you see him?

A. No, sir, but my crew did. My crew did.

Q. When did your crew see him?

A. I was the foreman out there this particular day. They was there working at the office when they seen Mr. Thompson go in there and carry Mr. Swack and Ms. Nancy. They said he had a gun in his pocket.

THE COURT: Take the jury out.

(T312-313)

In response to the court's inquiry, defense counsel asked the court to instruct Smith to answer his question and to instruct the jury to disregard Smith's last remark as not being responsive to the question. (T313) Defense counsel remarked, "I suppose I don't want to ask for a mistrial at this juncture, because I think it's curative at this point in time." (T313)

The court inquired about when the prosecutor or anyone else in law enforcement had first learned of Smith's claim that someone saw Appellant abduct Swack and Walker. The prosecutor said he learned of it about two weeks before when Smith came to his office to discuss his testimony. Smith had never told Det. Childers. (T314-316)

Defense counsel remarked that while he preferred to have the court do what he first asked, he was concerned that the remedy might prove to be incomplete and the jury might choose to disregard the instruction. Defense counsel then moved for a mistrial based upon Smith's response. (T316) The court denied the motion. (T317) The court brought the jury back and instructed them to disregard the portion of Smith's answer concerning what somebody told him may have occurred. (T318-319)

Carol Lawson testified that Appellant is the father of her children. (T320-323) On August 27, 1986, she saw Appellant at her mother's house between 2:00 and 3:00 p.m. He was wearing a watch she had never seen before, State's exhibit 17. She asked him where he got it. (T321-324) [The watch was actually exhibit 16. (T222-223)]

Kenneth Bell testified that he saw Appellant at the 505 Bar on the evening of August 27, 1986. Appellant offered to sell him a ring, State's exhibit 17. Bell agreed to pay Appellant $50 if the ring was real. Bell took the ring to a pawn shop to have it appraised the next day. He saw Appellant again the next evening and gave him $50 for the ring. (T326-328) Detective Childers obtained the ring from Bell on September 4, 1986. (T328,334-335)

Richard Hurd, an investigator for the State Attorney's Office, testified in the jury's absence that Heurta Carnegie had been served with a subpoena to testify at trial. Hurd called Carnegie's mother the night before to tell her when Carnegie was needed in court. When Carnegie failed to appear, Hurd spoke to Carnegie on the phone and arranged to pick him up. Carnegie was not home when Hurd went to get him. Hurd attempted unsuccessfully to find him. (T344-348) The court found that Carnegie was unavailable and allowed the prosecutor to read his prior trial testimony to the jury. (R348-351)

Carnegie testified that Appellant gave him a watch, State's exhibit 16, in August, 1986, as security for a prior debt. Appellant said he got the watch from someone at Jackson's Store, but

Carnegie did not believe him. (T352-356) Det. Childers obtained the watch from Carnegie. (R335,352)

Jim Vanatta, a former car salesman and assistant manager at the Auto Plan dealership in Tampa, testified that four people came in on August 29, 1986, to buy a car priced at $500. (T214-215) One of the men said he did not have a driver's license, he wanted to put the car in the other man's name. He gave Vanatta a paycheck and Florida identification card, State's exhibit 15. (T215-216) The check, State's exhibit 14, was for $1500 from Myrtle Hill Cemetery. Vanatta took the check and ID card to his manager, Charles Cross. (T216,218)

Around 1:40 p.m. on August 29, 1986, Det. Childers went to Auto Plan and found Appellant there with another man and two women. (T196-198) Childers obtained Appellant's ID card, exhibit 15, and the check, exhibit 14, and arrested Appellant. (T198-200) The check was from Myrtle Hill, made out to Appellant for $1500, signed by Swack, and endorsed by Appellant with his address, 4005 North 34th Street. (T199) At the time of his arrest, Appellant was 35 years old, six feet tall, and weighed 220 pounds. He lived three or four miles from Williams Park. (T202)

Marvin Lacy testified that he was a Hillsborough County Jail inmate with six prior felony convictions. At the time of this trial, Lacy was waiting to be sentenced for burglary and grand theft charges to which he pled guilty. The State Attorney's Office had agreed to speak on his behalf at sentencing in exchange for his testimony. (T272-274,279,292-293)

On August 30, 1986, Lacy was arrested for possession of cocaine and incarcerated in the Hillsborough County Jail. (T274,288-289) He had been using cocaine three or four times a week for about two years. (T280-282) Lacy admitted using cocaine a couple of times during the preceding week, but he denied being high at the time of his arrest. (T287-288,294) Lacy met Appellant in a holding cell at the jail. (T275,278,282) Appellant looked like a "monster" to Lacy -- about six feet tall and 270 or 280 pounds. (T290) Lacy asked Appellant what he was charged with. Appellant answered that he was in jail for stabbing a man and shooting a woman. (T275,285) Lacy had previously testified that Appellant said the woman was stabbed and the man was shot. (T286) Appellant said he was arrested trying to cash a personal check from the man. He had the man write the check for $1500. He went to a car lot to cash the check so he could leave town, and someone called the Sheriff's Department. He said he had sold some jewelry. (T276)

Lacy bonded out of jail on August 31, 1986. (T283) He waited a week or two before reporting what he heard to law enforcement, then he called the FBI. (T277,283-284,287,295-298) In the interim, Lacy had read about the murder case in the newspaper or heard about it on radio or television. (T294-295) Det. Childers came to his mother's house and spoke to him. (T277) Childers testified that he first learned about Lacy on September 21, 1986, and saw Lacy on September 22 at his residence. (T336-337)

Appellant waived his right to testify. The defense presented no evidence. (T366-367)

C. Penalty Phase

Before trial, defense counsel filed motions to declare the heinous, atrocious, or cruel and cold, calculated, and premeditated aggravating circumstances unconstitutional on the grounds that they were vague, overbroad, and had been inconsistently interpreted and applied. (R96-105) The motion attacking the constitutionality of the heinous factor expressly argued that a limiting construction of an otherwise vague factor must be included in the jury instruction on the factor to satisfy the Eighth Amendment. (R98) At the hearing on the motions, defense counsel argued that the narrowing construction of the factor in case law had not been incorporated into the instruction. (T699-700) The prosecutor proposed a modified instruction using limiting language from the case law. (T700-705) Defense counsel responded that the requested instruction was better, but not good enough. He argued that "conscienceless and pitiless" was still vague. (T705) The court denied the motion on the heinous factor and said it would consider any alternative instruction submitted by either party. (T706-707) Defense counsel withdrew the motion concerning the cold, calculated, and premeditated factor. (T707)

At trial, the State introduced two exhibits. (T450-451) Exhibit 22 was a judgment and sentence for Appellant's November 29, 1983, conviction for aggravated battery. (R vol. VIII)[2] Exhibit

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[2] The clerk failed to consecutively number the pages of the exhibits contained in volume VIII of the record on appeal.

23 was a judgment for Appellant's February 20, 1985, conviction for second-degree felony sexual battery. (R vol. VIII)

Dr. Charles Logan, a psychologist, testified for the defense that he does assessments of intellectual and adaptive competency for the Department of Health and Rehabilitative Services (HRS). (T451-454) He examined Appellant by giving him an intelligence test, the Wechsler Adult Intelligence Scale Revised (WAISR), and conducting a structured interview to determine Appellant's competency to stand trial. (T454) Dr. Logan concluded that Appellant meets the criteria for mild retardation, i.e., an IQ range of 55 to 69. Appellant's IQ was 56. (T455-456) Retardation can result from a genetic disturbance or physical injury. Dr. Logan had no evidence of injury in Appellant's case. (T456) Dr. Logan also received and reviewed collateral information from an HRS case worker, including Appellant's job history, police reports, and other doctors' reports. (T460-461) He determined that Appellant could read very little and needed much assistance. (T461) Appellant was able to write his own name, but not his address. (T462) Dr. Berland had tested Appellant in the past and found Appellant's IQ to be 62. Dr. Berland's results were consistent with Dr. Logan's. (T464)

Dr. Robert Berland, a forensic psychologist, testified that he examined Appellant in 1986. He conducted a diagnostic evaluation, including psychological testing and an interview with Appellant, to determine whether Appellant was mentally ill. He also conducted a clinical legal evaluation to determine competency, sanity, and

criteria for mitigation. (R465-474) In Dr. Berland's opinion Appellant "suffered from very low intellectual functioning and a psychotic disturbance which placed him essentially under the influence of mental or emotional disturbance during the period in which this offense occurred, and impaired his ability to conform his conduct to the requirements of law." (T475)

Dr. Berland orally administered several psychological tests to Appellant: the Minnesota Multi-Phasic Personality Inventory (MMPI), the Wechsler Adult Intelligence Scale (WAIS), the Bender Gestalt with Canter's Background Interference Procedure, and the Rorschach Test. (T475-476) Dr. Berland determined that Appellant was able to read in 1986, but he was concerned about his ability to read consistently throughout the test. (T502-504) The results of the MMPI showed that Appellant was genuinely psychotic and was not faking. (T485-486) Elevated scores on the schizophrenia and paranoia scales showed Appellant had a psychotic disturbance characterized by delusional beliefs which could only be changed with medication. (T486) Appellant had a mood disturbance -- he was depressed well beyond the level of reactive depression caused by circumstances. (T486-487) Appellant's high score on the hypochondriasis scale indicated delusions and probably hallucinations. (R487) There was no evidence of any form of malingering. Appellant's test results showed a "fairly severe but chronic profile," meaning that he had the problem for more than two years. (T487) In October, 1986, Appellant was agitated and upset by his mental illness. (T488)

Dr. Berland used the WAIS test to determine Appellant's intellectual functioning and to determine whether he had brain damage. (T488) The test resulted in an overall IQ of 70, which was the upper limit of retardation. (T490) If Dr. Berland had used the revised version of the test, Appellant's IQ score would have been seven or eight points lower, an IQ of 62 or 63, well into the retarded level. (T490-491,504-505) Appellant was significantly below average in his ability to make judgments or figure things out. (R491) Differences in Appellant's scores on various parts of the test indicated that Appellant had suffered from brain damage from an injury or series of injuries. (T491-492,501-502)

Appellant's responses to Dr. Berland's questions during the clinical interview showed that Appellant was being truthful. He was not sophisticated enough to be able to "out fox" someone on a mental health examination. (T493-495) Appellant admitted a number of delusional beliefs and an even greater number of visual, auditory, and tactical hallucinations. This was evidence of his symptoms of psychosis. (T495) One of Appellant's co-workers told Dr. Berland about Appellant's irrational belief that his employers were cheating him and persecuting him although they had shown him their books and had taken him to the doctor. (R496-497) Dr. Berland also learned that Appellant was psychotic and suffered from hallucinations, delusions, and a mood disturbance as early as the age of nine. (T497-498) Appellant's mental illness was the kind which lasts for life, although the symptoms may be more or less severe at various times. (T498) Appellant had also been using drugs; in par-

ticular, he had used cocaine for a considerable period of time up to the time of his arrest. (R498,501) Drugs usually increase the severity of psychotic symptoms; "it's like throwing gasoline on the flames." (T499)

In Dr. Berland's opinion, Appellant suffered from a mental or emotional disturbance which had been present and was a significant factor in his behavior for a long time, including the time of the offense. (T499-500) Appellant's ability to recognize the criminality of his conduct was not impaired. (T500,508) But there was an impairment of his ability to conform his conduct to the requirements of law. (T500)

Defense counsel read the prior testimony of Appellant's older sister, Darlene Harmon, to the jury. (T528-529) Appellant was born at home in Amolie, Mississippi in 1950. (T529-531) Appellant was the seventh or eighth of twelve children in the family. (T529) Their home had no running water or electricity. There was an outside toilet. It was a tough life. (T532-533) Their mother died when Appellant was seven years old. Their father raised the children and died in 1975. (T530) Appellant went to school only until the fourth or fifth grade. When he was sixteen, he moved to Homestead to live with Mrs. Harmon and obtained work with better wages. He eventually moved to Tampa. (T531) Mrs. Harmon loved Appellant very much and maintained contact with him when he was in prison. (T531-532) They had a sister, Earnestine Thompson, who spent twenty years in a mental hospital. One of their brothers spent two years in the mental hospital in Chattahoochee. (T532)

During the charge conference, defense counsel had no objection to the State's proposed jury instructions on the aggravating circumstances for previous convictions for another capital offense or a felony involving the use or threat of violence and for crime committed while engaged in the commission of the crime of kidnapping. (T513-514) Defense counsel objected to the State's proposed instruction on the aggravating factor of avoiding or preventing a lawful arrest on the ground that the evidence was insufficient. (T514-517) The court overruled the objection and modified the instruction to delete "or effecting an escape from custody." (T518-519) Defense counsel objected to the instruction on financial gain on the ground that the evidence was insufficient. (T519) Again, the court overruled the objection. (T519-520) Defense counsel renewed his pretrial objections to the instruction on heinous, atrocious, or cruel. (T520-521) The court reiterated its denial of the pretrial motion. (T521) Defense counsel argued that the evidence was insufficient to support the cold, calculated, and premeditated instruction. (T515-517,521) The court overruled the objections. (T522) The court agreed to give proposed mitigating circumstance instructions on mental or emotional disturbance, impaired capacity, and any other aspect of the defendant's character, record, or background and any other circumstances of the offense. (T522-523) The court instructed the jury upon each of the proposed aggravating and mitigating factors. (T555-558)

D. Sentencing Hearing

Prior to the sentencing hearing, both defense counsel and the State filed sentencing memoranda. (R182-202) Defense counsel argued that the evidence was insufficient to find the cold, calculated and premeditated aggravating factor because there was no evidence of the existence of a careful plan or prearranged design. (R182) He also argued that execution of the mentally retarded is cruel and unusual punishment. (R182-190)

The sentencing hearing was conducted on December 28, 1992. (T581) Defense counsel relied upon his earlier arguments concerning the aggravating circumstances. (T597) He again argued that the evidence was insufficient to find the cold, calculated, and premeditated aggravating factor (T597-598) and that execution of the mentally retarded is cruel and unusual punishment. (T598-601) Defense counsel also urged the court to consider the closeness of the jury's seven to five vote in recommending the death penalty. (T605-606)

The court sentenced Appellant to death for each of the two first-degree murder convictions. (R211-227;T607-615) The court's sentencing order containing its factual findings regarding the aggravating and mitigating circumstances is set forth in full in the Appendix to this brief. (A12-17) The court found six aggravating factors:

1) prior convictions for capital felonies and felonies involving the use or threat of violence;

(2) capital felony committed while engaged in a kidnapping;

(3) capital felony committed for the purpose of avoiding or preventing a lawful arrest;

(4) capital felony committed for pecuniary gain;

(5) the capital felony was especially heinous, atrocious, or cruel; and

(6) the capital felony was committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification.

(R222-225; T608-612;A12-15)

The court found that neither of the statutory mental mitigating factors, extreme mental or emotional disturbance and substantially impaired capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law, was established by the evidence. (R225; T612-613; A15) However, the court gave some weight to the nonstatutory mitigating factors that Appellant suffered from a chronic mental illness, was moderately disturbed, and exhibited some symptoms of mental illness. (R225; T613;A15) The court found Appellant's family background to be a nonstatutory mitigating circumstance, but gave it very little weight. (R226; T614; A16) The court found Appellant's mental retardation to be a nonstatutory mitigating circumstance which was given "considerable weight" by the court. (R116; T614; A16)

SUMMARY OF THE ARGUMENT

I. State witness Herman Smith's testimony that members of his crew told him they saw Appellant remove Swack and Walker from the cemetery office while carrying a gun in his pocket was improper because it was not responsive to defense counsel's question on cross-examination, because it was inadmissible hearsay, and because it violated Appellant's constitutional right to confront and cross-examine the witnesses against him. This testimony was extraordinarily prejudicial to the defense because the State presented no eyewitness testimony to establish Appellant's participation in the offense. The prejudice could not have been cured by the court's instruction to disregard the testimony. The court's error in denying Appellant's motion for mistrial requires reversal and remand for a new trial.

II. The State's evidence failed to prove beyond a reasonable doubt that the dominant motive for the murders was to avoid arrest, that the primary motive for the murders was financial gain, that Appellant intended to torture the victims, or that Appellant had a careful plan or prearranged design to kill. Because the evidence was legally insufficient, the court erred by instructing the jury upon and finding four aggravating circumstances: avoid arrest; pecuniary gain; heinous, atrocious, or cruel; and cold, calculated and premeditated. These errors require a new penalty phase trial with a new jury.

III. The felony murder and cold, calculated, and premeditated aggravating circumstances are unconstitutionally overbroad because

either or both of the circumstances could be found to apply to nearly all first-degree murders. The felony murder aggravating factor is not amenable to a limiting construction. The cold, calculated, and premeditated factor has been limited to cases involving a careful design or prearranged plan to kill, but this limiting construction has not been incorporated into the jury instructions. The court's errors in instructing the jury upon and finding these aggravating factors requires remand for a new penalty phase trial before a new jury.

IV. Defense counsel presented competent, substantial evidence that Appellant suffers from a mental or emotional disturbance, his capacity to conform his conduct to the requirements of law is impaired, he suffers from brain damage, and he has a history of drug abuse. This evidence was not refuted by the State. The court's error in failing to find and weigh these mitigating circumstances requires reversal and resentencing.

V. The death sentences are disproportionate and violate the unusual punishment prohibition of the Florida Constitution. This case is not among the most aggravated and least mitigated murder cases in Florida. Only one aggravating factor was properly found. The trial court found that Appellant suffers from chronic mental illness, is moderately disturbed, has a deprived family background, suffers an intellectual deficit, and is mildly retarded. The court should also have found extreme mental or emotional disturbance, impaired capacity, brain damage, and a history of drug abuse. The

death sentences must be vacated and the case remanded for the imposition of life sentences for the murders.

VI. Because Appellant is mentally retarded, the death sentences violate the cruel and/or unusual punishment prohibitions of the state and federal constitutions and must be vacated.

VII. The statutory authorization of death recommendations by a simple majority of the jury conflicts with Fla. R. Crim. P. 3.440 which requires unanimous jury verdicts and therefore violates Article V, section 2(a) of the Florida Constitution. It also violates the Sixth, Eighth, and Fourteenth Amendments which mandate unanimous jury death verdicts to insure the reliability of the decision to impose the death penalty. Again, the death sentences must be vacated.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN STATE WITNESS HERMAN SMITH TESTIFIED THAT MEMBERS OF HIS WORK CREW TOLD HIM THEY SAW APPELLANT REMOVE THE VICTIMS FROM THE CEMETERY OFFICE WITH A GUN IN HIS POCKET.

Herman Smith was the grounds supervisor at Myrtle Hill Cemetery. (T307) The State presented Smith's testimony that he was at work all day on the day of the offenses, Appellant did not give him the $1500 check -- State's exhibit 14, he did not try to cash the check at Clementi's Lounge, and he had nothing to do with the deaths of the victims. (T308-310) The evident purpose of this testimony was to disprove an allegation investigated by Detective Childers that Smith had attempted to cash the check at Clementi's Lounge. (T192-197,204)

On cross-examination, defense counsel sought to elicit Smith's testimony that he had not seen Appellant at the cemetery on the day of the offenses. (T312) The following exchange occurred:

> Q. . . . On August 27th, 1986, did you at any point in time while you were working on that day see Charlie Thompson on the grounds of the Myrtle Hill Cemetery?
>
> A. My crew have told me he was at that time. I got to explain myself.
>
> Q. No, sir. Just tell me this: "Did you, sir, see Thompson on August 27th at the cemetery? Did you see him?
>
> A. No, sir, but my crew did. My crew did.

Q. When did your crew see him?

A. I was the foreman out there this particular day. They was there working at the office when they seen Mr. Thompson go in there and carry Mr. Swack and Ms. Nancy. They said he had a gun in his pocket.

THE COURT: Take the jury out.

(T312-313)

Defense counsel's initial response to this testimony was to ask the court to instruct Smith to answer his question and to instruct the jury to disregard Smith's remarks because they were not responsive to his question. Counsel expressly stated that he did not want to ask for a mistrial. (T313) The court determined that defense counsel was not at fault for Smith volunteering this information. (T315)

Upon reflection while the court determined when the prosecutor first learned of Smith's allegation, (R314-316) defense counsel changed his mind. He expressed concern that the jury would disregard a curative instruction, withdrew his request for the instruction, and moved for a mistrial because of Smith's remarks. (T316) The court denied the motion for mistrial (T317) and instructed the jury to disregard Smith's remarks about what someone told him:

Members of the jury, the witness, Mr. Smith, was asked a question whether he had seen Mr. Thompson at the cemetery on the date in question, and his answer to that was no, he did not. The remainder of his answer -- you are being instructed to disregard the remainder of his answer concerning what somebody told him may have occurred. You will disregard all of the answer except the witness saying, no, he did not.

(T319)

Smith's testimony that members of his crew said they saw Appellant remove Swack and Walker from the cemetery office while carrying a gun in his pocket was improper because it was not responsive to defense counsel's question whether Smith had seen Appellant at the cemetery that day. Periu v. State, 490 So. 2d 1327, 1328 (Fla. 3d DCA 1986). In Periu, a police officer testifying for the State gave a non-responsive answer during defense counsel's cross-examination revealing prejudicial and inadmissible evidence of other crimes -- that he had recovered stolen vehicles from the defendant's body shop before the vehicle theft in question. The Third District held that the trial court committed reversible error by denying the defendant's motion for mistrial.

Smith's non-responsive testimony in this case was more prejudicial than the non-responsive testimony in Periu. Instead of referring to collateral crimes, Smith alleged that there were eyewitnesses who saw Appellant kidnap Swack and Walker. No such eyewitness testimony was ever presented in court. The prosecutor first learned of Smith's allegations two weeks before trial.[3] (T315-316) The prosecutor asked Smith to locate the purported eyewitness, but Smith was not able to do so. (T314)

Smith's testimony was hearsay, an out-of-court statement offered (by Smith) for the truth of the matter asserted. Hodges v. State, 595 So. 2d 929, 931 (Fla.), vacated on other grounds,

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[3] It does not appear that the prosecutor disclosed this information to the defense, but defense counsel did not object that the prosecutor violated the discovery rules, Fla. R. Crim. P. 3.220(b)(1)(B) and(j). (T313-317)

__U.S.__, 113 S. Ct. 33, 121 L. Ed. 2d 6 (1992); § 90.801(1)(c), Fla. Stat. (1991). Section 90.802, Florida Statutes (1991), provides, "Except as provided by statute, hearsay evidence is inadmissible." Section 90.801(2)(c), Florida Statutes (1991), provides an exception for an out-of-court statement pertaining to the identification of a person, but only when the hearsay declarant, i.e., the person who originally made the statement, testifies at the trial and is subject to cross-examination . Hayes v. State, 581 So. 2d 121, 124 (Fla.), cert.denied, __U.S. __, 112 S. Ct. 450, 116 L. Ed. 2d 468 (1991). Since the crew members who supposedly told Smith they saw Appellant commit the kidnapping did not testify at trial, Smith's hearsay testimony was not admissible. Id.; D'Agostino v. State, 582 So. 2d 153, 154 (Fla. 4th DCA 1991); Rivera v. State, 510 So. 2d 340, 341-342 (Fla. 3d DCA 1987); Graham v. State, 479 So. 2d 824, 825-826 (Fla. 2d DCA 1985).

Smith's testimony not only violated the statutory rule excluding hearsay, it also violated Appellant's constitutional right to confront the witnesses against him. Asberry v. State, 568 So. 2d 86, 87 (Fla. 1st DCA 1990); Beatty v. State, 486 So. 2d 59, 61 (Fla. 4th DCA 1986). Cf. United States v. Owens, 484 U.S. 554, 560, 108 S. Ct. 838, 98 L. Ed. 2d 951, 958-959 (1988) (no violation of right to confrontation to admit out-of-court statement identifying defendant when declarant testified at trial and was subject to cross-examination). The right to confront and cross-examine adverse witnesses is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Davis v. Alaska, 415 U.S.

308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347, 353 (1974); Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). It is also guaranteed by Article I, section 16 of the Florida Constitution. Coxwell v. State, 361 So. 2d 148, 150 n.5 (Fla. 1978); Coco v. State, 62 So. 2d 892, 894-95 (Fla. 1953).

The trial court attempted to alleviate the violation of Appellant's right to confrontation by instructing the jury to disregard Smith's hearsay testimony. (T319) But this instruction did not satisfy the central concern of the confrontation clause which "is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Maryland v. Craig, 497 U.S. 836, 845, 110 S. Ct. 3157, 3163, 111 L. Ed. 2d 666, 678 (1990). Telling the jurors to disregard what they had heard could not ensure the reliability of the evidence against Appellant because such instructions are "of legendary ineffectiveness" in removing the taint of prejudicial evidence. Malcolm v. State, 415 So. 2d 891, 892 n.1 (Fla. 3d DCA 1982).

This Court recognized the futility of curative instructions in Geralds v. State, 601 So. 2d 1157 (Fla. 1992). In Geralds, the prosecutor cross-examined a defense penalty phase witness in a murder trial and asked whether the witness was aware of the defendant's prior felony convictions. The trial court denied defense counsel's motion for mistrial and instructed the jury to disregard the improper question. Yet this Court found reversible error and explained,

> Although the judge gave a so-called "curative" instruction for the jury to disregard the question, such instructions are of dubious value. Once the prosecutor rings that bell and informs the jury that defendant is a career felon, the bell cannot, for all practical purposes, be "unrung" by instruction from the court.

Id., at 1162.

Similarly, the Third District found a curative instruction inadequate to remove the taint of evidence of prior felony convictions in another murder case. Vazquez v. State, 405 So. 2d 177 (Fla. 3d DCA 1981), approved in part, quashed in part on other grounds, 419 So. 2d 1088 (Fla. 1982). The court reasoned that the improperly admitted evidence

> was too powerful, too damning, and too prejudicial for any conscientious jury to disregard pursuant to the above jury charge. Cautionary instructions of this sort have their place in our law, but are utterly ineffective when applied, as here, to such powerful prejudicial evidence.

Id., at 180.

Thus, a curative instruction will not suffice to cure the damage caused by the improper admission of hearsay evidence of the defendant's identity as the perpetrator of the charged offense. In Asberry v. State, 568 So. 2d at 87, the First District found that a curative instruction would "have been futile" when the victim's mother and a police officer testified that a non-testifying witness said he recognized the victim's description of the man who robbed her as being the defendant. And in Graham v. State, 479 So. 2d at 826, the Second District ruled that a curative instruction to disregard a police officer's testimony that two non-testifying witnes-

ses identified the defendant as the perpetrator of a robbery was insufficient to cure the error. The court declared that "there are some instances in which the prejudice is so great that it is impossible 'to unring the bell.'" Id.

Since it was impossible to unring the bell and erase the jurors' memories of Smith's testimony, the only adequate remedy was to grant defense counsel's motion for mistrial. Because Smith's inadmissible hearsay testimony violated Appellant's constitutional right to confront the witnesses against him, the court committed constitutional error by denying counsel's motion for mistrial.

Violations of the confrontation clause, like most constitutional errors, are subject to application of the harmless error rule announced in Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1965). Delaware v. VanArsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); State v. Clark, No. 77,461 (Fla. March 25, 1993) [18 F.L.W. S205].

> The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

VanArsdall, 475 U.S. at 681, 89 L. Ed. 2d at 684-685; Clark, 18 F.L.W. at S205.

In Clark, this Court held that the admission of an absent witness's discovery deposition as substantive evidence was fundamental error and violated the confrontation clause. This Court further determined that the error was not harmless because the deposition

was not given in an adversarial proceeding to test its reliability and it provided proof not testified to by any other witnesses. Id., at S205-206.

Similarly, Smith's hearsay testimony repeated alleged out-of-court statements by non-testifying witnesses whose reliability was never tested in an adversarial proceeding. Also, the hearsay statements were the only evidence at Appellant's trial that there may have been eyewitnesses who saw Appellant kidnap Swack and Walker.

Smith's hearsay testimony struck at the very heart of Appellant's defense as presented in defense counsel's closing argument -- the absence of any eyewitnesses. (T374,401-405) Counsel argued that Marvin Lacy, the cell-mate who claimed Appellant admitted the crimes (T272,275-276), could not be believed because of his self-interest in testifying, his drug use, and his exposure to news reports of the crimes. (T370-373) Counsel further argued that the State's circumstantial evidence did not establish Appellant's guilt. (T373-383,400-407) Despite the court's instruction to disregard Smith's testimony, his assertion that there were eyewitnesses who saw Appellant kidnap the victims must have affected the jury's evaluation of defense counsel's argument.

This Court has consistently ruled that the harmless error test places the burden on the State to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict. State v. DiGuilio, 491 So. 2d 1129, 1135, 1139 (Fla. 1986); State v. Lee, 531 So. 2d 133, 136-137 (Fla. 1988). The State cannot satisfy its

burden under the circumstances presented by this case. Smith's unresponsive, inadmissible hearsay testimony not only violated Appellant's right to confront adverse witnesses, it seriously undermined the reliability of the jury's determination and deprived Appellant of his fundamental right to a fair trial. The judgments and sentences must be reversed, and the case must be remanded for a new trial.

ISSUE II

THE TRIAL COURT ERRED BY FINDING AND INSTRUCTING THE JURY UPON AGGRAVATING CIRCUMSTANCES WHICH WERE NOT PROVED BEYOND A REASONABLE DOUBT -- AVOID ARREST, PECUNIARY GAIN, HEINOUS, ATROCIOUS, OR CRUEL, AND COLD, CALCULATED, AND PREMEDITATED.

The State has the burden of proving aggravating circumstances beyond a reasonable doubt. Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993). "Moreover, even the trial court may not draw 'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden." Id. In this case, the State failed to prove beyond a reasonable doubt four of the six aggravating circumstances found by the trial court -- avoid arrest,[4] pecuniary gain,[5] heinous, atrocious, or cruel,[6] and cold, calculated, and premeditated.[7] The court erred by finding these aggravating factors by drawing inferences from the State's evidence. (R223-225;A13-15)

A. Avoid Arrest

The trial court found that the murders of Swack and Walker were committed for the purpose of avoiding or preventing a lawful arrest. (R223;A13) The court found the following factual basis to support this aggravating factor:

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[4] § 921.141(5)(e), Fla. Stat. (1991).

[5] § 921.141(5)(f), Fla. Stat. (1991).

[6] § 921.141(5)(h), Fla. Stat. (1991).

[7] § 921.141(5)(i), Fla. Stat. (1991).

> The Defendant was known to the victims as a previous employee of the cemetery. The Defendant believed he was owed money by the cemetery and had previously discussed this with at least one of the victims. The Defendant obtained a check in the amount of $1500 from the victims, an amount exceeding the amount in dispute by $1350. The victims were removed from their place of employment by the Defendant who was armed with a gun and knife, taken to a wooded area not far from the office and murdered.

(R223; A13)

Appellant does not contest the facts found by the court. However, those facts do not establish the avoid arrest factor beyond a reasonable doubt.

This Court has imposed a very stringent test for the application of the avoid arrest aggravating factor when the person killed is not a law enforcement officer:

> We have long held that in order to prove this aggravating factor when the victim is not a law enforcement officer, the State must show that the sole or dominant motive for the murder was the elimination of the witness.... The fact that witness elimination may have been one of the defendant's motives is not sufficient to find this aggravating circumstance. Further, the mere fact that the victim knew the assailant and could have identified him is insufficient to prove the existence of this factor.

Davis v. State, 604 So. 2d 794, 798 (Fla. 1992).

In Davis, the defendant entered an elderly woman's home, killed her by stabbing her twenty-one times, and stole her silver, purse, wallet, pistol, coins, jewelry, ring, and car. The defendant was known by the victim because he had done yard work for her. This Court ruled that the evidence was not sufficient to establish

that witness elimination was the sole or dominant motive for the murder. Id.

This Court has stricken findings of the avoid arrest factor in other cases where the defendant was known by the victim and killed the victim in the process of taking the victim's property. In Geralds v. State, 601 So. 2d 1157 (Fla. 1992), the defendant was a carpenter who had worked on remodeling the victim's home. A week before the murder the defendant encountered the victim and her children at a mall and learned that her husband was out of town and when her children were at school. The defendant went to the victim's home at a time when she was alone, beat her and stabbed her to death, and took her jewelry and Mercedes automobile. This Court held that the evidence was insufficient to prove that witness elimination was the dominant motive for the murder. Id., at 1164.

In Green v. State, 583 So. 2d 647 (Fla. 1991), cert. denied, __U.S.__, 112 S. Ct. 1191, 117 L. Ed. 2d 432 (1992), the defendant went to his landlords' house to recover a $250 check he had given them for his rent. When the wife refused to return the check, he stabbed her to death. When the husband ran into the bedroom, the defendant followed and stabbed him to death. This Court held the evidence failed to prove that witness elimination was the dominant motive for the murders. Id., at 652.

Similarly, in Bruno v. State, 574 So. 2d 76 (Fla.), cert. denied, __U.S.__, 112 S. Ct. 112, 116 L. Ed. 2d 81 (1991), the evidence showed that the defendant wanted to steal the victim's stereo and that he went to the victim's apartment planning to kill

the victim. When the defendant and the victim were drinking together in the apartment, the defendant hit the victim with a crowbar then shot him. Again, this Court held that the evidence was insufficient to prove witness elimination was the dominant motive for the murder. Id., at 81-82.

Thus, the trial court could not rely solely upon the facts that Swack and Walker knew Appellant, that Appellant obtained property from them to which he was not entitled, and Appellant killed them to support the avoid arrest aggravating factor. Those facts are substantially the same as the facts found to be insufficient in Davis, Geralds, Green, and Bruno.

The only additional fact found by the trial court was that Appellant removed Swack and Walker from their office to a nearby wooded area before he killed them. In Preston v. State, 607 So. 2d 404 (Fla. 1992), the defendant robbed a convenience store, took the clerk to an open field a few miles away, and then killed her. This Court approved the trial court's avoid arrest finding because "[t]he only reasonable inference to be drawn from the facts of this case is that Preston kidnapped Walker from the store and transported her to a more remote location in order to eliminate the sole witness to the crime." Id., at 409. Also, in Hall v. State, 614 So. 2d 473, 477 (Fla. 1993), this Court approved the use of circumstantial evidence to prove the avoid arrest factor and stated, "we have uniformly upheld finding this aggravator when the victim is transported to another location and then killed."

Appellant respectfully submits that Preston and Hall were wrongly decided. To begin with, those decisions are inconsistent with the rule that findings of aggravating circumstances cannot be based upon logical inferences drawn from the evidence. Robertson v. State, 611 So. 2d at 1232.

Furthermore, it is not true that this Court has uniformly upheld the avoid arrest factor when the victim was transported to another location and then killed. There are at least two cases in which this Court disapproved avoid arrest findings when the victim was transported to another location before she was killed, Waterhouse v. State, 596 So. 2d 1008, 1017 (Fla. 1992), and Dailey v. State, 594 So. 2d 254, 259 (Fla. 1991).

In Waterhouse it is necessary to refer to this Court's original opinion, Waterhouse v. State, 429 So. 2d 301 (Fla. 1983), to obtain all the pertinent facts, but the defendant met a woman at a bar, transported her to another location in his car, attempted to have sex with her, inflicted severe lacerations on her head and bruises around her throat, leaving blood stains in the car, then drug her from a grassy area on the shore into Tampa Bay and drowned her. Ultimately, this Court disapproved the trial court's finding that the murder was committed to avoid arrest. Id., 596 So. 2d at 1017.

Similarly, in Dailey, the defendant and two male companions picked up the victim, a 14-year-old girl hitchhiking with her twin sister and another girl. After going to a bar, a house, and another bar, the victim left in the car with the defendant and one

of the other men. Her nude body was later discovered floating in the water near Indian Rocks Beach. She had been stabbed, strangled and drowned. This Court held that the evidence failed to show that avoiding or preventing lawful arrest was the dominant motive for the murder. Id., 594 So. 2d at 259.

Thus, this Court has disapproved findings of the avoid arrest aggravating factor when the trial court inferred that witness elimination was the motive for the murder from circumstances similar to those in the present case involving the victim's knowledge of the defendant or the removal of the victim to a more remote location. In keeping with the rule in Robertson that the trial court cannot use logical inferences to supply deficiencies in the State's proof, this Court should hold that the court erred by finding the avoid arrest aggravating factor. The State's evidence did not prove beyond a reasonable doubt that Appellant's sole or dominant motive for the murders was the elimination of witnesses.

B. Pecuniary Gain

The trial court found that the capital felony was committed for pecuniary gain. (R223; A13) The court stated the following factual basis for this factor:

> The Defendant went, armed with a knife and a gun, to his previous place of employment and obtained a check in the amount of $1500 from the victims. The amount of the check exceeded by $1350 what the Defendant felt he was owed by the cemetery for a previous worker's compensation claim.
>
> After obtaining the check, the defendant kidnapped the victims, took them to a remote, wooded area and murdered them.

(R223-224; A13-14)

Again, Appellant does not challenge the facts found by the court, but the court's conclusion that those facts establish beyond a reasonable doubt that pecuniary gain was the motive for the murders. Again, the court's conclusion could only be derived by drawing inferences from the circumstances in violation of Robertson v. State, 611 So. 2d at 1232.

The fact that the check obtained by Appellant was for $1500 rather than the $150 to which Appellant believed he was entitled does not prove beyond a reasonable doubt that Appellant killed Swack and Walker in order to obtain the extra $1350. The State's circumstantial evidence simply failed to establish why Swack wrote the check for $1500 rather than $150. While it can be inferred that Appellant forced Swack to write the check for that amount, it could also be inferred that Swack mistakenly wrote the check for the larger amount because he was frightened, or that Swack intentionally wrote the check for the larger amount to make it more difficult for Appellant to cash the check or to make it easier to determine that Appellant was not entitled to the money.

This Court has ruled that circumstantial evidence will not support a finding of pecuniary gain unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance. Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982). In Simmons, the defendant offered money to two other people if they would help him to murder the victim, saying that he expected to receive a new car as a result of

the crime. There was no evidence where the money would come from or how the defendant would receive the car as a result of the murder. This Court found the evidence insufficient to prove a pecuniary motivation for the murder beyond a reasonable doubt.

In Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988), the defendant and an accomplice robbed a grocery store. While fleeing the store, the defendant shot and killed a witness and told his accomplice that the victim was "playing hero." This Court disapproved of the trial court's pecuniary gain finding on the ground that "the killing occurred during flight and thus was not a step in furtherance of the sought-after gain." Id., at 533. Similarly, the killing of Swack and Walker was not a step in furtherance of the sought-after gain in this case. Appellant had already obtained the check at the cemetery office. The victims were not killed until after they had been removed to the nearby wooded area.

Furthermore, this Court has required proof beyond a reasonable doubt that pecuniary gain was the primary motive for the murder to establish the pecuniary gain aggravating circumstance. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988), cert. denied, 490 U.S. 1037, 109 S. Ct. 1937, 104 L. Ed. 2d 408 (1989). Since the avoid arrest factor found by the court in this case requires proof that witness elimination is the sole or dominant motive for the murder, it is inconsistent to find the pecuniary gain factor along with avoid arrest. Pecuniary gain cannot have been the primary motive

for the murders if avoiding arrest was the sole or dominant motive for the murders.

This Court has approved finding both the avoid arrest and pecuniary gain factors in the same case. E.g., Preston v. State, 607 So. 2d at 409; Card v. State, 453 So. 2d 17, 24 (Fla.), cert. denied, 469 U.S. 989, 105 S. Ct. 396, 83 L. Ed. 2d 330 (1984). In Card, this Court explained, "We cannot say that because the murder was committed to avoid arrest, it cannot also have been committed for pecuniary gain." Id. While it is obvious that there can be more than one motive for a crime, it is inherently self-contradictory to find that each of two independent motives was the dominant or primary motive.

When the State's evidence fails to establish beyond a reasonable doubt which motive was the dominant motive, the proper conclusion to be drawn is not that both factors apply, but that the evidence is legally insufficient to sustain either factor. Thus, in Scull, this Court concluded that neither avoid arrest nor pecuniary gain was proved beyond a reasonable doubt, and both factors were stricken. 533 So. 2d at 1141-1142. Similarly, this Court should find that neither factor was proved beyond a reasonable doubt in Appellant's case and strike both factors.

C. Heinous, Atrocious, or Cruel

The trial court found that the capital felony was especially heinous, atrocious, or cruel. (R224; A14) In support of the factor, the court found the following facts:

> After obtaining a check to which he was not entitled, the Defendant forced the victims to

> go in one of the victim's cars to a park and then walk to a secluded wooded area. The Defendant was armed with a knife and a gun. The victims were forced to disrobe. The female victim was then allowed to redress. While clothed only in his underwear and shoes and socks, the male victim struggled with the Defendant and was stabbed nine times in various parts of his body. While the victim was still alive, the Defendant shot him in the head. The female victim was lying face down on the ground with her head on her arm. The autopsy revealed a bite mark to her arm that was inflicted while she was alive and aware of her impending death which came from a gunshot to her head. It is unclear which victim was killed first, but it is clear that both were aware for some period of time that the Defendant intended to kill them.

(R224; A14)

Under the Eighth and Fourteenth Amendments to the United States Constitution, the constitutionality of the heinous, atrocious, or cruel aggravating factor depends upon its limited application only to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Sochor v. Florida, 504 U.S. __, 112 S. Ct. 2114, 119 L. Ed. 2d 326, 339 (1992); Proffitt v. Florida, 428 U.S. 242, 255-256, 96 S. Ct. 2960, 49 L. Ed. 2d 913, 924-925 (1976). As this Court explained in Cannady v. State, No. 76,262 (Fla. May 6, 1983)[18 F.L.W. S 277, 279], quoting, Williams v. State, 574 So. 2d 136, 138 (Fla. 1991), this "'factor is permissible only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.'"

In this case, the killing of Walker plainly did not qualify as a torturous murder. The medical examiner testified that she died from a single gunshot wound to the back of her head which was immediately lethal. (T264-270) This Court has generally ruled that instantaneous or nearly instantaneous gunshot deaths are not heinous, atrocious, or cruel. Cannady v. State, at S 279; Clark v. State, 609 So. 2d 513, 514 (Fla. 1992).

The trial court inferred that Walker was aware of her impending death from the bite mark found on her arm. (R224; T265-267; A14) But this Court has rejected findings of heinous, atrocious, or cruel in gunshot deaths even when the State proved awareness of impending death through eyewitness testimony that the victim was pleading for his life at the time he was shot. Burns v. State, 609 So. 2d 600, 602, 606 (Fla. 1992); Wickham v. State, 593 So. 2d 191, 193 (Fla. 1991), cert. denied, __U.S.__, 112 S. Ct. 3003, 120 L. Ed. 2d 878 (1992); Brown v. State, 526 So. 2d 903, 904, 907 (Fla.), cert. denied, 488 U.S. 944, 109 S. Ct. 371, 102 L. Ed. 2d 361 (1988). Thus, the bite mark evidence does not set this case apart from the norm of capital felonies. Burns v. State, 609 So. 2d at 606; Clark v. State, 609 So. 2d at 514.

With regard to the manner in which Swack was killed, the medical examiner found nine knife wounds, all inflicted while he was still alive, and four of which could have been lethal. (T253-260) Dr. Diggs concluded that the knife wounds were inflicted during a struggle and were followed by a fatal, close-range gunshot

wound at the corner of Swack's left eye. The gunshot wound immediately incapacitated him. (T261-263)

Appellant acknowledges that this Court has upheld findings of heinous, atrocious, or cruel in cases where the victim died of multiple stab wounds. E.g., Davis v. State, 604 So. 2d 794, 797 (Fla. 1992); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990); Nibert v. State, 574 So. 2d 1059, 1061 (Fla. 1990). However, in each of those cases, the defendant left the victim to languish and die, while Appellant followed four potentially fatal stab wounds with a final and immediately incapacitating gunshot to the head. The gunshot makes the manner of death in this case more like the manner of death in Shere v. State, 579 So. 2d 86 (Fla. 1991), in which the defendant shot the victim ten times. This Court rejected a finding of heinous, atrocious, or cruel in Shere, noting, "Four of the wounds were potentially fatal, which is an indication that they tried to kill him, not torture him." Id., at 96.

The trial court also relied upon the facts that Walker and Swack were forced to leave their office, drive to a park, walk to a wooded area, and disrobe. (R224; A14) These facts are similar to the facts in Preston v. State, 607 So. 2d 404, 409-410 (Fla. 1992), in which this Court upheld a finding of heinous, atrocious, or cruel, reasoning that "the victim suffered great fear and terror during the events leading up to the murder." But in both Preston and the present case there was no direct evidence of the victims suffering great fear and terror during the abductions. More recently, in Robertson v. State, 611 So. 2d at 1232, this Court

ruled that courts may not draw logical inferences to support a finding of an aggravating circumstance when the State has not met its burden of proof.

Moreover, this Court has rejected findings of heinous, atrocious, or cruel in other cases where the victim was abducted and killed during a robbery or attempted robbery under circumstances in which great fear and terror could have been inferred. In McKinney v. State, 579 So. 2d 80 (Fla. 1991), the victim stopped his car to ask for directions. The defendant jumped in the car, hit the victim on the head, and ordered him to drive to an overpass where the defendant shot him. The victim was shot two more times while the car was driven two blocks further, then the defendant dumped the body from the car. This Court ruled, "The evidence in the record does not show that the defendant intended to torture the victim." Id., at 84.

Similarly, in Cochran v. State, 547 So. 2d 928 (Fla. 1989), the defendant approached the victim with a gun intending to rob her. When she screamed, he forced her into the car and drove away. The defendant claimed that the victim was shot during a struggle when she jumped at him and tried to stab him. When the victim asked to be taken to a hospital, the defendant left her in a field by the highway to die. This Court found the evidence insufficient to support the trial court's finding of heinous, atrocious, or cruel. Id., at 930-931.

Surely the victims in McKinney and Cochran had as much reason and opportunity to experience great fear before their deaths as

Walker and Swack in the present case. The circumstances surrounding their abduction and murder do not establish the heinous, atrocious, or cruel factor because they do not prove beyond a reasonable doubt that Appellant intended to torture them nor that he obtained pleasure from or was indifferent to their suffering. The trial court's finding of heinous, atrocious, or cruel should therefore be stricken.

D. Cold, Calculated, and Premeditated

The trial court found that the homicides were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R224; A14) The court provided the following factual basis for this factor:

> The dispute over payment for a worker's compensation claim by the Defendant had been ongoing for some months prior to the murders. The Defendant had expressed his displeasure with the company's failure to pay him what he believed he was owed to a number of people on a number of occasions. On the day of the murders, the Defendant went to the cemetery office, entered a back door used by employees only, went to the office of the victims, obtained a check for $1500 from the victims, forced the victims to leave their office in one of the victim's cars, and forced the victims to drive to a nearby park. Upon arriving at the park, the Defendant, armed with a knife and a gun, forced the victims to walk a distance into the park to a secluded wooded area where he killed them by shooting them in the head. The Defendant removed jewelry of the male victim and was later seen with that jewelry. The Defendant attempted to purchase a car with the check. No weapons were ever discovered.

(R224-225; A14-15)

In Geralds v. State, 601 So. 2d at 1163, this Court ruled,

> To establish the heightened premeditation required for a finding that the murder was committed in a cold, calculated and premeditated manner, the evidence must show that the defendant had a "careful plan or prearranged design to kill." . . . A plan to kill cannot be inferred solely from a plan to commit, or the commission of another felony.

Furthermore, when the State relies upon circumstantial evidence to establish a careful plan or prearranged design to kill, "the circumstantial evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." Id.

In Geralds, the defendant was a carpenter who had worked on remodeling the victim's home. A week before the murder he encountered the victim and her children at a mall and learned that her husband was out of town and when her children left for and returned from school. The day of the murder, the defendant entered the victim's home while her children were at school, tied her up with plastic ties, beat her and stabbed her to death, and stole her jewelry and Mercedes automobile. This Court rejected the trial court's finding of cold, calculated, and premeditated because there was a reasonable hypothesis that the defendant tied up the victim to question her about money that was hidden in the house, then became enraged and killed her when she refused to tell him. Alternatively, she may have been killed during a struggle when she tried to escape. Id., at 1163-1164.

Similarly, in this case the circumstantial evidence relied upon by the court presents a reasonable hypothesis that Appellant's only prearranged plan was to obtain the money which he felt the cemetery owed him for the disputed worker's compensation claim.

Appellant's belief that the cemetery owed him $150 gave him a pretense of moral and legal justification for such a plan. As discussed above in the argument concerning pecuniary gain, there is no evidence as to why Swack wrote the check for $1500 rather than $150; Swack may have done so because he was frightened, or because he wanted to make the check more difficult to cash, or to make Appellant's wrongful taking easier to detect. The ensuing abduction and murders may very well have been unplanned, spontaneous acts. Because the medical examiner found evidence that Swack was stabbed nine times in a struggle before he was shot (T253-263), it is also possible Swack attempted to escape from Appellant and caused him to become enraged.

Because the circumstantial evidence is susceptible to a reasonable hypothesis that Appellant did not have a careful plan or prearranged design to kill and that he did have a pretense of moral or legal justification for his initial acts, the evidence is not legally sufficient to sustain the court's finding of cold, calculated, and premeditated. See Lawrence v. State, 614 So. 2d 1092, 1096 (Fla. 1993) (insufficient circumstantial evidence of cold, calculated, and premeditated where convenience store clerk was shot twice in the head while lying face down in storeroom during robbery); Green v. State, 583 So. 2d at 652-653 (insufficient evidence of prior calculation where defendant went to landlords' house to recover rent check and stabbed them to death). This factor must also be stricken.

E. Jury Instructions

Defense counsel objected to the State's proposed jury instructions on avoid arrest, financial gain, and cold, calculated, and premeditated on the ground that the evidence was legally insufficient to support those factors. (T514-517,519,521) He also renewed his pre-trial objections to instructing the jury on the heinous, atrocious, or cruel factor on the ground that it was unconstitutionally vague and overbroad. (T520-521) The court overruled the objections (R96-103; T518-522) and gave all four contested instructions. (T555-558)

As a matter of state law, it is error to instruct the jury on aggravating factors which are not supported by the evidence. Padilla v. State, 618 So. 2d 165, 170 (Fla. 1993); White v. State, 616 So. 2d 21, 25 (Fla. 1993); Archer v. State, 613 So. 2d 446, 448 (Fla. 1993). Because the court found that the evidence established mitigating circumstances, including Appellant's chronic mental illness, family background, and mental retardation (R225-226; A16-17), the court's error in finding and instructing the jury upon factually unsupported aggravating circumstances requires reversal of the death sentences and remand for a new penalty phase trial before a new jury. Padilla; White; Archer.

ISSUE III

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY INSTRUCTING THE JURY UPON AND FINDING UNCONSTITUTIONALLY OVERBROAD AGGRAVATING CIRCUMSTANCES -- FELONY MURDER AND COLD, CALCULATED, AND PREMEDITATED.

Appellant was indicted for two counts of first-degree murder and two counts of kidnapping. (R24-26) In closing argument, the prosecutor relied upon both premeditation and felony murder to support convictions for first-degree murder. (T386-387) The court instructed the jury on both premeditated and felony murder, with kidnapping as the underlying felony. (T418-419) The jury found Appellant guilty as charged on all four counts. The murder verdicts did not specify whether the jury relied upon premeditation, felony murder, or both. (R158-160)

During the penalty phase, the court instructed the jury on the felony murder aggravating circumstance provided by section 921.141-(5)(d), Florida Statutes (1991), and the cold, calculated, and premeditated aggravating circumstance provided by section 921.141-(5)(i):

> 2. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of kidnapping or in an attempt to commit the crime of kidnapping or in flight after or [sic] attempting to commit the crime of kidnapping.
>
> * * *
>
> 6. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(T556-557)

The prosecutor urged the jury to find both aggravating circumstances. (T542-543) The jury recommended death sentences by a 7 to 5 vote. (T574-575) The court found both aggravating circumstances and sentenced Appellant to death for each of the murders. (R223-226;A13-16)

At trial, defense counsel did not object to either of these aggravating circumstances on the grounds that they are unconstitutional. (T514-517,521) Defense counsel filed a pretrial motion attacking the constitutionality of the cold, calculated, and premeditated circumstance, but he withdrew the motion. (R104-105;T707) Nonetheless, facial validity of a statute, including an assertion that the statute is infirm because of overbreadth, can be raised for the first time on appeal. . . ." Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1982).

The felony murder and cold, calculated, and premeditated statutory aggravating circumstances are facially overboard because they duplicate the elements of first-degree murder as defined by section 782.04(1)(a), Florida Statutes (1991). Since a murder must be premeditated or committed during the course of one of the enumerated underlying felonies to be a first-degree murder, one or both of these statutory aggravating factors would appear on its face to be applicable to nearly all first-degree murders.[8]

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[8] Section 782.04(1)(a)2 includes three underlying felonies not included in the section 921.141(5)(d) aggravating factor -- drug trafficking, aggravated child abuse, and escape. But there is a separate death penalty statute for drug trafficking murders. § (continued...)

Aggravating circumstances which apply to nearly all first-degree murder cases violate the Eighth and Fourteenth Amendments. "[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 77 L. Ed. 2d 235, 249-250 (1982). "When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so." Arave v. Creech, 507 U.S. __, 113 S. Ct. __, 123 L. Ed. 2d 188, 200 (1993).

In Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988), the Supreme Court upheld Louisiana's felony murder aggravating circumstance. But the Court did so only because Louisiana does not rely upon aggravating circumstances to narrow the class of defendants eligible for the death penalty. The Court found that Louisiana's capital sentencing scheme satisfies the Eighth Amendment narrowing requirement by defining first-degree murder much more narrowly than most other states.

The courts of at least three states which rely upon aggravating circumstances to narrow the class of death eligible defendants have ruled that their states' felony murder aggravating circum-

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[8](...continued)
921.142, Fla. Stat. (1991). Escape is an aggravating factor under section 921.141(5)(e), Florida Statutes (1991). Most aggravated child abuse murders would quality as heinous, atrocious, or cruel under section 921.141(5)(h), Florida Statutes (1991).

stances are unconstitutional. State v. Middlebrooks, 840 S.W. 2d 317, 341-346 (Tenn. 1992), cert.granted, __U.S.__, __S. Ct. __, 123 L. Ed. 2d 466 (1993); Engberg v. Meyer, 820 P. 2d 70 (Wyo. 1991); State v. Cherry, 257 S.E. 2d 551 (N.C. 1979). The United States Supreme Court should resolve this issue when it decides Middlebrooks. Meanwhile, the constitutionality of Florida's felony murder aggravating circumstance has been challenged in at least one other capital appeal pending in this Court. Taylor v. State, No. 80,121.

This Court has evidently recognized the facial overbreadth of the cold, calculated, and premeditated aggravating circumstance by subjecting it to a limiting construction requiring proof beyond a reasonable doubt of heightened premeditation and a careful plan or prearranged design to kill. Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992).

When the trial judge is the sentencer, a facially vague and overbroad aggravating circumstance may be saved by a narrowing construction applied by the judge or the appellate court. Walton v. Arizona, 497 U.S. 639, 653-654, 110 S. Ct. 3047, 111 L. Ed. 2d 511, 528 (1990). However, when the jury is the sentencer,

> it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face.

Id., 497 U.S. at 653; 111 L. Ed. 2d at 528.

Because Florida places its capital sentencing authority in two actors, the jury which recommends life or death, and the trial

judge who must give great weight to the jury's recommendation, "neither actor must be permitted to weigh invalid aggravating circumstances." Espinosa v. Florida, 505 U.S. __, 112 S. Ct. __, 120 L. Ed. 2d 854, 859 (1992). When the judge instructs the jury that it may consider an aggravating circumstance using only unconstitutionally vague statutory language, it must be presumed that the jury found an invalid aggravating factor, which is then indirectly weighed by the judge in giving great weight to the jury's recommendation. Id., 120 L. Ed. 2d at 858-859.

Thus, under Espinosa it must be presumed that the jury found two constitutionally invalid aggravating factors in this case because the court instructed the jury on the felony murder and cold, calculated, and premeditated factors using only the overbroad statutory language. This Court cannot cure the resulting Eighth Amendment violation. The felony murder aggravator has never been subjected to, and is not amendable to, a narrowing construction to satisfy the requirements of the Eighth Amendment.

Moreover, Espinosa does not permit this Court to apply the heightened premeditation limiting construction to determine whether the court properly found the cold, calculated, and premeditated circumstance. Whether or not the facts support the court's finding (see Issue II, supra, for Appellant's argument that they do not) the unconstitutionally overbroad jury instructions rendered the jury's death recommendations so unreliable that the death sentences must be vacated. Especially given the close 7 to 5 vote on the death recommendation, the jury's consideration of invalid aggravat-

ing circumstances is very likely to have determined the result. This case must be remanded for a new penalty phase trial before a new jury.

ISSUE IV

THE TRIAL COURT ERRED BY FAILING TO FIND AND WEIGH MITIGATING CIRCUMSTANCES ESTABLISHED BY UNREFUTED EVIDENCE -- MENTAL OR EMOTIONAL DISTURBANCE, IMPAIRED CAPACITY TO CONFORM CONDUCT TO THE REQUIREMENTS OF LAW, BRAIN DAMAGE, AND A HISTORY OF DRUG ABUSE.

The Eighth Amendment prohibits the State from precluding the sentencer in a capital case from considering any relevant mitigating factor, and it prohibits the sentencer from refusing to consider, as a matter of law, any relevant mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 113-114, 102 S. Ct. 869, 71 L. Ed. 2d 1, 10-11 (1982); U.S. Const. amends. VIII and XIV. The sentencer must be allowed to consider and give effect to mitigating evidence relevant to the defendant's background and character precisely because the punishment should be directly related to the personal culpability of the defendant. Penry v. Lynaugh, 492 U.S. 302, 327-328, 109 S. Ct. 2934, 106 L. Ed. 2d 256, 284 (1989).

Moreover, the Eighth Amendment requires that capital punishment be imposed fairly, and with reasonable consistently, or not at all. Eddings v. Oklahoma, 455 U.S. at 114, 71 L. Ed. 2d at 9. To insure fairness and consistency, this Court must conduct a meaningful independent review of the defendant's actual record. Parker v. Dugger, 408 U.S. ___, 111 S. Ct. ___, 112 L. Ed. 2d 812, 826 (1991). In conducting the requisite appellate review, this Court cannot ignore evidence of mitigating circumstances contained in the record. Id.

To insure the proper consideration of evidence of mitigating circumstances this Court has ruled that the trial court must expressly evaluate each mitigating circumstance to determine whether it is supported by the evidence and whether nonstatutory factors are truly mitigating in nature. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). The court must find that a mitigating circumstance has been proved if it is supported by a reasonable quantum of competent, uncontroverted evidence. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). "Once established, a mitigating circumstance may not be given no weight at all." Dailey v. State, 594 So. 2d 254, 259 (Fla. 1991).

A. Mental or Emotional Disturbance

Section 921.141(6)(b), Florida Statutes (1991), establishes as a mitigating circumstance, "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." This Court has effectively removed the adjective "extreme" from the statutory circumstance:

> However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say.

Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990).

Yet the trial court in this case apparently found that the statutory mitigating circumstance was not established because the defense expert, Dr. Berland, testified that Appellant suffered from

a "significant" mental or emotional disturbance, rather than an "extreme" disturbance:

> The testimony of one of the psychologists was to the effect that the Defendant does and did at the time of the offense suffer from "significant" mental or emotional disturbance, that this is a chronic mental illness that will never go away. This statutory mitigating factor was not established by the evidence, but the defendant's chronic mental illness was given some weight by the court as a nonstatutory mitigating factor.

(R225, A15)

Not only did the court err by rejecting mental or emotional disturbance as a mitigating factor on the ground that it was "significant" but not "extreme," the court's finding of "chronic mental illness" as a nonstatutory mitigating factor fails to convey the import of Dr. Berland's testimony.

Dr. Berland testified that Appellant suffered from a psychotic disturbance. (T475) The results of the psychological tests administered by Dr. Berland established that Appellant was genuinely psychotic and not faking. (T485-487) Elevated scores on the schizophrenia and paranoia scales showed that Appellant had a psychotic disturbance characterized by delusional beliefs which could only be changed by medication. (T486) Appellant also suffered from a mood disturbance; he was depressed well beyond the level of reactive depression caused by his circumstances. (T486-487) Appellant's high score on the hypochondriasis scale indicated delusions and probably hallucinations. (T487) The test results showed a "fairly severe but chronic profile," meaning that he had the problem for more than two years. (T487)

Appellant's responses during Dr. Berland's interview also showed that Appellant was being truthful and lacked the sophistication to "out fox" someone on a mental health examination. (T493-495) Appellant admitted a number of delusional beliefs and an even greater number of visual, auditory, and tactical hallucinations, which were symptoms of his psychosis. (T495) Through one of Appellant's co-workers, Dr. Berland learned that Appellant had an irrational belief that his employers were cheating and persecuting him although they had shown him their books and had tried to help by taking him to the doctor. (T496-497) Dr. Berland also learned that Appellant had been psychotic and suffered from hallucinations, delusions, and a mood disturbance as early as the age of nine. (T497-498) Appellant's mental illness was the kind which lasts for life, although the symptoms may be more or less severe at various times. (T498) Appellant had been using drugs, particularly cocaine, for a considerable period of time up to the day of his arrest. (T498,501) Drugs usually increase the severity of psychotic symptoms; "it's like throwing gasoline on the flames." (T499)

In summary, Dr. Berland's opinion was that Appellant suffered from a mental or emotional disturbance which had been present and was a significant factor in his behavior for a long time, including the time of the offense. (T499-500) The State presented no evidence to rebut Dr. Berland's testimony. Thus, the trial court erred by finding that the statutory mental or emotional disturbance mitigating factor had not been established. Santos v. State, 591

So. 2d 160, 163-164 (Fla. 1991); Nibert v. State, 574 So. 2d at 1062-1063; Farinas v. State, 569 So. 2d 425, 431 (Fla. 1990). The court's finding of chronic mental illness as a nonstatutory aggravator fails to adequately recognize or take into account the severity of Appellant's psychotic disturbance and its significant effect upon his behavior. See Farinas, at 431.

B. Impaired Capacity

Section 921.141(6)(f), Florida Statutes (1991), provides for the following mitigating circumstance: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." [Emphasis added.]

It is important to note that the Florida Legislature chose the disjunctive word "or" to separate the two relevant mental capacities which may be impaired. Thus, the statutory mitigating factor may be proved by showing either that the defendant's capacity to appreciate the criminality of his conduct was impaired or by showing that his capacity to conform his conduct to the requirements of law was impaired.

Dr. Berland testified that in his opinion Appellant's ability to recognize the criminality of his conduct was not impaired, but his ability to conform his conduct to the requirements of law was impaired. (T500) Dr. Berland's finding of Appellant's impaired capacity to conform his conduct to the requirements of law was supported by his other findings concerning Appellant's mental and emotional condition. As explained above, Dr. Berland determined

that Appellant suffered from a long-term psychotic disturbance characterized by delusional beliefs and hallucinations. (T475,485-487,495-498) Appellant's psychotic symptoms were made worse by his drug abuse. (T498-499,501) Both Dr. Logan and Dr. Berland found that Appellant was mildly retarded, with an IQ between 56 and 70, depending upon the test. (T454-456,462-464,489-492) Moreover, Dr. Berland found "clearcut and unequivocal" evidence of mental impairment from some form of brain damage. (T491-492,501-502)

Despite the substantial, unrefuted evidence that Appellant's capacity to conform his conduct to the requirements of law was impaired, the trial court rejected this statutory mitigating circumstance. The court erroneously stated the circumstance, connecting the separate mental capacities covered by the statute with the conjunctive "and." The court then found that the circumstance was not established because only Appellant's capacity to conform his conduct was impaired, while his capacity to appreciate the criminality of his conduct was not impaired. (R225; A15)

The court's finding regarding impaired capacity was plainly wrong. Because there was substantial, unrefuted evidence that Appellant's capacity to conform his conduct to the requirements of law was impaired, the court erred by failing to find and weigh the statutory mitigating circumstance. Santos v. State, 591 So. 2d at 163-164; Nibert v. State, 574 So. 2d at 1062-1063; Campbell v. State, 571 So. 2d at 419.

C. Brain Damage

This Court has recognized that brain damage, particularly in conjunction with mental illness or low intelligence, constitutes a valid nonstatutory mitigating circumstance. DeAngelo v. State, 616 So. 2d 440, 443 (Fla. 1993); Scott v. State, 603 So. 2d 1275, 1277 (Fla. 1992); Carter v. State, 560 So. 2d 1166, 1168-1169 (Fla. 1990).

Dr. Berland testified that the results of the psychological tests showed that Appellant had suffered brain damage from an injury or series of injuries. (T491-492) Dr. Berland had not determined the specific cause of the damage. (T495,502) Nonetheless, the test results alone provided "clearcut and unequivocal" evidence of impairment from injury to the brain. (T501-502)

The trial court did not even mention this evidence of brain damage in its findings on mitigating circumstances. (R225-226; A15-16) The court erred by failing to expressly evaluate this evidence of a nonstatutory mitigating circumstance. Campbell v. State, 571 So. 2d at 419. Because the circumstance was established by substantial, unrefuted evidence, the court erred by failing to find and weigh the mitigating factor of brain damage in determining the appropriate sentence. Dailey v. State, 594 So. 2d at 259; Nibert v. State, 574 So. 2d at 1062; Campbell v. State, 571 So. 2d at 419-420.

D. Drug and Alcohol Abuse

This Court has also recognized the defendant's history of drug abuse as a valid nonstatutory mitigating circumstance. Clark v. State, 609 So. 2d 513, 516 (Fla. 1992); McKinney v. State, 579 So. 2d 80, 85 (Fla. 1991); Campbell v. State, 571 So. 2d at 419.

Dr. Berland testified that Appellant had a history of drug abuse. In particular, Appellant used cocaine for a considerable period of time right up to the time of his arrest. (T498) Dr. Berland found this history of drug abuse particularly significant because it would have considerably increased the severity of Appellant's symptoms of psychosis, "like throwing gasoline on the flames." (R498-499)

Again, the trial court did not even mention this evidence of drug abuse in its findings on mitigating circumstances. (R225-226; A15-16) Again, the court's failure to evaluate the evidence and its failure to find and weigh a mitigating circumstance established by substantial, unrefuted evidence was error. Dailey; Nibert; Campbell.

In Farr v. State, No. 77,925 (Fla. June 24, 1993) [18 F.L.W. S 380], this Court declared, "We repeatedly have stated that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted." The trial court's errors in rejecting the statutory mitigating circumstances of mental disturbance and impaired capacity and in failing to even consider the nonstatutory mitigating factors of brain damage and history of drug abuse, although all four

factors were supported by substantial, unrefuted evidence at trial, requires reversal of the death sentence. Id.; Dailey; Nibert; Campbell. In Issue V of this brief Appellant argues that death is disproportionate in this case, so his sentence should be reduced to life. In the alternative, this case must be remanded to the trial court for reconsideration and reweighing of the mitigating circumstances. Farr; Campbell.

ISSUE V

THE TRIAL COURT VIOLATED THE UNUSUAL PUNISHMENT PROHIBITION OF THE FLORIDA CONSTITUTION BY IMPOSING DEATH SENTENCES WHICH ARE DISPROPORTIONATE TO THE CIRCUMSTANCES OF THIS CASE AND IN COMPARISON WITH OTHER CASES.

This Court conducts proportionality review of every death sentence to prevent the imposition of unusual punishment prohibited by Article I, section 17 of the Florida Constitution. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993); Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). Because death is a uniquely irrevocable penalty, death sentences require more intensive judicial scrutiny than lesser penalties. Tillman, at 169. "While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is nonproportional," this Court is "required to weigh the nature and quality of those factors as compared with other similar reported death appeals." Kramer, at 277. Application of the death penalty is reserved for "only the most aggravated and unmitigated" crimes. Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988); State v. Dixon, 208 So. 2d 1, 7 (Fla. 1973), cert.denied sub nom., Hunter v. Florida, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974).

Appellant's case is not among the most aggravated murder cases in Florida. As argued under Issue II, supra, four of the six aggravating circumstances found by the trial court are invalid because they were not proved beyond a reasonable doubt, thus eliminating the court's findings of avoid arrest, pecuniary gain,

heinous, atrocious, or cruel, and cold, calculated, and premeditated. As argued under Issue III, supra, the committed during the course of a kidnapping factor is unconstitutional. This leaves only one aggravating factor, prior conviction of another capital or violent felony. (R222-223; A12-13)

This Court has affirmed death sentences supported by only one aggravating factor only in cases involving "either nothing or little in mitigation." McKinney v. State, 579 So. 2d 80, 85 (Fla. 1991); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990). In McKinney, this Court struck findings of heinous, atrocious, or cruel, and cold, calculated, and premeditated, leaving as the sole aggravating factor that the murder was committed during the course of a robbery, kidnapping, and burglary. The mitigating factors were no significant history of criminal activity, mental deficiencies, and a history of drug abuse. This Court found that the death sentence was disproportionate. Id., at 84-85.

In Nibert, the sole aggravating factor was heinous, atrocious, or cruel. This Court held that the trial court erred by failing to find a number of mitigating factors, including extreme mental or emotional disturbance, impaired capacity, alcohol abuse, childhood abuse, remorse, and potential for rehabilitation. Again, this Court found that the death sentence was disproportionate. Id., at 1062-1063.

In this case there are a number of similar mitigating circumstances which render the death sentences disproportionate. The trial court found that Appellant suffers from chronic mental ill-

ness, is moderately disturbed, has a deprived family background, suffers an intellectual deficit, and is mildly retarded. (R225-226; A15-16) As argued under Issue IV, supra, the court erred by failing to find the statutory mitigating circumstances of extreme mental or emotional disturbance and impaired capacity and the nonstatutory mitigating factors of brain damage and a history of drug abuse.

Even if this Court rejects Appellant's arguments that five of the aggravating factors found by the court are invalid, the substantial mitigating circumstances in this case render the death sentences disproportionate. This Court has found other death sentences disproportionate in other cases involving multiple aggravating factors and substantial mitigating factors similar to those in the present case.

In Kramer v. State, 619 So. 2d 274 (Fla 1993), the aggravating factors were conviction of a prior violent felony and heinous, atrocious, or cruel. The mitigating factors were alcoholism, mental stress, severe loss of emotional control, and potential to be productive in prison. This Court found the death sentence was not proportional. Id., at 277-278.

In Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988), the aggravating factors were prior conviction of a capital or violent felony, great risk of death to many people, committed during a kidnapping, avoid arrest, and pecuniary gain. The mitigating factors were extreme mental or emotional disturbance, impaired capacity, low emotional age, and brain damage. This Court found that the

death sentence was disproportionate because the defendant's actions "were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer." Id., at 812. The same description would be appropriate in Appellant's case.

There are also jury life recommendation cases with similar aggravating and mitigating circumstances demonstrating the disproportionality of the death sentences in this case. In Scott v. State, 603 So. 2d 1275 (Fla. 1992), the trial court found five aggravators: committed during a robbery; heinous, atrocious, or cruel; cold, calculated, and premeditated; prior convictions for violent felonies; and avoid arrest. This Court reversed the death sentence because the jury's life recommendation was supported by evidence of several mitigating factors: difficult and abused childhood; mentally impaired with adjustment disorder, attention deficit disorder, brain damage, and borderline intelligence; drug and alcohol abuse; emotionally unstable and immature; and the capacity to form loving relationships. Id., at 1277.

In Craig v. State, 585 So. 2d 278 (Fla. 1991), the trial court found two aggravating factors, committed during a robbery for pecuniary gain and heinous, atrocious, or cruel. This Court reversed the death sentence because the jury's life recommendation was supported by evidence of the defendant's nonviolent nature and mental retardation. Id., at 281.

In Carter v. State, 560 So. 2d 1166 (Fla. 1990), the trial court found five aggravating factors and no mitigating factors. This Court reversed the death sentence because the jury's life

recommendation was supported by evidence of brain damage, mental disturbance, impaired capacity, childhood abuse, and chronic alcohol and drug abuse. Id., at 1168-1169.

The murder of Mr. Swack and Ms. Walker in this case were horrible crimes; virtually all murders are horrible. But Appellant's crimes were the product of his extreme mental and emotional disturbance, his impaired capacity to conform his conduct to the requirements of law, his brain damage, his mental retardation, his drug abuse, and his deprived family background. This case is not among the least mitigated murder cases reviewed by this Court. Instead, it is very much like the cases cited above in which this Court has reversed the death sentences and remanded for the imposition of life sentences. This Court should also find that the death sentences imposed upon Appellant are disproportionate and remand this case with directions to sentence Appellant to life.

ISSUE VI

IMPOSITION OF THE DEATH PENALTY UPON A MENTALLY RETARDED DEFENDANT LIKE APPELLANT VIOLATES THE CRUEL AND/OR UNUSUAL PUNISHMENT PROHIBITIONS OF THE STATE AND FEDERAL CONSTITUTIONS.

Dr. Charles Logan, a psychologist who performs assessments of intellectual and adaptive competency for the Department of Health and Rehabilitative Services (T451-454), examined Appellant and determined that he meets the criteria for mild retardation, i.e., an IQ range of 55 to 69. Appellant's IQ, as measured on the Wechsler Adult Intelligence Seale Revised (WAISR), was 56. (T454-456)

Dr. Robert Berland, a forensic psychologist, had examined Appellant in 1986 and found that he suffered from very low intellectual functioning and a psychotic disturbance which impaired his ability to conform his conduct to the requirements of law. (T465-475) Dr. Berland administered the older Wechsler Adult Intelligence Seale (WAIS) resulting in a overall IQ of 70, which was the upper limit of retardation. (T490) Dr. Berland testified that use of the WAISR would have resulted in an IQ of 62 or 63, well into the retarded level. (T490-491,504-505) Dr. Berland also found evidence of brain damage (T491-492,501-502), evidence of psychosis manifested by delusional beliefs and hallucinations which had existed since childhood (T495-498), and a history of drug abuse (T498-501), which impaired Appellant's ability to conform his conduct to the requirements of law. (T500)

Defense counsel argued that execution of the mentally retarded is cruel and unusual punishment in his sentencing memorandum and at

the sentencing hearing. (R182-190;T598-601) The court found that Appellant's chronic mental illness and mental retardation were mitigating factors, but were outweighed by the aggravating circumstances, so the court sentenced Appellant to death. (R225-226)

In Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the United States Supreme Court held that execution of the mentally retarded does not violate the cruel and unusual punishment prohibition of the Eighth Amendment, but that mental retardation must be considered as a mitigating circumstance. However, the Court noted that evolving standards of decency which mark the progress of a maturing society may ultimately lead to a national consensus against executing the mentally retarded. Id., at 340.

This Court has never directly decided whether executing the mentally retarded violates the cruel or unusual punishment prohibition contained in Article I, section 17 of the Florida Constitution. Hall v. State, 614 So. 2d 473, 481 (Fla. 1993) (Barkett, C.J., dissenting). Instead, the Court has evaded the question by finding insufficient evidentiary support for a claim of retardation, Watts v. State, 593 So. 2d 198, 204 (Fla. 1992), and Carter v. State, 576 So. 2d 1291, 1293-1294 (Fla. 1989), by deferring to the United States Supreme Court's Eighth Amendment decision in Penry, Carter v. State, at 1293-1294, or by finding the claim procedurally barred. Woods v. State, 531 So. 2d 79, 82 (Fla. 1988). But in this case the claim is supported by the evidence and the trial court's findings of fact, and it was argued by defense counsel at the sentencing hearing.

Appellant adopts Chief Justice Barkett's argument that execution of the mentally retarded constitutes cruel or unusual punishment from her dissent in Hall v. State, 614 So. 2d at 480-482:

> Since Penry was decided, Kentucky, Maryland, New Mexico, and Tennessee have passed legislation exempting mentally retarded people from the death penalty. See V. Stephen Cohen, Comment, Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation, 19 Fla.St.U.L. Rev. 457, 468 (1991). Additionally, the Georgia Supreme Court has found that execution of the mentally retarded violates its state constitutional provision against cruel and unusual punishment. Fleming v. Zant, 259 Ga. 687, 386 S.E.2d 339 (1989). The Georgia court wrote:
>
> > The "standard of decency" that is relevant to the interpretation of the prohibition against cruel and unusual punishment found in the Georgia Constitution is the standard of the people of Georgia, not the national standard. Federal constitutional standards represent the minimum, not the maximum, protection that this state must afford its citizens. Thus, although the rest of the nation might not agree, under the Georgia Constitution, the execution of the mentally retarded constitutes cruel and unusual punishment.
>
> Id. 386 S.E.2d 342 (citation omitted).7

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7. In determining its state standards of decency, the Georgia court relied in part on a prospective legislative enactment that was passed after the trial of the defendant. Fleming v. Zant, 386 S.E.2d 339, 342 (Ga. 1989). The Georgia statute was a response to public outrage over the 1986 execution of Jerome Bowden, a mentally retarded man with an IQ of 59. V. Stephen Cohen, Comment, Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation, 19 Fla.U.L.Rev. 457, 468 n.117 (1991).

Floridians' attitudes toward the mentally retarded have evolved significantly in recent decades. Those mentally retarded people committed to state care no longer are warehoused in "training centers," and a variety of procedural safeguards have been enacted to protect the rights of those committed to state facilities. See § 393.11, Fla.Stat. (1991) (regulating involuntary admission of the mentally retarded to state residential services); see also David A. Davis, Executing the Mentally Retarded, Fla.Bar J., February 1991, at 13, 15 (discussing generally how statutes have changed to reflect a more enlightened approach to caring for the mentally retarded).

Society has developed a greater understanding of mental retardation. It is generally recognized now that mental retardation is a permanent learning disability that manifests itself in several predictable ways, including poor communication skills, short memory, short attention span, and immature or incomplete concepts of blameworthiness and causation. Davis, Fla.Bar J. at 13; see also James W. Ellis & Ruth A. Luckason, Mentally Retarded Criminal Defendants, 53 Geo.Wash.L.Rev. 414, 417 (1985); John Blume & David Burk, Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis, 41 Ark.L.Rev. 725, 732-34 (1988). A person who is mentally retarded is not just "slower" than the average person. Mental retardation is "a severe and permanent mental impairment that affects almost every aspect of a mentally retarded person's life." Blume & Burk, 41 Ark.L.Rev. at 734.

* * *

First, because a mentally retarded person. . . has a lessened ability to determine right from wrong and to appreciate the consequences of his behavior, imposition of the death penalty is excessive in relation to the crime committed. Coker v. Georgia, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977). As Justice Brennan noted in Furman v. Georgia, 408 U.S. 238, 257, 92 S.Ct. 2726, 2736, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring), a punishment is excessive when it is unnecessary. An excessive punishment "makes no measurable contribution to acceptable goals of

punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." Coker, 433 U.S. at 592, 97 S.Ct. at 2866 (discussing Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). . . . [I]mposing the death penalty on mentally retarded defendants is excessive, serves no purpose except to dispose of those some might deem to be "unacceptable members" of society, and therefore, is "cruel."

Second, executing a mentally retarded defendant . . . is "unusual" because it is disproportionate. Because mentally retarded individuals are not as culpable as other criminal defendants, . . . the death penalty is always disproportionate when the defendant is proven to be retarded.

* * *

The law requires that the death penalty be reserved for the most heinous of crimes and the most culpable of murderers. See, e.g., Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989); State v. Dixon, 283 So.2d 1, 8 (1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). . . . However, [Appellant] is not among the most culpable of murderers. [His] judgment, thought processes, and actions are unquestionably affected by his mental retardation. He cannot understand right from wrong in the way that most members of our society do, and . . . he should not be executed.

In evaluating both the "cruel" and "unusual" punishment prohibitions of article I, section 17 and the evolving standards of decency in Florida regarding the mentally retarded, . . . executing the mentally retarded violates the state constitution.

ISSUE VII

THE STATUTORY PROVISION ALLOWING THE JURY TO RECOMMEND DEATH BY A SIMPLE MAJORITY VOTE VIOLATES THE STATE AND FEDERAL CONSTITUTIONS.

Section 921.141(3), Florida Statutes (1991), permits the jury to recommend death by a majority vote. The jury in this case recommended death for each murder by a 7 to 5 simple majority vote. (R168;T574-575,625) Defense counsel did not question the constitutionality of basing the jury's penalty verdict on a majority vote, although he urged the court to consider the closeness of the vote in imposing sentence. (T606) However, the facial validity of a statute may be argued for the first time on appeal. Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1982). Moreover, the state and federal constitutional issues presented here are currently pending before this Court in at least one other capital appeal, Taylor v. State, No. 80,121.

This Court has ruled that the jury's recommendation as to sentence need not be unanimous, and a simple majority vote is sufficient for a death recommendation. Brown v. State, 565 So. 2d 304, 308 (Fla. 1990). This Court has also ruled that the jury is not required to unanimously agree on the existence of a specific aggravating factor. Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990). Appellant respectfully requests this Court to reconsider and recede from Brown and Jones.

Article V, section 2(a) of the Florida Constitution grants the Florida Supreme Court exclusive power to adopt rules for the prac-

tice and procedure in all Florida courts. "Where this Court promulgates rules relating to the practice and procedure of all courts and a statute provides a contrary practice or procedure the statute is unconstitutional to the extent of the conflict." Haven Federal Savings and Loan Assoc. v. Kirian, 579 So. 2d 730, 732 (Fla. 1991).

Whether a jury's penalty recommendation in a capital case requires a unanimous verdict or a majority vote is plainly a matter of practice and procedure. "As related to criminal law and procedure, substantive law is that which declares what acts are crimes and prescribes the punishment therefor, while procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished." State v. Garcia, 229 So. 2d 236, 238 (Fla. 1969).

Florida Rule of Criminal Procedure 3.440 provides, in pertinent part, "No verdict may be rendered unless all the trial jurors concur in it." No exception to this general rule requiring unanimous verdicts is made under Florida Rule of Criminal Procedure 3.780 which provides for the procedure in the penalty phase of a capital trial. Because the majority vote provision of section 921.141(3) concerns a matter of procedure and conflicts with the unanimous verdict requirement of Rule 3.440, the statute is unconstitutional to the extent of the conflict.

The majority vote provision of section 921.141(3) also violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. In Morgan v. Illinois, 504 U.S. __, 112 S. Ct. __, 119 L. Ed. 2d 492, 500 (1992), the Supreme Court held that

while a state is not required by the Sixth Amendment to provide for jury determination of whether to impose the death penalty, if it chooses to do so, the jury proceedings must satisfy the due process clause of the Fourteenth Amendment. Florida has chosen to place its capital sentencing authority in two actors, the jury and the judge, so both actors are subject to the requirements of the Eighth and Fourteenth Amendments. See Espinosa v. Florida, 505 U.S. __, 112 S. Ct. __, 120 L. Ed. 2d 854 (1992).

In non-capital state cases, the Supreme Court has upheld the use of substantial majority verdicts (9 to 3 or 10 to 2 votes), ruling that jury unanimity is not required by the Sixth or Fourteenth Amendments. Johnson v. Louisiana, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972); Apodaca v. Oregon, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972).

However, in federal capital cases the Court has ruled that the jury verdict must be unanimous both as to guilt and as to punishment:

> Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement extends to all issues -- character or degree of the crime, guilt and punishment -- which are left to the jury.

Andres v. United States, 333 U.S. 740, 748, 68 S. Ct. 880, 92 L. Ed. 1055, 1061 (1948).

Because there is a qualitative difference between death and any other penalty, there is a greater need for reliability in determining whether the death penalty is appropriate in a specific case. Zant v. Stephens, 462 U.S. 862, 884-885, 103 S. Ct. 2733, 72

L. Ed. 2d 235, 255 (1983). This need for reliability forecloses the states from requiring juror unanimity in the consideration and finding of mitigating circumstances. McKoy v. North Carolina, 494 U.S. 433, 443-444, 110 S. Ct. 1227, 108 L. Ed. 2d 369, 381 (1990); Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988). However, the need for reliability mandates juror unanimity in finding aggravating circumstances and imposing a death sentence. State v. Daniels, 542 A. 2d 306, 314-316 (Conn. 1988); People v. Durre, 690 P. 2d 165, 172-173 (Colo. 1984). There must be a distinction between requiring juror unanimity in finding aggravating circumstances and deciding to impose death, while prohibiting a requirement of juror unanimity in considering mitigating circumstances, because the Eighth and Fourteenth Amendments require the state to narrow the sentencer's discretion to impose a death sentence, but prohibit the state from narrowing the sentencer's discretion to decline to impose a death sentence. McKoy v. North Carolina, 494 U.S. at 443-444, 108 L. Ed. 2d at 381.

Because the majority jury verdict provision of section 921.141(3) violates both the state and federal constitutions, and because five members of Appellant's jury voted for a life sentence, the death sentences must be vacated. This Court should reverse and remand for imposition of a life sentence for each of the murders.

Charlie THOMPSON, Appellant,

v.

STATE of Florida, Appellee.

No. 70401.

Supreme Court of Florida.

July 20, 1989.

Rehearing Denied Sept. 28, 1989.

Defendant was convicted in the Circuit Court, Hillsborough County, M. Wm. Graybill, J., and sentenced to death, and he appealed. The Supreme Court held that: (1) trial court conducted improper inquiry into State's peremptory challenges of black prospective jurors when court failed to question State as to each and every peremptory challenge exercised against blacks once it became clear that State might be improperly exercising its peremptory challenges, and that failure was reversible error; (2) reasons given by State for challenging one black prospective juror would not support valid challenge; and (3) evidence supported conclusion that subnormality of suspect was not so severe as to render his entire confession during police interrogation, including that portion of confession occurring prior to his equivocal request for counsel, inadmissible.

Reversed and remanded for new trial.

McDonald, J., concurred specially with opinion.

Barkett, J., filed opinion concurring in part and dissenting in part in which Kogan, J., concurred.

1. Jury ⇐33(5.1)

Facts that prosecutor permitted single black from panel subsequent to initial voir dire panel to sit as juror and offered to seat other blacks that State "approved" were not sufficient to insulate State from claim of discriminatory use of peremptory challenges when peremptories had been exercised improperly in case of other prospective jurors.

2. Jury ⇐121

Where trial court entertains serious doubts as to whether State is improperly exercising its peremptory challenges, court should resolve that doubt in favor of defense and conduct inquiry as to State's reason for all challenged excusals of prospective jurors.

3. Jury ⇐121

Trial court's inquiry into State's reasons for excusals of prospective black jurors through peremptory challenges that were challenged was improper, where court failed to question State as to each and every peremptory challenge exercised against blacks once it became clear that State might be improperly exercising its peremptory challenges.

4. Criminal Law ⇐1166.16
Jury ⇐121

Failure of trial court to question State as to each and every peremptory challenge exercised against black prospective jurors once it became clear that State might be improperly exercising its peremptory challenges against blacks was reversible error.

5. Jury ⇐121

Duty of court to question State regarding peremptory challenges exercised against black prospective jurors does not become applicable only if there is "systematic" exclusion of blacks through peremptories.

6. Jury ⇐120

State's reasons for peremptorily challenging black prospective juror, that the prospective juror had been in jail in the 1950s when "they were hanging black people • • • for spitting on the sidewalk," was not valid basis for challenge; phrasing of answer by prosecutor indicated that State was as much concerned with prospective juror's race as with his prior incarceration, and unsupported speculation that the prospective juror harbored secret prejudice because of general circumstances of blacks in the 1950s was not the kind of required racially neutral explanation for challenge.

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7. Criminal Law ⇐517.2(1)

Suspect's statement during interrogation constituted equivocal request for counsel such that police should have ceased all questioning until they clarified meaning of the statement, and those portions of confession occurring after equivocal request for counsel would thus be suppressed.

8. Criminal Law ⇐525

Fact of mental subnormality or impairment does not alone render confession involuntary except in those rare cases involving subnormality or impairment so severe as to render defendant unable to communicate intelligibly or understand meaning of *Miranda* warnings even when presented in simplified form.

9. Constitutional Law ⇐266.1(1)
Criminal Law ⇐519(1)

Question of voluntariness of confession is question to be determined by state law, subject to minimum requirements of Fourteenth Amendment's due process clause. U.S.C.A. Const.Amend. 14.

10. Criminal Law ⇐525

Mental weakness of accused is factor in determining voluntariness of confession.

11. Criminal Law ⇐519(1)

In determining voluntariness of confession, court should consider comprehension of rights described to defendant. West's F.S.A. Const. Art. 1, § 9.

12. Criminal Law ⇐531(3)

Burden is on State to show by preponderance of the evidence that confession was freely and voluntarily given and that rights of accused were knowingly and intelligently waived.

13. Criminal Law ⇐1158(4)

Trial court's conclusion on question of voluntariness of confession will not be upset on appeal unless clearly erroneous, but the clearly erroneous standard is not applied with full force in those instances in which determination turns in whole or in part not upon live testimony, but on meaning of transcripts, depositions, or other documents reviewed by trial court which are presented in essentially the same form to appellate court.

14. Criminal Law ⇐531(3)

Evidence supported conclusion that subnormality of suspect was not so severe as to render entire confession during police interrogation inadmissible, including that portion of confession occurring prior to suspect's equivocal request for counsel; detective testified that suspect talked with police for more than two hours without having difficulty understanding questions during initial interview, and suspect attempted to provide alibi during that time, suggesting that he realized he was in trouble and appreciated consequences of his conversations with police.

James Marion Moorman, Public Defender, and Stephen Krosschell, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., and Davis G. Anderson, Jr., Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

Charlie Thompson appeals his conviction and sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We reverse and remand for new trial.

Charlie Thompson was grounds keeper and gravedigger for the Myrtle Hill Cemetery in Tampa. In May 1986, he pulled a muscle digging a grave and filed a worker's compensation claim. Apparently he never received a final $150 check on the claim and called Myrtle Hill's treasurer and bookkeeper, William Swack, about the missing check. Swack told him to come to the cemetery the next day.

On August 27, Thompson arrived at the cemetery and confronted Swack and an assistant, Nancy Walker. At that time, Swack mistakenly wrote Thompson a check, not for $150, but for $1500. For reasons not clear in the record, a fight erupted. Thompson contended in a taped statement that Walker slapped him, he pulled a gun, and forced Swack to drive him and Walker to a nearby park.

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At the park, Swack supposedly hit Thompson with a tree branch and, in return, Thompson slapped Swack on the neck. Thompson then made both Swack and Walker strip to their underclothes, but later he permitted Walker to put her clothes back on. There was no allegation of sexual battery. Finally, Thompson shot Swack and then Walker.

On the afternoon of August 27, 1986, a passerby found the bodies of Swack and Walker in the woods at the park. Swack had been stabbed several times and then shot, and Walker had died of a bullet wound to the back of the head. Police arrived and prepared the evidence. They noted that Swack was dressed only in underwear, shoes and socks. A pair of trousers lay next to the body, and a shirt covered the face. Evidence indicated that a watch and other jewelry may have been removed from Swack's body. Walker was entirely clothed.

Later, police learned that Thompson had sold a watch and ring to a man and a woman on August 28, 1986. Between August 27 and 29, 1986, Thompson also attempted unsuccessfully to cash the $1500 check at various businesses. Police arrested him on August 29, 1986, at a used car lot.

After a jury trial, Thompson was found guilty and the jury then returned an advisory verdict of nine to three in favor of death. The court concurred and imposed the death sentence.

On this appeal, Thompson raises eighteen issues. We confine our review to two issues dispositive of the case.

[1] Despite repeated objections by defense counsel at trial, the prosecutor used his peremptory challenges to excuse all eight blacks sitting on the initial panel at voir dire.[1] Thompson now argues that at least four of those challenges were exercised contrary to our holding in *State v. Neil*, 457 So.2d 481 (Fla.1984), *clarified*, *State v. Castillo*, 486 So.2d 565 (Fla.1986), *and clarified*, *State v. Slappy*, 522 So.2d 18 (Fla.), *cert. denied*, — U.S. —, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988).

As we explained in *Slappy*,

> the appearance of discrimination in court procedure is especially reprehensible, since it is the complete antithesis of the court's reason for being—to insure equality of treatment and evenhanded justice.

Slappy, 522 So.2d at 20. Based on this principle, in *Slappy* we expressly reaffirmed the test established in *Neil*. Under that test, parties alleging that group bias [2] is the reason for the excusal of any distinct class of persons from a venire must (a) make a timely objection, (b) demonstrate on the record that the challenged persons are members of that group, and (c) show that there is a strong likelihood these persons have been challenged because of impermissible bias. *Neil*, 457 So.2d at 486.

In *Slappy*, we extended the principles of *Neil* by holding that "broad leeway" must be accorded to the objecting party, and that any doubts as to the existence of a "likelihood" of impermissible bias must be resolved in the objecting party's favor. *Slappy*, 522 So.2d at 21–22. Whenever this burden of persuasion has been met, the burden of proof then rests upon the state to demonstrate "that the proffered reasons are, first, neutral and reasonable and, second, not a pretext." *Id.* at 22. Thus, in *Slappy* we expressly found that the state's use of four of its six peremptory challenges to exclude blacks who had indicated no partiality was sufficient of itself to shift the burden of proof to the state. *Id.* at 23.

The record before us contains several exchanges regarding the excusal of blacks.

1. From a subsequent panel, the prosecutor permitted a single black to sit on the jury and offered to seat others that the state "approved." However, this fact standing alone is not sufficient to insulate the state from a challenge under *State v. Neil*, 457 So.2d 481 (Fla.1984), when the peremptory has been exercised improperly in the case of other jurors. *State v. Slappy*, 522 So.2d 18, 21 (Fla.), *cert. denied*, — U.S. —, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988).

2. As we have noted in *Kibler v. State*, 546 So.2d 710 (Fla.1989), *Neil* applies equally to any use of the peremptory because of "group bias." At 712.

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When the state first excused a black peremptorily, the trial court denied the defense's *Neil* motion without requiring any explanation from the state. The following exchange then occurred:

THE COURT: ... There's been no showing of any systematic preemptorily [sic] challenging of blacks on this jury, and the Court recalls that [the black juror] Mr. Brooks said that he was arrested and charged a couple of months ago, and although he said that wouldn't affect him—

MR. ALLDREDGE: Wait a second, Judge.

THE COURT: I'm saying that the State does not have to give its reasons for exercising a preemptory [sic] challenge. I'm saying that, as the Court, I heard that and I'm not going to force the State to state its reasons for exercising a preemptory [sic] challenge at this stage.

There's been no showing that the State is systematically striking blacks.

As in this instance, the trial court refused to require the state to give any explanation for the excusal of the next several blacks it peremptorily challenged. However, when the state challenged Juror Bell, the following exchange occurred between the trial judge and prosecutor Benito:

THE COURT: If the Court had heard Mr. Bell vascillate [sic] as to any particular matter in this case, I may recognize that the State has the right to exercise a preemptory [sic] challenge.

But when Mr. Bell says that he knows two of the State witnesses and has not shown any reason for being prejudice [sic] for or against the State or for or against the defense, and *we are about to run out of all black persons in this panel, I will force the State to explain, on the record, why you are exercising a preemptory [sic] challenge* ...

....

MR. BENITO: First of all, I don't have to make a showing unless the Court is finding there is a systematic exclusion of blacks.

THE COURT: *I've s. found.*

(Emphasis added.) The prosecutor, however, continued to challenge the judge's finding:

MR. BENITO: ... That's not what the Neal [sic] case says. The Neal [sic] case says if I start systematically excluding blacks from the jury panel, you got [sic] to make a finding of that, and I've got to explain my reasons for doing that. There's a black seated on the jury.

How can I be systematically excluding blacks when you got a black sitting on the jury after I excuse Mr. Bell?

THE COURT: Is there any case to that effect, Mr. Benito, other than, as you say, common sense shows you're not systematically because there's one left?

MR. BENITO: Certainly.

....

THE COURT: *The Court finds that the State is not systematically excluding blacks from this jury.* State has exercised a preemptory [sic] challenge as to Mr. Bell.

(Emphasis added.) The trial court then permitted the state to continue exercising peremptory challenges against black jurors without explanation. However, when the state attempted to strike Juror Tyler, defense counsel Alldredge objected and the following exchange occurred:

MR. ALLDREDGE: The objection is that you are systematically excluding blacks from the jury.

THE COURT: The Court so finds unless you have valid, cogent reasons for excusing Mr. Tyler in this case.

....

MR. BENITO: Tyler has been in jail. I'm very uncomfortable even though he said he could try to be fair and impartial. I think I have a right to exercise a preemptory [sic] challenge regarding Mr. Tyler having been in jail at one time *back in the '50's, when my recollection and my school work in college was they were hanging black people back then for spitting on the sidewalk.* So this man's view of law enforcement regarding what's happened to him in the past and going to jail, I think may taint his

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> ability to be fair to the State in this particular case.

(Emphasis added.) As the state continued to exercise its peremptory to strike blacks, it then offered explanations for each.[3] However, at no time did the state give, or the trial court require, reasons for the excusal of Juror Brooks.

[2–4] The record reflects that the trial court below clearly entertained serious doubts as to whether the state was improperly exercising its peremptory challenges. Accordingly, the court should have resolved this doubt in favor of the defense and conducted an inquiry as to the state's reasons for all the challenged excusals. *Slappy*, 522 So.2d at 21–22. These reasons must be supplied by the prosecutor. Here, the trial court conducted an improper inquiry because it failed to question the state as to *each and every* peremptory challenge exercised against blacks once it became clear that the state might be improperly exercising its peremptory challenges. For this reason alone, we must reverse.

[5] Moreover, the entire course of voir dire recounted here reflects a serious misunderstanding of our holdings in *Neil* and *Slappy*, as well as the related federal case law. In *Slappy* we found

> the number [of challenged peremptories] alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternate. Indeed, the issue is not whether several jurors have been excused because of their race, but whether *any* juror has been so excused, independent of any other.

Slappy, 522 So.2d at 21 (citations omitted). *Accord United States v. David*, 803 F.2d 1567, 1571 (11th Cir.1986); *Fleming v. Kemp*, 794 F.2d 1478 (11th Cir.1986). The present record reflects a grave possibility that the trial court below relied upon the state's erroneous statement that *Neil* only comes into play if there is a "systematic" exclusion of blacks.[4] This is the only reasonable conclusion based on the record. Indeed, the trial court first began to conduct a *Neil* inquiry but then reversed itself after hearing the state's erroneous statement of the law. Moreover, every relevant statement by the trial court incorrectly characterized *Neil* as applying only to "systematic" uses of the peremptory.

[6] Finally, we note that the reasons given by the state for challenging Juror Tyler did not meet the standard set in *Slappy*. The state asserted that it excused Tyler because he had been in jail in the 1950s when "they were hanging black people ... for spitting on the sidewalk." While in some circumstances the state might validly challenge a person based on prior incarceration, the phrasing of the answer by the prosecutor here indicates that the state was as much concerned with Juror Tyler's race as with the prior incarceration. This is not permissible. The unsupported speculation that Tyler somehow harbored secret prejudice because of the general circumstances of blacks in the 1950s is not the kind of racially "neutral explanation" required by *Slappy*. 522 So.2d at 22.

Next, appellant asserts constitutional error based on the admission of his confession. During interrogations, police persuaded Thompson to submit to a "test." Turning down the lights and putting on goggles, police informed Thompson that a laser light directed at his arms would make them glow in the dark if he recently had fired a weapon. They did not tell Thompson that this "test" also reveals the presence of many other common chemicals and substances. Putting on goggles and turning down the lights, police shone the laser on Thompson's arms, producing a glow. Within minutes, Thompson made incriminating statements to the police.

3. We need not concern ourselves with these explanations, since we decide this case based on the first series of peremptories exercised by the state.

4. The term "systematic" is derived from *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), a decision that was rejected on state-law grounds by the Court in *Neil* and overruled by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Under *Neil* and *Slappy*, there is no requirement that the improper use of the peremptory be "systematic."

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[7] Also during these interrogations, the following relevant exchange between police and Thompson occurred:

DETECTIVE CHILDERS: Did you understand your rights?

THE DEFENDANT: Yeah.

DETECTIVE CHILDERS: *Did you at any time request an attorney?*

THE DEFENDANT: *Yeah, but I don't have the money to pay an attorney.*

DETECTIVE CHILDERS: You never told us that you wanted an attorney, did you?

THE DEFENDANT: No.

DETECTIVE CHILDERS: Okay. What you're saying right now is because Charlie Thompson wants to say it, isn't that correct?

THE DEFENDANT: Yes.

(Emphasis added.) Thompson had given portions of his confession both before and after the statement quoted here. Thus, two subissues are raised.

First, Thompson argues that the statement quoted above was an equivocal request for counsel and that police failed to comply with *Long v. State*, 517 So.2d 664, 666–67 (Fla.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1754, 100 L.Ed.2d 216 (1988). There, we clarified the standard governing police interrogations after an equivocal request for counsel. We first noted in *Long* that *Miranda v. Arizona*, 384 U.S. 436, 444–45, 86 S.Ct. 1602, 1612–13, 16 L.Ed.2d 694 (1966), required police questioning to stop if the accused indicated "in any manner and at any stage of the process that he wishes to consult with an attorney before speaking." Then we cited *Edwards v. Arizona*, 451 U.S. 477, 484, 101 S.Ct. 1880, 1884, 68 L.Ed.2d 378 (1981), which held that an accused who has invoked his right to counsel does not waive that right merely by responding to further police-initiated interrogation. Based on these principles, we concluded that an equivocal request for counsel by the accused permits police "to continue questioning for the sole purpose of clarifying the equivocal request," but nothing more. 517 So.2d at 667.

In the present case, we believe the *Long* error is clear on the face of the record. At the time Thompson made his equivocal request, police should have ceased all questioning until they had clarified the meaning of Thompson's statement. *Long*. Accordingly, those portions of the confession occurring after the equivocal request for counsel must be suppressed on remand.

The second subissue deals with those portions of the confession occurring prior to Thompson's equivocal request for counsel. In support of this argument, Thompson primarily rests his argument on evidence of mental subnormality contained in the record as well as on police "trickery" in using the laser. This subnormality, he argues, renders his entire confession nonvoluntary and inadmissible.

[8] The fact of mental subnormality or impairment alone does not render a confession involuntary, *Ross v. State*, 386 So.2d 1191 (Fla.1980), except in those rare cases involving subnormality or impairment so severe as to render the defendant unable to communicate intelligibly or understand the meaning of *Miranda* warnings even when presented in simplified form. *Cooper v. Griffin*, 455 F.2d 1142 (5th Cir.1972).

A number of courts have considered this problem in analogous situations in which the *Miranda* warnings may have been misunderstood by a mentally retarded or otherwise impaired defendant. The United States Supreme Court, for instance, has held that permanent or temporary mental subnormality is a factor that must be considered in the totality of the circumstances to determine the voluntariness of a confession. *Sims v. Georgia*, 389 U.S. 404, 88 S.Ct. 523, 19 L.Ed.2d 634 (1967) (confession suppressed when defendant who was illiterate, with third-grade education and "decidedly limited" intellectual abilities, had been interrogated for eight hours). *Accord Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) (pre-*Miranda* case in which confession was suppressed when drug-addicted defendant had been administered a medication that had properties of "truth serum"). This is in

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keeping with the "totality of the circumstances" test used in cases involving the alleged waiver of constitutional rights. *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); *Henry v. Dees*, 658 F.2d 406 (5th Cir.1981).

It appears that a majority of American jurisdictions expressly adhere to the totality of the circumstances approach. *See* Annotation, *Mental Subnormality of Accused as Affecting Voluntariness or Admissibility of Confession*, 8 A.L.R.4th 16, 24–28 (1981) & 3–4 (Supp.1988) (citing cases). This includes Florida. *Kight v. State*, 512 So.2d 922 (Fla.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988); *Ross; Myles v. State*, 399 So.2d 481 (Fla. 3d DCA 1981).

[9] The question of voluntariness is, in the first instance, a question to be determined by state law, subject to the minimum requirements of the fourteenth amendment's due process clause. *Jackson v. Denno*, 378 U.S. 368, 393, 84 S.Ct. 1774, 1789, 12 L.Ed.2d 908 (1964). While the United States Supreme Court has not explicitly provided a standard for determining voluntariness, *see* Martens, *The Standard of Proof for Preliminary Questions of Fact under the Fourth and Fifth Amendments*, 30 Ariz.L.Rev. 119, 119 (1988), other federal courts have held that

> [i]n considering the voluntariness of a confession, this court must take into account a defendant's mental limitations, to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confession was not a product of his own free will.

Jurek v. Estelle, 623 F.2d 929, 937 (5th Cir.1980), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981). One of the central concerns in this inquiry is "a mentally deficient accused's vulnerability to suggestion." *Henry*, 658 F.2d at 409.

[10–13] We agree with this assessment. Florida case law holds that mental weakness of the accused is a factor in the determination, and that the courts also should consider

> comprehension of the rights described to him, ... a full awareness of the nature of the rights being abandoned and the consequences of the abandonment.

Kight, 512 So.2d at 926. *See* art. I, § 9, Fla. Const. To this end, the burden is on the state to show by a preponderance of the evidence that the confession was freely and voluntarily given and that the rights of the accused were knowingly and intelligently waived.[5] *Henry*, 658 F.2d at 409; *Ross*, 386 So.2d at 1194. *Accord Doerr v. State*, 383 So.2d 905 (Fla.1980); *Fields v. State*, 402 So.2d 46 (Fla. 1st DCA 1981).

Accordingly, we must consider Thompson's claims of subnormality in light of all the evidence in the record.

[14] We find that there was other substantial evidence suggesting that this subnormality was not so severe as to render his entire exchange with the police inadmissible. Indeed, some evidence shows that Thompson was capable of understanding his *Miranda* rights. For instance, Detective Childers testified that during the initial interview Thompson talked with police for more than two hours without having difficulty understanding the questions. The trial court was entitled to weigh the credibility of this testimony against that of Thompson. Thompson also attempted to provide an alibi during this period of time, suggesting that he realized he was in trouble and appreciated the consequences of his conversations with the police. We thus must conclude that sufficient evidence exists on this record to support the trial court's decision to allow into evidence that portion of the confession occurring prior to Thompson's equivocal request for counsel.

5. The trial court's conclusion on this question will not be upset on appeal unless clearly erroneous; however, the clearly erroneous standard does not apply with full force in those instances in which the determination turns in whole or in part, not upon live testimony, but on the meaning of transcripts, depositions or other documents reviewed by the trial court, which are presented in essentially the same form to the appellate court. *Jurek v. Estelle*, 623 F.2d 929, 932 (5th Cir.1980), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981).

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We reverse and remand for new trial on all issues.

It is so ordered.

EHRLICH, C.J., and OVERTON, SHAW and GRIMES, JJ., concur.

McDONALD, J., concurs specially with an opinion.

BARKETT, J., concurs in part and dissents in part with an opinion, in which KOGAN, J., concurs.

McDONALD, Justice, concurring specially.

I concur because of the majority opinion in *State v. Slappy*, 522 So.2d 18 (Fla.), *cert. denied*, — U.S. —, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988). I do not agree with all of *Slappy* because it was overly restrictive in allowing a trial judge to decide whether the peremptories were being made on a racially neutral basis. Under any reasonable test, however, an insufficient inquiry and finding were made in this case. I fully concur with the discussion of the confession issue.

BARKETT, Justice, concurring in part, dissenting in part.

While I concur on the *Slappy* and *Long* issues, I would order the entire confession suppressed. The degree of this defendant's mental subnormality combined with the police use of the unreliable laser "test" casts grave doubts on the voluntariness of the confession. I would resolve those doubts in favor of the accused.

KOGAN, J., concurs.

LEON COUNTY SCHOOL BOARD, et al., Petitioners,

v.

Thelma J. GRIMES, Respondent.

No. 71694.

Supreme Court of Florida.

July 20, 1989.

Rehearing Denied Sept. 25, 1989.

Claimant, who fell and fractured her ankle at work when brace which she wore as result of polio gave way sought workers' compensation benefits. The Deputy Commissioner, A.S. Fontaine, denied claim, and claimant appealed. The District Court of Appeal, 518 So.2d 327, reversed and certified issue as one of great public importance. The Supreme Court, Overton, J., held that: (1) injuries that occur at place of employment but are result of condition personal to claimant and are not caused by place of employment are not compensable, and (2) evidence supported determination that fall suffered by claimant was solely result of her personal condition and that her employment in no way contributed to her injury.

Decision of District Court of Appeal quashed; remanded with directions.

Barkett, J., filed dissenting opinion in which Kogan, J., concurred.

1. Workers' Compensation ⇐604

Injuries which occur at place of employment but are result of condition personal to workers' compensation claimant and are not caused by place of employment are not compensable absent showing of increased risk or hazard attributable to workplace. West's F.S.A. § 440.01 et seq.

2. Workers' Compensation ⇐649

Workers' compensation claimant who fell and fractured ankle at work when brace that she wore as result of polio gave way was not entitled to workers' compensation benefits; claimant's employment in no way contributed to her injury where evi-

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Charlie THOMPSON, Appellant,

v.

STATE of Florida, Appellee.

No. 76147.

Supreme Court of Florida.

Jan. 30, 1992.

Rehearing Denied March 26, 1992.

After reversal and remand of defendant's convictions for kidnapping and murder, 548 So.2d 198, defendant was convicted in the Circuit Court, Hillsborough County, Robert H. Bonnano, J., of first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court, Barkett, J., held that *Miranda* warnings must inform accused that cost of lawyer will be borne by state or county if defendant is unable to hire lawyer.

Reversed and remanded.

1. Criminal Law ⇐518(3), 1169.12

Miranda warning was inadequate because it did not inform defendant that ultimate cost of attorney would be borne by state or county if defendant could not afford attorney, as evidenced by defendant's equivocal statement that he wanted lawyer but could not afford one; thus, admission of defendant's confession was reversible error. U.S.C.A. Const.Amend. 5; West's F.S.A. Const. Art. 1, § 9.

2. Criminal Law ⇐412.2(3)

While accused need not be told in exact language of *Miranda* that "if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires," police must somehow communicate to accused basic idea of right to consult free attorney before being questioned. U.S.C.A. Const.Amend. 5; West's F.S.A. Const. Art. 1, § 9.

3. Criminal Law ⇐1169.12

Erroneous admission of statements obtained in violation of *Miranda* is subject to harmless error analysis. U.S.C.A. Const. Amend. 5; West's F.S.A. Const. Art. 1, § 9.

James Marion Moorman, Public Defender and Stephen Krosschell, Assistant Public Defender, Tenth Judicial Circuit, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen. and Robert J. Landry, Asst. Atty. Gen., Tampa, for appellee.

BARKETT, Judge.

Charlie Thompson appeals from convictions for first-degree murder and related offenses and sentences, including the death penalty.[1]

Thompson's 1987 convictions for two counts of kidnapping and two counts of first-degree murder were previously reversed and remanded for a new trial by this Court finding error in the prosecutor's use of peremptory challenges to exclude blacks from the jury and the introduction of a portion of Thompson's confession after an equivocal request for counsel. *Thompson v. State*, 548 So.2d 198 (Fla.1989). The facts of the case are fully set forth in our previous opinion.

Briefly stated, Thompson was a grounds keeper and gravedigger for the Myrtle Hill Cemetery in Tampa. On August 27, 1986, Thompson confronted the bookkeeper, William Swack, and an assistant, Nancy Walker, over the last $150 of a worker's compensation claim that Thompson alleged was owed him by the cemetery. After Swack mistakenly wrote Thompson a check for $1500, a fight erupted. Thompson forced Swack, at gunpoint, to drive him and Walker to a nearby park where he later killed them. Swack was stabbed several times and then shot; Walker died of a bullet wound to the back of the head. Evidence indicated that a watch and other jewelry may have been removed from Swack's body. Police arrested Thompson on August 29, 1986, after learning that Thompson had sold a watch and a ring to a man and a woman and had attempted unsuccessfully to cash the $1500 check.

1. We have jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

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On remand, a jury again found Thompson guilty and recommended death by a vote of seven to five on both murder counts. The trial judge imposed two death sentences and two consecutive life sentences for the kidnappings and a consecutive fifteen-year term of imprisonment for a sexual battery for which Thompson had been on probation.

Thompson raises thirteen issues on appeal. We confine our review to the one issue dispositive of this case.

[1] The detective who interrogated Thompson advised him of his *Miranda*[2] rights by reading from a "Consent to be Interviewed" form as follows:[3]

> I understand that I need not consent to being interviewed nor am I required to make any further statement whatsoever; that I have the right to remain silent and not answer any questions asked of me relative to this crime. I further understand that if I do make a statement or answer any questions that said statement, whether written or oral, could and will be used against me if I am prosecuted for this offense. I further understand that prior to or during this interview that I have the right to have an attorney present. *I further understand that if I am unable to hire an attorney and I desire to consult with an attorney or have one present during this interview that I may do so and this interview will terminate.* I further understand that at any time that I desire I can have this interview stopped.

(Emphasis added.)

The State argues that this version of *Miranda* was sufficient to advise Thompson of his rights. The State's position is that "the gist of the *Miranda* warnings were provided and it is not essential that the accused be told that the ultimate cost [of a lawyer] will be borne by the state or the county." We disagree with the State's interpretation of *Miranda* and the requirements of the Florida Declaration of Rights.

In our recent opinion in *Traylor v. State*, 596 So.2d 957 (Fla.1992), we summarized the procedural safeguards required by the Florida Constitution to ensure that the privilege against self-incrimination is not jeopardized during police questioning:

> [T]he Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida suspects must be told that they have a right to remain silent, that anything they say will be used against them in court, that they have a right to a lawyer's help, *and that if they cannot pay for a lawyer one will be appointed to help them.*

Id. at 966 (footnote omitted) (emphasis added); *see Miranda v. Arizona*, 384 U.S. 436, 478–79, 86 S.Ct. 1602, 1629–30, 16 L.Ed.2d 694 (1966).

Of course, neither Florida nor federal courts have required a "talismanic incantation" of these rights. *See, e.g., State v. Delgado–Armenta*, 429 So.2d 328, 329–31 (Fla. 3d DCA 1983); *California v. Prysock*, 453 U.S. 355, 359, 101 S.Ct. 2806, 2809, 69 L.Ed.2d 696 (1981). Instead, all that is necessary is that the accused be "adequately informed" of the *Miranda* warnings or their equivalent. *See, e.g., Delgado–Armenta; Prysock.*

[2] Thus, while the accused need not be told in the exact language of *Miranda* that "if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires," the police must somehow communicate to the accused the basic idea of the right to consult a free attorney before being questioned. Here, even if we ignore that Thompson is borderline mentally retarded, we doubt that persons of average intelligence and verbal skills would have been able to glean from the statement read to Thompson that they were entitled to a free lawyer prior to questioning. Indeed, Detective Childers admitted at the suppression hearing that the warning did

2. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

3. The detective was reading from Tampa Police Department Form 310, printed in December 1984.

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not advise Thompson of his right to have a lawyer present at no cost.[4]

Indicative of the inadequacy of the *Miranda* warnings in this case was the equivocal statement made by Thompson that he wanted a lawyer but could not afford one. As this Court noted in the first *Thompson* opinion, sometime during the interrogation, the following relevant exchange occurred between Thompson and the police:

DETECTIVE CHILDERS: Did you understand your rights?

THE DEFENDANT: Yeah.

DETECTIVE CHILDERS: *Did you at any time request an attorney?*

THE DEFENDANT: *Yeah, but I don't have the money to pay an attorney.*

DETECTIVE CHILDERS: You never told us that you wanted an attorney, did you?

THE DEFENDANT: No.

DETECTIVE CHILDERS: Okay. What you're saying right now is because Charlie Thompson wants to say it, isn't that correct?

THE DEFENDANT: Yes.

(Emphasis added.) This exchange illustrates clearly that Thompson did not understand his right to consult with a lawyer free of charge.

As we said in *Traylor*, to insure that confessions are freely given, article I, section 9 of the Florida Constitution, requires that, prior to questioning, the indigent accused be advised of and given the opportunity to consult with a court-appointed lawyer. The record is clear that Thompson did not understand this right, and it is mere speculation whether he would have waived it had he understood.

In *Caso v. State*, 524 So.2d 422, 425 (Fla.), *cert. denied*, 488 U.S. 870, 109 S.Ct. 178, 102 L.Ed.2d 147 (1988), this Court held that "the failure to advise a person in custody of the right to appointed counsel if indigent renders the custodial statements inadmissible in the prosecution's case-in-chief." Consequently, because Thompson's statements were procured absent the proper warnings required by article I, section 9 of the Florida Constitution, we find his confession was improperly admitted in evidence.

[3] We recognize, of course, that the erroneous admission of statements obtained in violation of *Miranda* is subject to harmless error analysis. *See Caso; Kight v. State*, 512 So.2d 922, 926 (Fla.1987), *cert. denied*, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988). Nevertheless, we find the admission of Thompson's confession in this case constituted reversible error. We cannot state, beyond a reasonable doubt, that the impermissible admission of the confession did not affect the jury's verdict. *See Caso; State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla.1986).

Accordingly, we reverse Thompson's convictions and remand for a new trial consistent with this opinion.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, GRIMES, KOGAN and HARDING, JJ., concur.

4. Thompson did not argue the inadequacy of the *Miranda* warnings in his 1989 appeal because the deficiency in the warnings had not been presented at the first trial. Detective Childers testified at the first trial that he read Thompson the following statement of *Miranda* rights: "I further understand that prior to or during this interview that I have a right to an attorney present and if I can not afford one, *one will be appointed to me at no cost*" (emphasis added). However, at a suppression hearing held in connection with the second trial, Detective Childers admitted that his previous testimony was in error and that he did *not* tell Thompson he had the right to a lawyer at no cost. Although it is not entirely clear from the record, Detective Childers apparently was relying on the wording of a different *Miranda* form when he testified at the first hearing, and it was only at the second hearing that defense counsel brought out the insufficiency in the *Miranda* warnings that were actually read to Thompson. Clearly, this omission constitutes a material change in the evidence not previously addressed by this Court.

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IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY
CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA

vs.

CHARLIE THOMPSON

FILED

DEC 28 1992

RICHARD AKE, CLERK

CASE NO: 86-12224

DIVISION C

SENTENCING ORDER

The Defendant was tried before this Court on October 5, 1992 through October 8, 1992. The jury found the Defendant guilty as charged in the Indictment of First Degree Murder, F.S. 782.04 (Counts One and Two) and Kidnapping, F.S. 787.01 (1)(a)(3) (Counts Three and Four). The same jury reconvened on October 9, 1992, and evidence in support of aggravating factors and mitigating factors was heard. On October 9, 1992, the jury returned a 7-5 recommendation that the Defendant be sentenced to death. The Court requested memoranda from both Counsel for the State and Counsel for the Defendant. On December 28, 1992, at 8:30 a.m., the Court held a further sentencing hearing where both sides made further argument. Sentencing was set for 1:00 p.m. this date, December 28, 1992.

This Court, having heard the evidence presented in both the guilt phase and penalty phase, having had the benefit of legal memoranda and further argument both for and against the death penalty finds as follows:

A) AGGRAVATING FACTORS

1. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The Defendant was previously convicted of aggravated battery and sexual battery, both offenses involving the use or threat of use of violence.

Additionally, the Defendant's conviction of the first degree murder of each victim in this case is properly considered as an aggravating circumstance when considering sentence for the other victim.

This aggravating circumstance was proved beyond a reasonable doubt.

2. The capital felony was committed while the Defendant was engaged in the commission of, or attempt to commit, or escape after committing a kidnapping.

The Defendant was convicted of committing kidnapping of the victims of both murders. The evidence showed that both victims were at work together and were both discovered missing from their office. Their office door was locked, and when opened, the business machines were turned on, and their personal effects, i.e. purse, glasses, cigarette lighter were in the office. The business check register showed the last entry to be a check written to the Defendant in the amount of $1500.00 dated the same day of the disappearance of the victims. The bodies of the murdered victims were found later that same day.

This aggravating circumstance was proved beyond a reasonable doubt.

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

The Defendant was known to the victims as a previous employee of the cemetery. The Defendant believed he was owed money by the cemetery and had previously discussed this with at least one of the victims. The Defendant obtained a check in the amount of $1500 from the victims, an amount exceeding the amount in dispute by $1350. The victims were removed from their place of employment by the Defendant who was armed with a gun and knife, taken to a wooded area not far from the office and murdered.

This aggravating circumstance was proved beyond a reasonable doubt.

4. The capital felony was committed for pecuniary gain.

The Defendant went, armed with a knife and a gun, to his previous place of employment and obtained a check in the amount of $1500 from the victims. The amount of the check exceeded by $1350 what the Defendant felt he was owed by the cemetery for a

previous worker's compensation claim.

After obtaining the check, the defendant kidnapped the victims, took them to a remote, wooded area and murdered them.

This aggravating circumstance was proved beyond a reasonable doubt.

5. The capital felony was especially heinous, atrocious or cruel.

After obtaining a check to which he was not entitled, the Defendant forced the victims to go in one of the victim's cars to a park and then walk to a secluded wooded area. The Defendant was armed with a knife and a gun. The victims were forced to disrobe. The female victim was then allowed to redress. While clothed only in his underwear and shoes and socks, the male victim struggled with the Defendant and was stabbed nine times in various parts of his body. While the victim was still alive, the Defendant shot him in the head. The female victim was lying face down on the ground with her head on her arm. The autopsy revealed a bite mark to her arm that was inflicted while she was alive and aware of her impending death which came from a gunshot to her head. It is unclear which victim was killed first, but it is clear that both were aware for some period of time that the Defendant intended to kill them.

This aggravating circumstance was proved beyond a reasonable doubt.

6. The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The dispute over payment for a worker's compensation claim by the Defendant had been ongoing for some months prior to the murders. The Defendant had expressed his displeasure with the company's failure to pay him what he believed he was owed to a number of people on a number of occasions. On the day of the murders, the Defendant went to the cemetery office, entered a back door used by employees only, went to the office of the victims, obtained a check for $1500 from the victims, forced the victims to leave their office in one of the victim's cars, and forced the victims to drive to a nearby park. Upon arriving at the park, the

Defendant, armed with a knife and a gun, forced the victims to walk a distance into the park to a secluded wooded area where he killed them by shooting them in the head. The Defendant removed jewelry of the male victim and was later seen with that jewelry. The Defendant attempted to purchase a car with the check. No weapons were ever discovered.

This aggravating circumstance was proved beyond a reasonable doubt.

Nothing except as previously indicated above was considered in Aggravation. No other aggravating factors enumerated by statute is applicable to this case, and none were considered by this Court.

B. MITIGATING FACTORS

Statutory Mitigating Factors

1. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

The testimony of one of the psychologists was to the effect that the Defendant does and did at the time of the offense suffer from "significant" mental or emotional disturbance, that this is a chronic mental illness that will never go away. This statutory mitigating factor was not established by the evidence, but the defendant's chronic mental illness was given some weight by the Court as a nonstatutory, mitigating factor.

2. The capacity of the Defendant to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired.

The testimony of one of the psychologists established that the Defendant's ability to conform his conduct to the requirements of law was impaired, but that his capacity to appreciate the criminality of his conduct was not impaired. Therefore, this statutory mitigating circumstance was not established. However, the Court gave some weight to this testimony that the Defendant was moderately disturbed and exhibited some symptoms of mental illness as a nonstatutory, mitigating circumstance.

Non-Statutory Mitigating Factors

The Court has considered the following non-statutory, mitigating factors.

1. Family Background

The testimony of one of the defendant's sisters showed that the Defendant was born in Mississippi; had twelve siblings; his mother died when he was seven years old and his father died when he was 22. The Defendant was born in 1950, making him 36 years old at the time of the offense. The Defendant's sister loves him. The Defendant has a brother and a sister who have both been in mental institutions. The Court gave this family background little weight.

2. Mental Retardation

The testimony of two psychologists established that the Defendant suffers an intellectual deficit and is mildly retarded. This non-statutory, mitigating circumstance was given considerable weight by this Court.

The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake. The Court finds, as did a majority of the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present.

Accordingly, it is

ORDERED AND ADJUDGED that the Defendant, CHARLIE THOMPSON, is hereby sentenced to death for the murder of WILLIAM RUSSELL SWACK. It is further

ORDERED AND ADJUDGED that the Defendant, CHARLIE THOMPSON, is hereby sentenced to death for the murder of NANCY WALKER.

The Defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of these sentences as provided by law.

MAY GOD HAVE MERCY ON HIS SOUL.

DONE AND ORDERED in Tampa, Hillsborough County, Florida, this 28th day of December, 1992.

DIANA M. ALLEN
CIRCUIT JUDGE

Copies furnished to:

The Honorable Bill James, State Attorney
William Murphy, Counsel for the Defendant
Mr. Charlie Thompson, Defendant

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copies sent 12-

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 16th day of September, 1993.

Respectfully submitted,

Paul C. Helm

JAMES MARION MOORMAN
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