IN THE SUPREME COURT OF FLORIDA

ERIC SCOTT BRANCH,

Appellant,

v.

CASE NO. 83,870 ~~83,870~~

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

# INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA, :

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_____:

# INITIAL BRIEF OF APPELLANT

## PRELIMINARY STATEMENT

Eric Branch is the Appellant in this capital case. The record on appeal consists of nine volumes. Branch will refer to the record proper with the letter "R" and to the transcript with the letter "T."

## STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Escambia County on February 23, 1993 charged the Appellant, Eric Branch, with one count of first degree murder, one count of sexual battery, and one count of theft of an automobile (R 1-3). Nothing apparently happened in the case for nine months, but in October 1993, Branch' appointed counsel filed 18 motions, most of which are commonly filed in capital cases, and two of which have relevance for this appeal: Motion to Exclude Evidence or Argument Designed to Create Sympathy for the Deceased (R 91-107)(Denied (T 286)) and Motion to Continue (R 108) (In light of subsequent events, that request must have been granted). Three weeks later, the court also granted a motion by Branch's privately retained counsel that it find him partially indigent (R 109-110).

In the latter part of January 1994, the state filed a notice that it intended to introduce evidence that at the time of the murder there was a warrant for the defendant's arrest, and he took action to avoid it (R 111). On the third of March, Branch sought to strike that notice (R 168), but the court allowed the state to introduce its evidence (R 297). Two days earlier he had also filed motions to continue (R 158-61) and to postpone the penalty phase portion of the defendant' trial (R 162-64). The court denied both requests (R 290).

On March 4, 1994, Branch asked the court to change the venue of his trial. The court refused to do so until they tried to find an acceptable jury panel (R 172-262).

Three days later, Branch went to trial before Judge Edward Nickinson. He was found guilty as charged on all counts (R 318-19). By a vote of 10-2, the jury recommended Branch die (R 334). In the latter part of April, Branch filed a pro-se Motion for New Trial (R 353-54). He also filed a letter he had written the court more than two months earlier complaining about his

lawyer's representation of him (R 355).[1]

The court followed the jury's recommendation, and in justifying the death sentence it imposed on the defendant, it found in aggravation:

> 1. The murder was committed while Branch committed or attempted to commit a sexual battery.
>
> 2. Branch had a prior conviction for a violent felony, namely a forcible rape committed in Indiana in 1992.
>
> 3. The murder was especially heinous, atrocious, or cruel.

(R 449-52).

In mitigation the court found:

> 1. Branch has expressed remorse for the victim's death.
>
> 2. He had an unstable childhood.
>
> 3. He has some positive personality traits.
>
> 4. He acted appropriately at trial.

(R 452-53).

As to the sexual battery conviction, the court sentenced Branch to life in prison. For the theft conviction, the court imposed a five year prison term. All sentences are to run consecutively (R 453).

This appeal follows.

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[1]Branch's grandfather sent an affidavit to Judge Nickinson on February 22, 1994 also complaining about counsel's representation of Branch (R 338-40). The court filed it and an explanatory memorandum with the clerk on April 13, 1994 (R 341).

## STATEMENT OF THE FACTS

Eric Branch moved to Panama City, Florida from southern Indiana in the first part of November 1992 (T 771). He lived with his cousin, got a job at a local sandwich shop, and made plans to start college the next semester (T 773). About the first of the year he learned that the police in Indiana had issued a warrant for his arrest. Branch both waited to return and tried to hide the car he had driven from that state to delay his arrest (T 774). It was impounded, however, and when his relatives recovered it, Branch took it and drove toward Pensacola (T 777). About six a.m. on the morning of January 9, he checked into a motel in that city and took a short nap. When he awoke, he drove about town, finally stopping at a local club, the Ratskeller, near the University of West Florida campus. He met Melissa Cowden, and the two struck up a friendship that would continue for the next several days.

She took him to her dormitory room where he took a shower, they had sex, and then left (T 784). They went to another club, The Warehouse, because he had been there earlier, liked the music, and had met some members of the band who played there (T 606-607). About eight or nine p.m. they returned to his motel room where they spent the night (T 785).

The next day was Sunday. The pair spent the day trying to find a Western Union so Branch could get some money from his grandfather. They also visited Cowden's friends, and spent Sunday night in her dormitory room (T 785-788).

Monday, while Cowden went to class, Branch wandered around campus. He met her that afternoon, and they agreed to get together later at a club they had gone to over the weekend (T 793). He went to The Warehouse, and while there, he saw a band member he had met a few days earlier named Eric "Peters or St. Peters or St. Pierre." (T 779) They drank some beer and played

pool. During the evening, the defendant told the other Eric that he was wanted in Indiana, and he was so desperate that he thought he should steal a car and return to that state (T 795). The police were looking for him and the Pontiac he had used to drive to Panama City (T 796). His friend told him he could probably hotwire a car, so the pair left the club and tried to find a car to steal (T 797).

They wandered about for a while, eventually discovering a small Toyota Celica in a parking lot on campus. They tried to break into it, but when they noticed someone approaching they backed off and sat on a nearby curb (T 800).

Susan Morris approached her car, and as she started to get in, Branch's friend asked her what time it was. When she turned, he hit her in the head, and she collapsed (T 801). Although Branch had said nothing to Eric about using violence, he helped him carry her into a nearby wooded area (T 802). As both men tried to tie her up, she began to regain consciousness. Eric hit her again, and Branch fell on top of her (T 804). He got up, told Eric that he would let him tie her up because he was going to the car to wait (T 804).

He drove the car, but returned a few minutes later and picked up Eric (T 806). They returned to Cowden's dormitory. While the defendant's friend waited in the car, Branch got him a towel to dry off because he was wet from the mist that had rolled in (T 807). Branch also changed his clothes, socks, and shoes because they were wet (T 598). The two men drove away, eventually parking the car at the Pensacola airport. The pair split up, and Branch returned to the club where he had met Melissa Cowden. The defendant apparently spent the night with her because the next morning he left her room, drove the Pontiac to the airport, left it there, and drove Morris' car back to Panama City (T 814-16).

He intended to have his cousin return to Pensacola with him, pick up the Pontiac, and for him to fly back to Indiana, leaving Morris' car at the airport (T 816). While in Panama City, he tried to get a paycheck from the store he had worked, but when that failed, he borrowed $20 from another employee (T 820). His grandfather also wired him another $50, and with that money, he drove back to Indiana (T 821). He ran out of gas at Bowling Green, Kentucky, but since that was only an hour's drive from home, he called his grandfather to come get him (T 822). Before abandoning the car, he wiped it clean of fingerprints (T 848).

He talked with an aunt who told him the police in Panama City had questioned his brother and cousin about Morris' disappearance. Suspecting that they may want to question him as well, Branch talked with his lawyer and then turned himself into the local authorities (T 822-24).

## SUMMARY OF THE ARGUMENTS

Eric Branch presents nine issues in this capital case for this court to consider, five guilt phase and four penalty phase arguments. Two themes connect several points on appeal. First, Branch challenges the reliability of the jury's verdict because his lawyer had inadequate time to prepare his defense. This surfaces through the first issue's argument that the court should have granted his several requests to continue the trial. Defense counsel assumed responsibility for the defendant's capital trial barely four months before he went to trial. During that time he had two other major cases to prepare, in which one defendant, like Branch, faced a death sentence. Moreover, he had hired a mitigation specialist only a month before trial who needed several more weeks to complete her investigation of the brain injuries Branch had suffered as a child. While motions to continue generally are left to the trial court's discretion, in this instance the judge abused it when defense counsel, before trial, requested only short delays for specific reasons, the court articulated no reason Branch needed to be tried so soon, and the state never claimed any prejudice if the judge delayed the trial.

Branch realized counsel was not devoting enough time to his case, and several weeks before trial he asked the court to hold a hearing to determine his lawyer's competence. The defendant's grandfather also asked for a similar inquiry at the end of a routine hearing. The court refused to acknowledge any obligation to do so because the lawyer was privately retained.

Yet, the United States Supreme Court has, for Sixth Amendment purposes, refused to find the distinction the trial court made here. Additionally, the court had found Branch partially indigent. Because Branch clearly requested the court conduct the hearing required by Nelson v. State, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973), and it did not, it erred.

A second theme permeating the guilt phase portion of Branch's trial concerns the reliability of the jury's verdict. The state had to depend exclusively on circumstantial evidence to prove Branch and only Branch murdered and sexually battered Susan Morris. While it was free to rely on this type of proof, some special liabilities attached to it. First, because the state's case has a compelling quality, with its use of DNA and the fantastic aura of conclusiveness it presents, the jury should have received special guidance regarding how it should consider circumstantial evidence. That it was not, considering the state's heavy use of scientific evidence to link Branch to the charged crimes, was error.

This mistake only highlights the more basic problem the state faced: it presented no evidence to contradict Branch's reasonable explanation of events. Because the defendant never denied stealing Morris's car and helping carry her to the wooded area around the University of West Florida campus, the state needed more evidence that he murdered her than what the DNA proof supplied. Merely being present at the scene of the crime, but not necessarily when the victim was killed, fails to establish his guilt of her murder and sexual battery.

That the state realized the weakness of its case became evident when it cross examined Branch. It asked him why he had never come forward with his exculpatory story, a violation of his Fifth Amendment right to remain silent the court recognized. Undeterred, the state repeatedly harped on that theme during closing argument, but the court refused to recognize the constitutional violations. Such was error.

As part of its penalty phase case, the state introduced a picture of Morris taken at Christmas showing her holding the sweater she wore when killed. The state justified admitting it "for no other reason than to make her a human being, I think." Such justification of this victim

impact evidence, however, is foreign to Florida capital sentencings. Section 921.141(7) requires such proof "be designed to demonstrate the victim's uniqueness." This picture did not, and because it had such a high emotional impact, the court's error must result in a new sentencing hearing for Branch.

During the "informal" penalty phase charge conference, Branch asked the court to provide a definition of mitigation, a term used several times in the standard jury instructions but for which the jury had no idea what it meant. The court refused that request. That was error. Without any idea what the law considers as mitigation, the jury was left to wander along paths of its own creation to find a definition for that term. In death penalty sentencing, even little mistakes become reversible error, and a failure of this magnitude demands this court order a new sentencing hearing.

Branch apparently had committed some type of sexual crime in Indiana. The state claimed the "Abstract of judgment" from that state sufficiently proved that offense was one of violence, and therefore it had shown Branch had a prior conviction for a violent crime. The defendant, however, wanted the state to prove that in his case it actually involved violence. The statute under which Indiana had charged him could be read to include acts that in Florida may have been nothing more than lewd and lascivious conduct, which is ostensibly non-violent conduct. In other cases, this court has let the state present evidence that some apparently non violent offense, such as burglary, which the defendant had committed was one laced with violence. Here, Branch argued the flip side of that situation. The prosecutor had to prove that the "sexual battery" Branch had committed in Indiana was violent. The "Abstract of judgment" failed to do so. Branch simply wanted the state to prove this aggravator applied to him.

Finally, the Defendant objected to the state introducing victim impact evidence. While he acknowledges this court's opinion in Windom v. State, 656 So. 2d 432 (Fla. 1995), he makes two arguments on this issue. First, Windom is wrong. Second, the evidence the state introduced never showed that Susan Morris, as decent and nice a young woman as she was, was unique as the legislature required when it wrote section 921.141(7).

## ARGUMENT

### ISSUE I

THE COURT ERRED IN FAILING TO GRANT BRANCH'S REPEATED REQUESTS TO DELAY THE GUILT AND PENALTY PHASE PORTIONS OF HIS TRIAL, A DENIAL OF THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

The Grand Jury for Escambia County indicted Branch in February 1993 with the murder and sexual battery of Susan Morris and the grand theft of her car (R 01-03). The defendant, however, also faced charges in Panama City, and he was not returned to Pensacola until June (R 142). The Public Defender's office was appointed to represent him, but there is little evidence in the record it did anything until late October other than demand discovery. In that month it filed a flurry of motions, most of which were "form" death penalty requests. One of those, however, asked a continuance (R 108), which the court apparently granted.

In that month, Branch hired private counsel, and until the latter part of January of the next year, he filed only two motions. One of them asked the court declare him partially indigent, which it did (R 110). Another requested a continuance (T 115). He needed more time, he said, for three reasons: 1) when he became Branch's lawyer, he had "very little if any knowledge of the facts of the case," 2) he was conducting discovery in a major drug case at the same time, and 3) he was involved in another capital cast that was scheduled for trial in February (R 115-16). The court granted that motion until March 7 (T 145 ).

On the last day of February, about a week before trial was scheduled to begin, counsel again asked the court to continue Branch's case (T 158). He needed to prepare for the testimony of a forensic dentist the state planned to call. The court refused to continue the guilt phase

portion of the trial when the state announced it would not call the dentist (T 153-54).

Branch's lawyer also requested the trial judge postpone phase II of the trial, if it became necessary (T 162). He needed more time for the mitigation specialist he had hired to complete her investigation (T 302). Indeed, this person signed an affidavit that she needed several weeks to finish developing Branch's mitigation (R 335). The court summarily refused to give him any more time for her to do that (T 153).

Immediately before the penalty phase portion of Branch's trial began, counsel renewed his request for delay, noting that the mitigation specialist needed to investigate the "three or four incidents of head injuries to Eric." (T 942) When the court pointed out that the specialist had been available since February (the penalty phase started on March 11) and Branch and his family could have helped find the medical records she needed, defense counsel responded that the family may not have recognized Branch's head traumas as a possible significant mitigating factor (T 943). The court denied the request to delay the penalty phase trial, and when it asked counsel if he was ready to proceed, the lawyer responded: "Other than that, we're--we're not prepared to proceed. We will proceed." (T 944)

The court erred in denying Branch's repeated requests to delay has trial. It compounded that mistake by refusing to give the defendant more time to prepare his penalty phase defense.

The law in this area is simple, at least in articulating the standard of review. It is far more difficult in application. A trial court will have erred in denying a defendant's motion to continue if it has abused (or palpably abused) its discretion in making such rulings. Fennie v. State, 648 So. 2d 95 (Fla. 1994); Bouie v. State, 559 So. 2d 1113 (Fla. 1990). This necessarily implies that this court and other reviewing courts conduct a case specific examination of the facts to insure

the defendant suffered no "undue prejudice" by the trial judge's refusal to give him more time to prepare. Fennie, at 97.

Among the factors this court has considered in determining the amount of prejudice the defendant suffered has been the timing of the request. Mid-trial requests obviously find much less favor with this court than motions made before the trial has started. Id. at 98.

Similarly, if the defendant or his lawyer showed a lack of diligence in preparing his case, and the state has not created the perceived need for more time, the trial court will not have abused its discretion in forcing the defendant to go to trial before he would have wanted. Fennie, at 98.; Bouie, at 1114. Similarly, if defense counsel claimed he needed time to conduct tests, but had the results he needed by trial time, he will have suffered no prejudice just because he may have had to hustle more than he would have wished. Id. Of course, where time is at less a premium, that is, before trial, continuances should be more liberally granted.

This court has, however, been less forgiving of trial court rulings that force the defendant to go to the penalty phase portion of his capital trial before he was ready. In Wike v. State, 596 So. 2d 1020 (Fla. 1992), the defendant asked for a one week delay between the guilt and penalty phase portions of the trial. He needed the extra time so several witnesses could attend his sentencing hearing. This court found the trial court had abused its discretion in not granting the request for more time because Wike had asked for a short delay for a specific reason. Id. at 1025.

Here, Branch, before trial, alerted the trial court about the specific reasons he needed to continue his trial. He had hired a mitigation specialist in February (about a month before trial started). She told him and the court that she needed more time to develop the mitigation in Branch's case. Specifically, Branch had had several head injuries as a child, and such trauma

could have affected his behavior even years later. She needed time to find the records, apparently a difficult task because at least an attending physician had retired (R 335-38). Moreover, those files were in Indiana, and that fact produced some understandable problems (R 116). Also, counsel requested only a four week delay (T 942-43), not one of several months. Thus, counsel, like the one in Wike, requested a delay for a specific, limited time and for a specific reason. The court should have granted his motion to delay the penalty phase portion of his trial, particularly in light of counsel's embarrassing admission that he was unprepared for the penalty phase. "Other than that we're--we're not prepared to proceed. We will proceed." (T 944)

Counsel limped into the penalty phase obviously unprepared. He initially had nothing to present in his client's behalf (T 984). Troubled by this lack of any penalty phase defense, the court made sure Branch understood the reason he had refused to grant any delay.

> The Court has denied those request because I believe the Defense simply waited and waited and waited through a number of continuances before beginning to seek that information. I simply was not willing to delay the case one more time to do that when there was nothing unusual about the information that couldn't have been sought earlier.

(T 985).

Counsel then changed his mind and made an anemic effort to defend Branch. He called the defendant's brother and grandfather who said Branch had a tough childhood because his grandfather raised him, he had strict rules, and the defendant did not get along with his stepfather (T 992). Not very compelling. If the court was bothered by Branch's lack of any death sentencing defense, what counsel presented should have aggravated that concern, particularly when other, much stronger mitigation had been mentioned and was being pursued.

The court also should have given Branch more time to prepare for the guilt phase of trial. Even before trial, he had repeatedly given the court several reasons why he needed more time (T 115, 158). Specifically, the state had had six months to develop its case, free from the discovery demands of the defendant (T 142). Mr. Allbritton, Branch's retained counsel, assumed responsibility for Branch's case in late October. During the next several months this lawyer also had to prepare for trial in another capital case and also defend a third client charged with serious drug offenses (R 115). Then, when he began to work on Branch's case, he learned the state intended to call a Dr. Philip Levine, a forensic dentist it had used since January 1993, a year earlier. Branch's lawyer had not received that expert's report.[2] The state said it did not plan to use him, then it decided it would because the court had granted a short continuance (T 145). When finally pressed on the matter, it decided it did not need Dr. Levine (R 154), and the court denied any further delays in starting the trial (T 154). While the state agreed that this expert was unnecessary for its case, that does not eliminate the problem that counsel had essentially wasted time discovering what he would say and framing a possible defense to his testimony. The fundamental problem counsel had identified, that he was unprepared for trial, remained.

He had done little to develop a defense to the case the state actually presented. He had entered it late, barely four months before trial started. The state had kept the defendant in Panama City from January 1993 to June of that year until it had resolved the charges there. Once returned to Pensacola, the Public Defender's Office represented Branch. So almost until the eve of trial, the attorney who represented the defendant at trial and sentencing was not his lawyer.

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[2]Neither had the state (T 145).

Even after Mr. Allbritton became Branch's counsel he had other duties that took him away from developing this defendant's case. He was in the middle of discovery in a major drug case, and perhaps most significant, he had another capital trial only days or weeks before Branch's trial. While defense counsel may have tried to get ready for this defendant's trial, when it started much remained for him to do. As discussed in the next issue even Branch recognized his lawyer's deficiencies and asked the court to determine his competency to represent him.

Branch requested only a short delay so he could develop specific evidence. Other identifiable and legitimate reasons also explained his unpreparedness. The court abused its discretion in denying his repeated requests for more time. It gave no reason for rushing the defendant's case to trial, and the undue prejudice Branch suffered was evident. Witnesses, such as members of the band who played at The Warehouse, could have confirmed at least part of his story involving the "other" Eric. His Indiana lawyer could have testified that Branch called him when he returned to Indiana. He could also have said what the defendant told him. The judge's refusal to grant even a short delay becomes more troubling because the Defendant made his requests well before any trial started and any jury chosen. Except for some minor inconvenience, there would have been no prejudice to anyone in granting this defendant a short, specific delay.

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

ISSUE II

THE COURT ERRED IN FAILING TO CONDUCT ANY HEARING REGARDING TRIAL COUNSEL'S COMPETENCE WHEN BRANCH COMPLAINED ABOUT IT TO HIM, A VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

On February 17, 1994, about three weeks before his scheduled trial, the defendant wrote the trial judge a letter, complaining about his lawyer's representation of him. Specifically, he said that since October 29, 1993 his attorney, Mr. John Allbritton, had not visited him once, although Branch had called him several times. Counsel also had not given him any documents about his case, nor had any defense experts seen him. He closed the letter by asking for a hearing with the court, Mr. Allbritton, and himself, for the attorney to "discuss his accountability." He also asked Mr. Loveless, the Assistant Public Defender who had represented Mr. Branch until Mr. Allbritton took over, to attend (R 356). The court took no action on that request.

On the same date, the defendant's grandfather (who had hired Allbritton to represent his grandson) signed an affidavit setting out the history of counsel's representation, noting specifically the lawyer's failure to respond to numerous telephone calls, and his indifference to the case (R 338-40).

Two weeks later, at the close of a routine hearing on matters relating to this case, Branch's grandfather asked to address the court:

> THE COURT: I have a hand from the back. Yes, sir.
>
> DEFENDANT'S GRANDFATHER: Judge, I'm Eric's grandfather.
>
> THE COURT: Yes, sir.
>
> DEFENDANT'S GRANDFATHER: And I would like to talk to

the Court at this time, if I may.

THE COURT: I'm not sure that it's appropriate for you to do that. What do you want to talk to me about?

DEFENDANT'S GRANDFATHER: I want to talk about the affidavit that I sent to you that I've heard nothing. I want to talk about the letter that I sent to Mr. Allbritton that I've only had verbal answer.

THE COURT: Well, Mr. Allbritton is privately retained. He is not appointed by the Court and I do not-- I supervise what he does. I have some responsibility for what he does in my courtroom, but his retention as counsel for Mr. Branch is not a matter for the Court to supervise.

DEFENDANT'S GRANDFATHER: Well, I feel that I have some things that --in that affidavit that should have been answered by someone.

THE COURT: Not by this court. Mr. Allbritton is not responsible to me. His retention by Mr. Branch is a matter of contract between Mr. Branch and Mr.Allbritton. And unless Mr. Allbritton seeks leave to withdraw, it's not something--

DEFENDANT'S GRANDFATHER: That is my request, that-- because I paid him, but I do not have-- and I have the letter.

THE COURT: That's not something with which I can be concerned. I'm afraid.

DEFENDANT'S GRANDFATHER: I have a copy of a letter I was going to give him and ask him to withdraw from the case, because he hasn't--

THE COURT: Well, I'll let you deal with him.

DEFENDANT'S GRANDFATHER: --done things timely, as I pointed out in my affidavit to you.

THE COURT: You're going to have to deal with Mr.Allbritton about that.

DEFENDANT'S GRANDFATHER: Thank you, sir.

(R 154-56).

The court erred in never conducting the type of hearing articulated by the Fourth District Court of Appeal in Nelson v. State, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973) and approved by this court in Hardwick v. State, 521 So. 2d 1071 (Fla. 1988) when a defendant complains about the competency of his counsel or the quality of his representation.[3]

In Nelson, the lower appellate court said:

> If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.

Id. at 258-59.

In short, the Nelson inquiry is in the nature of a pre-trial hearing to find out whether counsel has provided effective assistance without requiring the defendant meet the rigorous standards that he must satisfy in that post-conviction inquiry. This examination distinctly differs from that required when a defendant unequivocally tells the court he wants to represent himself.

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[3]Branch's argument, therefore, has nothing to do with the adequacy of the Nelson, inquiry, an irrelevant issue here because the court committed a more fundamental error: it never acknowledged the need for such a hearing.

In that situation, the court must conduct the inquiry required by Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Watts v. State, 593 So. 2d 198, 203 (Fla. 1992). The Nelson inquiry focuses, instead, on counsel's alleged competency. Watts.

Here Branch or his grandfather raised or questioned Allbritton's abilities. In the defendant's letter to the court, he said he "would like to make you [the court] aware of my concern for the representation my family has retained for my defense, Mr. John Allbritton." He then listed several deficiencies he found in his lawyer: failure to talk with him at all, not just infrequently; lack of investigation as evidenced by having no one ask him about what evidence he may have had. He finally asked for a Nelson hearing: "I would ask that you hold a hearing with Mr. Allbritton to discuss his accountability for the services not rendered." (T 355-56) Branch may not have said explicitly that he questioned the competence of his lawyer, but that is clearly the thrust of his letter. His grandfather's affidavit and courtroom request also had the same focus (R 355-56). All the Branch's, in short, questioned Allbritton's competence.

With counsel's effectiveness at issue, the trial judge should have conducted the inquiry this court required in Smith v. State, 641 So. 2d 1321 (Fla. 1994). Failure to hold a Nelson inquiry creates reversible error. Johnson v. State, 629 So. 2d 1050 (Fla. 2d DCA 1993). Here, the court did nothing, brushing off the grandfather's complaint with a brief "His retention by Mr. Branch is a matter of contract between Mr. Branch and Mr. Allbritton." (R 155)

In Smith, defense counsel sought to withdraw from representing the defendant for ethical reasons. At the hearing on the matter, the court never addressed Smith, and neither did the defendant talk with the court. After the court denied the motion, Smith wrote the court a letter asking her to reconsider her decision, questioning counsel's experience. The trial court

responded by letter telling him that he must talk to the court through his lawyer. During trial, Smith never reraised the issue again although he had the chance to do so.

This court short circuited the defendant's Nelson argument by characterizing the letter Smith had written to the judge as "in effect, a motion for rehearing" from its denial of the motion to withdraw. Id. at 1321. Smith never questioned his lawyer's competence, he merely "expressed dissatisfaction" with him. Id.

In contrast, Branch was more than dissatisfied with Allbritton's representation. He believed that a competent lawyer would have seen him more than once, would have investigated his case, and would have talked with him about what evidence he had. Although he recognized his need for a lawyer, he also clearly saw, as the United States Supreme Court saw, that he "and not his lawyer or the State, [would] bear the personal consequences of a conviction." Faretta, cited above at p. 834. That consequence could be a short walk to the electric chair. Given the extreme punishment Branch faced, the court should have given his cry for help more attention.

A warning flag should have gone up again when Branch's Grandfather raised this issue. From his perspective, Allbritton had taken his $12,000 and run (R 339). Counsel, in his motion to continue, admitted as much, noting that he needed more time to prepare Branch's defense because he had "another major drug case as well as another capital case that is scheduled for trial in February." (R 115) Branch went to trial in March.

Further distinguishing Smith, the court never talked with Branch about his concerns, a particularly troubling failure because the defendant had essentially asked the court to conduct a Nelson inquiry (R 354). Even after his trial, the defendant continued to complain about his lawyer by filing a "Motion for New Trial," listing nine specific deficiencies in his lawyer's

performance (R 357-58). Those included counsel's failure to introduce evidence, failure to retain a psychologist or other experts, and failure to call available witnesses to support his defense. Branch was more than dissatisfied with his lawyer's performance, It was "beyond me how a lawyer expects to fight for my life when he hasn't even asked me the first question concerning the charges at hand." (R 356) Branch had done all the court should have expected a non lawyer do to. He informed the trial judge that he questioned his lawyer's competence (R 356). He asked the court to hold a hearing with Allbritton to ". . . insure my rights are protected." (R 356) The court should have done something more than explicitly saying he was going to ignore the problem. He should have conducted the minimal hearing required by Nelson. Any doubts about the need for holding it should have been resolved in Branch's favor. Jones v. State, 658 So. 2d 122, 12 (Fla. 2d DCA 1995) (Altenbernd, concurring.)[4]

That is Branch's argument, but there are some loose ends that need to be snipped so the state cannot tug at them, hoping to unravel the argument just woven. First, cases such as Hardwick, cited above; Jones v. State, 612 So. 2d 1370, 1372 (Fla. 1992); and Valdes v. State, 626 So. 2d 1316, 1319 (Fla. 1993) have no relevance here because there the question arose as to the adequacy of the trial court's Nelson inquiry. In this instance, this court will never get that far because the lower court never recognized a need for such.

Second, the state may claim that because Branch had privately retained counsel, the court had no Nelson obligation. It seemed to believe as much when it told Branch's grandfather that

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[4]In Jones, Judge Altenbernd provided a thorough outline of what a trial court should do when faced with a defendant who challenges the competency of his lawyer.

the issue he raised was "a matter of contract between Mr. Branch and Mr. Allbritton." (R 154-56) Moreover, Nelson, and this court's opinion in Hardwick talk in terms of questioning appointed counsel's effectiveness. No mention is made regarding inquiring into privately retained attorney's competence.

This court should reject any distinction between private and public counsel. First, the United States Supreme Court has. In Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) that court held private counsel to the same standards of competence as lawyers appointed to represent the indigent. "The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection. . . . [W]e see no basis for drawing a distinction between retained and appointed counsel . . . " Id. at 344 (Footnote omitted.) Second, the court had found Branch partially indigent (R 110). Third, although Nelson, Hardwick, and other cases talk in terms of appointed counsel, the rationale supporting those holdings apply with equal strength regardless of how the defendant's lawyer came to represent the accused. Being appointed or privately retained was irrelevant to this court's decisions in those cases. Whether counsel was publicly or privately retained, the Nelson procedure should have been followed here: the court should have explored Branch's dissatisfaction with his lawyer, and once having done that, have presented his options to him. Those choices would have been the same ones he would have faced had the Public Defender continued to represent him. He could either represent himself or have public counsel defend him.[5]

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[5]Allbritton apparently was the only lawyer in Pensacola who would take Branch's case for the money offered. (R 338).

This court should reverse the trial court's judgment and sentence and remand for a new trial.[6]

[6]Mr. Allbritton's fundamental problem was that he had taken on more work than he could handle. Counsel sought to solve his dilemma by delaying Branch's trial, the focus of the first issue. That Branch and his grandfather recognized this problem underlies Issue II. If Counsel's ambitions outstripped his abilities, that failing should condemn the lawyer, not his client.

ISSUE III

THE COURT ERRED IN REFUSING TO GIVE THE REQUESTED JURY INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE, A VIOLATION OF BRANCH'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

During the charge conference at the end of the guilt phase portion of Branch's trial, the defendant's lawyer asked the court to instruct the jury on circumstantial evidence. As he told the court, "there's no direct evidence of my client killing Susan Morris. Basically, it's built upon the circumstances." (T 862) The state objected, and the court refused to give the requested guidance (T 864, 913). Under the special circumstances of this case, that was error.[7]

The law in this area begins with this court's decision in In re Standard Jury Instructions in

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[7]The requested instruction was the one previously included in the standard jury instructions (T 862):

Circumstantial evidence is legal evidence and a crime or any fact to be proved may be proved by such evidence.

A well-connected chain of circumstances is as conclusive, in proving a crime or fact, as is positive evidence. Its value is dependent upon its conclusive nature and tendency.

Circumstantial evidence is covered by the following rules:

1. The circumstances themselves must be proved beyond a reasonable doubt.

2. The circumstances must be consistent with guilt and inconsistent with innocence.

3. The circumstances must be of such a conclusive nature and tendency that you are convinced beyond a reasonable doubt of the Defendant's guilt of the fact to be proved.

If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept that construction indicating innocence.

Circumstances which, standing alone, are insufficient to prove or disprove any fact may be considered by you in weighing, direct and positive testimony.

(R 317)

Criminal Cases, 431 So. 2d 599 (Fla. 1981). Until that case, the standard jury instructions in criminal cases included the instruction on circumstantial evidence requested in this case and included as footnote 1. That is, if the evidence supported giving the jury that extensive guidance on this special form of evidence, the court had to give it as a matter of law.

In In re Standard Jury Instructions, this court left to the trial judge's discretion whether to instruct the jury on circumstantial evidence. It never disapproved the guidance given the jury, it merely said the court had the choice of whether to give it to the fact finder or not.

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

Id. at 595.

Since then courts have consistently rejected, usually summarily, attacks on trial courts' refusal to specifically instruct the jury on circumstantial evidence. Pietri v. State, 644 So. 2d 1346, 1355 (Fla. 1994); Trepal v. State, 621 So. 2d 1361, 1366 (Fla. 1993); Kelly v. State, 543 So. 2d 286, 288 (Fla. 1st DCA 1989); Rivers v. State, 526 So. 2d 983, 984 (Fla. 4th DCA 1988). As far as Appellate Counsel can determine, no court has reversed a trial court's decision refusing to give this instruction. It is with a certain amount of trepidation, therefore, that he now argues that the trial judge abused its discretion in denying Branch's requested guidance on circumstantial evidence.

The basic question this court should ask is "What makes this case so special that the circumstantial evidence instruction should have been given?" When viewed as part of a larger

whole, several factors combine to compel the conclusion that the court should have instructed the jury on circumstantial evidence.

First, the state's circumstantial case has a deceptively compelling quality. Through Branch's instant girlfriend, Melissa Cowden, the state placed Branch on the University of West Florida campus within a day or so of the murder. Cowden also saw that the defendant had a cut finger on Tuesday, the day after the murder (T 599). The forensic evidence did even better. The DNA analyst said he found blood consistent with Morris' blood type on Branch's shoe and sock (T 709). That was the only connection he found, however. He found no other evidence of Morris's DNA on other items belonging to Branch. Similarly, he found none of Branch's DNA on Morris property, or from fluid samples taken from her (T 697-704). The blood splatter expert said the drops found there were "medium velocity" suggesting that the victim had been hit (T 546). It was consistent with "someone straddling" the victim (T 550).

The state also presented evidence that Branch's brother saw him a day or so after the murder driving Morris' car in Panama City (T 565). A few days later, the car was found abandoned in Bowling Green, Kentucky (T 670), 63 miles from where Branch lived in Indiana (T 821).

The state had a compelling case, and one that proved that Branch possibly, perhaps probably, committed the charged crimes. It was not, however, one that excluded Branch's version of what had happened. At least had the jury received an instruction on circumstantial evidence it would have had explicit guidance that it could have so concluded. Instead it had to deduce that well settled law from the burden of proof and reasonable doubt instructions. Because the state had a deceptively strong case, and Branch had a reasonable and uncontroverted

explanation for the state's evidence, the jury should have received explicit guidance on how to consider circumstantial evidence.

Indeed, it never knew what circumstantial evidence was, although defense counsel in closing argument repeatedly told them that this was a circumstantial evidence case (T 882, 883). The jury should have been informed that such proof was a "well connected chain of circumstances."

Now circumstantial evidence is a subtle legal concept. The jury here could be excused for not fully understanding that the presumption of innocence requires (not permits) the jury to accept the defendant's story since it reasonably explains his actions. Davis v. State, 90 So. 2d 629, 631 (Fla. 1956); McArthur v. State, 351 So. 2d 972 (Fla. 1977). Guidance, as provided in the old standard instruction that "The circumstances must be consistent with guilt and inconsistent with innocence" was essential. It articulated and emphasized that point with greater clarity than either the reasonable doubt or burden instructions do and with more authority than counsel's argument could have commanded. Such special, specific guidance was needed here considering the apparently strong circumstantial case the state presented.

In short, if this court has recognized that special rules of appellate review apply to issues involving circumstantial evidence, State v. Law, 559 So. 2d 187, 188 (Fla. 1989), the court in this case should have given the jury particular guidance on how to consider this evidence. This is particularly true here where the state's case was strongly, exclusively circumstantial that Branch murdered Susan Morris, and the defendant, using the state's evidence, provided a plausible explanation exonerating himself of her death and sexual battery. Because of the strong emotional undercurrent running through this trial, the jury needed particular guidance and a

reminder that "If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept that construction indicating innocence." Afterall, if the defendant is entitled to an instruction on his theory of defense, Hooper v. State, 476 So. 2d 1253 (Fla. 1985), the jury in this particularly treacherous case should have been given specific guidance so they could have avoided the emotional bogs the facts of this case produced.

With the defendant on trial for his life, the court should have given the guidance he requested on the rules for considering this special type of evidence. This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IV

THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT ERIC BRANCH MURDERED SUSAN MORRIS, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHTS.

At first glance this case seems easy. Eric Branch, sometime after 8:30 p.m. Monday January 11, 1993 beat, and sexually battered Susan Morris, and killed her. He then took her car, left Pensacola the next morning, and eventually abandoned the vehicle in Bowling Green, Kentucky. Shortly after that, he voluntarily turned himself into the police. While such a scenario may have possibly, even probably happened, the evidence never established to a "subjective state of near certitude" that Branch and only Branch killed Susan Morris. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The state's unsurmounted problem here arises from the special rules of evidence and appellate review applied when the state relies solely on circumstantial evidence to prove the defendant's guilt. This Court has long held that

> One accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of inocence.

Davis v. State, 90 So. 2d 629, 631 (Fla. 1956); McArthur v. State, 351 So. 2d 972 (Fla. 1977).

As applied to cases such as this, where the key issue focuses on who committed the crimes, "Circumstantial evidence must lead 'to a reasonable and moral certainty that the accused and no one else committed the offense charged.' Hall v. State, 90 Fla. 719, 729, 107

So. 246, 247 (1925)." Cox v. State, 555 So. 2d 352, 353 (Fla. 1990)(Emphasis supplied.) Significantly, the defendant does not have to identify who may have murdered the victim. Id. Suspicions, even strong suspicions of the defendant's guilt are insufficient, as a matter of law, to justify a conviction if the evidence supports a theory that someone else may have committed the charged crimes. Id.

Thus, if we resolve whatever conflicts exist in the evidence in favor of the state, as we must, what evidence showed the defendant's guilt? Not much.

Indeed, except the conclusions the state drew from the evidence it presented, Branch has no serious dispute with its case. He came to Panama City in November 1992 and began living with his cousin (T 771). Apparently, the police in Indiana wanted him, and in January he left that city and drove a family owned Pontiac to Pensacola. He got there Saturday the ninth and checked into a motel. He went to a place called the Rathskeller where he met a girl, Melissa Cowden (T 590-91). They apparently became good friends very quickly because she spent the night in his motel room having sex with him (T 591, 607). He treated her nicely and never beat her (T 607). The next day, Branch, short of money, had his grandfather in Indiana wire him some. He got $35-$50 from the Western Union about two p.m. That night, the couple stayed at Cowden's dormitory room on the University of West Florida campus (T 593). Significantly, because it corroborates Branch's story, Melissa Cowden said they went to The Warehouse on Sunday, the day before the murder. Branch liked the music, and he had met some of the band members. The "other" Eric played with that band (T 779).

Monday, as Cowden attended classes, Branch roamed about campus, trying to enroll. They met about that afternoon, and agreed that they would get together after she had finished

studying (T 595).

During that time Branch, afraid that the police may be looking for him because of the Indiana warrant for his arrest, left the Pontiac at the Pensacola Airport. He took a taxi back to the University about seven p.m. and was wearing shorts and high topped tennis shoes (T 629).[8]

When Cowden tried to find Branch, he was at none of the haunts they had been to previously (T 596). About ten-thirty she called her dorm room, and Branch answered the telephone. At approximately 11 p.m. he was seen putting something in a small red car (T 642).

After returning to her room, Melissa noticed Branch had a cut on his hand and was wearing different clothes than he had on earlier (T 598-99).[9] She also said he had already taken a shower. The wound could not have been very deep because it was starting to heal when Cowden saw it (T 619). He took another shower, dried off, and they went to bed (T 600). About seven o'clock the next morning he left and drove the red car (that would eventually be identified as belonging to Susan Morris) to Destin and Panama City (T 565, 655). He met his brother, who saw no marks on his hands, face, or neck (T 570, 579). He told him he wanted to turn himself into the authorities in Indiana. A day later, he abandoned

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[8]Branch said the taxi driver picked him up between 10 and 10:15 p.m. (T 813). Also contrary to the cab driver's testimony, Branch said he never gave him a $5 tip for a $10 fare(T 629, 813) Considering Branch's perpetual lack of money during this time, it seems unlikely he would tip the driver so much, if at all.

[9]Branch said he had been wounded earlier that day when he had gotten into a scuffle with some men (T 599).

the car in Bowling Green, Kentucky, called his grandfather, and turned himself in (T 822).

Susan Morris had a night class at the University of West Florida Monday, January 11 that got out at 8:20 (T 690). That was the last time she was seen alive. Her badly beaten body was found near a parking lot, in a wooded area (T 429-31). Although the state presented several expert witnesses who tried to link Branch to Morris, only two pieces of evidence did so. Branch's left shoe had blood stains on it consistent with Morris's DNA, and a sock found in the shoe also had similar blood stains (T 471, 709). A blood splatter expert said the blood splotches found on Branch's shoe indicated that Morris had been beaten. They were also consistent with the victim laying on the ground while her assailant straddled her (T 546-50). It coincided also with Branch's version that he had hold of Morris from the back when the other Eric hit her (T 804, 833).

Branch explained his actions at trial. About the first week of January his grandfather told him that a warrant for his arrest had been issued in Indiana (T 774). With that in mind, he drove the Pontiac to Pensacola (T 775). He went to a nightclub called The Warehouse, and while shooting pool he met a young man also named Eric. The next day he met Melissa Cowden at the Ratskeller, and began running with her for the next couple of days.

Monday evening, January 11, he met Eric again at the Ratskeller. The defendant bought them some beer, and the two played pool. During the evening, Branch said that the police in Indiana wanted him. After kidding about that situation, he said "I was so desperate, that I think I can probably go out and steal a car now just to get back to Indiana." (T 795)

After some more joking, they decided to do it.[10] They wandered about for a while, eventually finding Susan Morris' car (T 799). The men tried to pick the lock, but when they saw Morris walking toward them they backed off, and sat on a nearby curb (T 800-801). As Morris got in her car, the other Eric approached her, and asked her what time it was. When she turned around, he hit her in the head (T 801). She fell to the ground.

Surprised at this unexpected and sudden violence, Branch nevertheless helped carry her into the woods so they could tie her up (T 802). As they set her down and began to untie her shoes (so they could use the shoelaces to tie her up) she began to moan. The other Eric "just snapped real quick and hit her again. He hit her so hard that I dropped her and I fell back." (T 804) Branch, who had hold of her arms from behind (T 804), tripped over her.[11] He had had enough, and he told the other Eric that he was going back to the car, drive it around a bit, and return to pick him up in a few minutes (T 804). He did so, and after the other man got in the car he returned to Cowden's apartment. The evening had been wet, and Branch got a towel from Cowden's room for Eric to use to dry off (T 806).

Afterwards, they drove around for a while, and eventually Branch left the car and the other Eric at the airport parking lot (T 812). He gave the keys to the other man who said he was going to listen to the radio for a while, but would leave them in the car when he left (T

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10 Branch was afraid to drive the Pontiac because the police were looking for it (T 796). Once he had stolen a car he intended to drive to Panama City, get his paycheck from the sandwich shop where he worked, and fly back to Indiana. That plan fell through when he could not get the paycheck (T 795-96).

11 Which explained how his boots had Morris' blood on them.

812). The defendant left him there, but Eric was true to his word. When Branch returned in the Pontiac Tuesday, the car and keys were there (T 812, 817). He left his car at the airport, and drove Morris' car to Panama City and later to Kentucky.

Thus, the jury could have believed Branch's story without also discrediting any of the state's case against him. It could have also accepted the prosecutor's facts without rejecting the defendant's additions. Branch, in short presented a reasonable explanation of his actions. While not exonerating him of the theft of the car, they show he never sexually battered or murdered Susan Morris. Other circumstantial evidence murder cases support the reasonableness of this hypothesis.

In Cox v. State, 555 So. 2d 352 (Fla. 1990), the only evidence linking Cox to the murder of a 19 year old female was a hair that was similar to his found in the victim's car, some O-type blood also discovered there, which was the type Cox had, and a military type boot print found near the crime scene. Cox was in the army at the time of the victim's death, and when the murder occurred he was vacationing near where it had happened. Cox also had had part of his tongue bitten off, probably by someone other than him. He did not know the victim, and he had an alibi that state witnesses discredited. This court reversed his conviction for first degree murder because "the state's evidence could have created only a suspicion, rather than proving beyond a reasonable doubt that Cox, and only Cox, murdered the victim." Id. at 353. (Emphasis supplied.)

In Scott v. State, 581 So. 2d 887 (Fla. 1991), the state had stronger evidence placing the defendant in the company of the 12 year old victim on the day of the murder. She and other girls had often flirted with older men, and Scott, on occasion, had given them beer and

smoked marijuana with them.

On the day after the murder, Scott asked his wife and employer if they had heard about the girl's murder. When asked about it, he said that he had learned of it when stopped at a police roadblock the night before. The state presented evidence they had never set up such a barrier where the defendant said they had.

The state proved that a hair sample taken from Scott's car matched that of the victim. Some seashells found there were also the same type as the necklace found near the victim's body. As to this latter point, however, the defense produced evidence that the defendant's mother collected shells similar to those used to make the necklace, that she had used Scott's car to move them, and often the boxes she carried them in spilled.

This court reversed Scott's murder conviction because, among other reasons, "the state has not been able to show that the circumstantial evidence in this cause is not only consistent with the defendant's guilt but also inconsistent with any reasonable hypothesis of innocence." Id. at 893. Scott is important because the abundant contradictory evidence weakened the state's argument of the defendant's guilt. That is, it contradicted the prosecutor's theory of the defendant's guilt rather than conflicting with its evidence. This is an important point. While any conflicts in the evidence are resolved in favor of the state, evidence rebutting or weakening the state's argument of the defendant's guilt must be considered in the circumstantial evidence analysis.

On the other hand, this and lower appellate courts have rejected several defendants' circumstantial evidence claims. In Fratello v. State, 496 So. 2d 903 (Fla. 4th DCA 1986) the defendant and the victim had a fight in a bar. They went to the kitchen with some other

people who returned to the main part of the bar a few minutes before a loud crash was heard coming from the kitchen. When the police arrived in response to a call, Fratello told them nothing was wrong and they could go. Disregarding him, they went inside and found the victim in the kitchen with a contact bullet wound to the head. The Fourth District found sufficient circumstantial proof the defendant had murdered the victim because 1) the evidence showed the two had fought immediately before the shooting, 2) although several people had been in the kitchen with the victim and the defendant, only the latter two were there when the "crash" was heard, and 3) Fratello tried to deflect a police investigation.

In Green v. State, 408 So. 2d 1086 (Fla. 4th DCA 1982), a woman pulled into a motel parking lot about 8:30 p.m. She saw another car with its engine running and the defendant standing near it who appeared startled when she drove up. She then saw him follow a short, elderly man. Green got into his car, and when he did, the woman got out and walked past the defendant. As she did so, he said something like "Hey" or "Lady" or "hold it." The woman looked at him and saw him pointing a gun at her. She screamed and fled. About five or ten seconds later, a shot was fired, and the elderly man was found dead. At the time, only Green was in the parking lot.

The Fourth District concluded that despite the defendant's alibi defense, the evidence sufficiently excluded every reasonable hypothesis of his innocence.

Similarly, this court in Lindsey v. State, 636 So. 2d 1327 (Fla. 1994) found sufficient evidence the defendant had murdered his girl friend and her brother. The state presented some ambiguous evidence that about a month before the killings Lindsey had tried to run her down in a car. On the day of the murder she had gone to where her brother lived. They returned to

Lindsey's house (where she also lived) to move some of her things. Lindsey, who had followed her to her brother's house and back, also went inside his house when the pair entered. A few seconds later, shotgun blasts were heard, and the defendant called the police. Although he claimed someone else had killed his girlfriend and her brother, this court found sufficient evidence to sustain his homicide convictions.

Finally, although other cases could be mentioned, this court affirmed the murder conviction in Rose v. State, 425 So. 2d 521 (Fla. 1983), which the state had proven solely by circumstantial evidence. Rose had dated Lisa Berry's mother for some time, but their relationship had cooled. Jealous that she was seeing other men, he told her that he could hurt her. Unfortunately, she did not know what he could do. On the night of the murder, Lisa, her mother, the defendant, and others were bowling. Lisa was last seen in the presence of the defendant. He later called her mother, asked what time it was, and when she said it was 10:30, he corrected her claiming it was 10:23. The next day some of Lisa's clothing was found behind a nearby grocery store, and a van matching Rose's had been seen there the night before. Also fibers matching the girl's sweater were found on the defendant's pants.

The girl's nude body was found four days later in a canal. A paint stained hammer was discovered nearby, which was particularly damning. Rose was a painter, and the paint on the hammer matched that found in his van.

Also, when the defendant returned to the bowling alley after disappearing with Lisa, he had a blood stain on his pants that when tested, had the same type as the victim's but different from his. Rose gave several inconsistent stories of how the blood got there.

This court affirmed Rose's conviction for the murder and kidnapping of Lisa. The

evidence, although circumstantial, unerringly pointed to Rose and no one else as the one who had the motive and opportunity to commit these crimes.

So, where does Branch's case stand among the other circumstantial cases the courts of this state have considered? Un- like Lindsey and Rose, the defendant here never expressed in any way any jealousy, hatred, or animosity to the victim.

Also, no one ever saw Morris and Branch together as were the victims and defendants noticed in Green and Fratello. In those cases only seconds separated the shots from the last time the victim and the defendant were seen together. The reasonable conclusion arose that only those defendants could have committed the murders. This exclusive association with them immediately before their deaths is considerably different from the testimony in Scott. There, Scott and the victim were seen together on the day of her death. Here, Morris and Branch were never seen together, and except for the possibilities raised by the blood evidence, they would never have been linked.

That the defendant has given only one version of what he knew also supports his theory. Never, has he, as Rose had, given contradictory stories. Unlike Fratello, he never tried to deflect or impede the police investigation. Instead, after talking with his attorney, he turned himself into the authorities.

Thus, Branch's theory was that when he left, the other Eric raped and murdered Morris. It is a hypothesis consistent with the evidence presented here, and one that the state never presented any evidence to contradict.

Human nature wants to solve crimes, to find the neat solution to every puzzle. Reality and the law, however, accept that sometimes, we cannot tie all the loose ends into a neat knot

that holds the theory together. Instead, as in Cox and Scott we must admit that whoever killed the victims, the evidence fails to exclude the reasonable hypothesis that the defendants in those cases did not. Similarly here we will be unable to say who murdered Morris. We must conclude, however, that the state failed to prove to a "subjective state of near certitude" of any rationale juror that Branch and only Branch murdered her. Jackson v. Virginia, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). This court should, therefore, follow the correct legal path, relying on the guides along the way, and reverse the trial court's judgment and sentence and order Branch's discharge for murder and sexual battery.

It could be argued that even if we accept Branch's story he is still guilty of first degree murder under a felony murder theory, the underlying felony being the charged sexual battery. Such a conclusion would be wrong because the defendant said he left the other Eric before the latter had committed any sexual assault on Morris (T 804). Thus, it was done independently of whatever agreement the two young men had regarding tying Morris up. In Bryant v. State, 412 So. 2d 347 (Fla. 1982), the co-defendant, Jackson, enlisted Bryant's assistance in burglarizing what the defendant thought was a vacant apartment. On entering it, however, he saw the victim, naked and bound. Bryant retied the man, and after doing so, placed him on the bed in the room. He left the apartment 15 minutes later, when the victim was still alive and had not been sodomized. Two days later, Jackson gave Bryant his share of the money taken from the apartment. The victim's body was discovered, and evidently it had been violently sexually battered. The cause of death was strangulation due to a necktie that had been tied around the victim's neck after Bryant had left the room.

This court agreed that the trial judge should have instructed the jury on independent

acts because the evidence could have supported a finding that the victim was killed during the sexual battery and not the robbery. Because Bryant had not participated in the former crime, and it was outside the "common design of Jackson and Bryant to rob the victim: the jury could have found the defendant not guilty of the murder. The evidence could have further supported a jury finding that Bryant intended to participate only in the burglary and robbery but not the sexual battery. Therefore what Bryant did was not part of what the two men had agreed to do.

Similarly, here, Branch wanted only to steal a car. There is no evidence that the two men agreed on sexually battering and murdering Morris. Branch, like Bryant, left the scene before those crimes were committed, so what was done later was beyond the common plan the men had agreed to do. Thus, this court should still reverse the trial court's judgment and sentence and remand for Branch's discharge for the murder and sexual battery convictions.

ISSUE V

THE COURT ERRED IN DENYING BRANCH'S MOTION FOR MISTRIAL MADE DURING THE STATE'S CLOSING ARGUMENT BECAUSE THE PROSECUTOR HAD COMMENTED ON THE DEFENDANT'S RIGHT TO REMAIN SILENT, A VIOLATION OF BRANCH'S FIFTH AND FOURTEENTH AMENDMENT RIGHT TO REMAIN SILENT.

During the state's cross-examination of Branch at trial, the prosecutor asked the defendant "What have you done to help catch the other Eric?" (T 829) Branch's counsel immediately objected to that question as an infringement on the defendant's Fifth Amendment right to remain silent. The prosecution retorted that "He [Branch] has absolutely no right, no constitutional right to remain silent as to being a witness to someone else committing a crime, absolutely not." The court, unpersuaded by that reasoning, sustained Branch's objection (T 829-30).

Undeterred, the state, during its closing, argued:

> During the trial, before we had this first-time revelation about another Eric, there was no admission about the blood on the boots.

(T 830).

Defense counsel immediately objected:

> MR. ALLBRITTON: You Honor, at this time I would move for a mistrial. The defendant has an absolute right to remain silent, and a comment that he had not admitted any of these things before, I think it's improper and it flies in the face of his constitutional rights. I think that this has tainted the jury and I would ask for a mistrial.

> THE COURT: Motion for mistrial is denied. However, I think you are treading on very thin ice.

(T 887).

Undeterred, the prosecutor told the jury that "for the first time, an imaginary figure has appeared. Another Eric." (T 888) . . . "because he wants to tailor his facts to fit this wild and crazy story." (T 892) . . . "The story that the defendant has concocted today is absurd . . . " (T 896) "So if you believe the story of another Eric that we hear for the first time today, . . . " (T 897)

The state was "treading on very thin ice," and its argument became so overbearing that the fairness of the trial cracked under the weight of this unconstitutional attack.

The law in this area is simple. At least in concept. Comments that are "fairly susceptible" of being interpreted as reflecting on a defendant's right to remain silent are serious constitutional errors and are impermissible. State v. Kinchen, 490 So. 2d 21, 22 (Fla. 1985); David v. State, 369 So. 2d 943 (Fla. 1979). That standard includes direct and indirect references to take the stand or otherwise speak. State v. Bolton, 383 So. 2d 924, 927 (Fla. 2d DCA 1980). Despite the grave nature of such errors, this court will apply a harmless error analysis. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Extending the right to its logical extremes could mean that the State had infringed on a defendant's constitutional privilege any time it referred to his failure to present any evidence or argument to refute its allegations. This court, however, has not gone so far. In fairness to the defendant and the State, it has ruled that the latter may legitimately refer to the absence of a defense generally if the attack does not extend to include the defendant's failure to take the

stand. State v. Sheperd, 479 So. 2d 106 (Fla. 1986). Examining some cases will help illuminate how this law applies.

In Heath v. State, 648 So. 2d 660 (Fla. 1995), this court held that the state had impermissibly (though harmlessly) commented on Heath's right to remain silent when it had said during its opening statement that the brother of the defendant was the only person who can tell the jury about what Heath and he had done on the night of the murder. The brothers had lured an unsuspecting victim to a remote area where they robbed and killed him.

In State v. Moya, 460 So. 2d 446 (Fla. 3d DCA 1984), the State, during its closing argument, said Moya did not deny committing the kidnapping he had been charged with committing. That comment infringed on that defendant's right to remain silent. In Rosso v. State, 505 So. 2d 611 (Fla. 3d DCA 1987), the State, in its opening statement and closing argument, belittled the defendant's insanity defense. The Third District reversed her subsequent conviction. "The prosecutor's references in the instant case to what Rosso was `saying' through her insanity defense is amenable to interpretation as an indirect comment on her failure to testify." Id. at 612.

On the other hand, when the State in White v. State, 377 So. 2d 1149 (Fla. 1980) said "You haven't heard one word of testimony to contradict what she said, other than the lawyer's argument" this court held that it was only a reference to White's defense and was therefore proper. Whether the objected to comment refers to the absence of a defense or is a comment on the defendant's right to remain silent was clarified in Marshall v. State, 473 So. 2d 688 (Fla. 4th DCA 1984). There, Marshall was charged with burglary, kidnapping, and sexual battery. As so often happens, only two people could testify about what happened: the victim

and the defendant. In its closing argument the State said, "the only person you heard from in this courtroom with regard to the events of November 9, 1981 [the date of the alleged crimes] was Brenda Scavone [the victim]." Id. at 689. That was a comment on the defendant's right to remain silent because of the two people with information about the crimes, only the victim had testified.

Finally, although a myriad of other cases exist discussing this issue, the Fourth District reversed the defendant's conviction in Lowry v. State, 468 So. 2d 298 (Fla. 4th DCA 1985). The prosecutor in closing had told the jury that "Until Mr. Lowry testified in here the other day I had no idea whatsoever what he was going to say but he knew exactly what all of the State witnesses were going to say before he got up and testified. They had no idea what he was going to say. Keep that in mind." Id. at 299.[12]

Here, the court had already slapped the state's hand for commenting on Branch's right to remain silent when it had asked the defendant what he had done "to catch the other Eric." (T 829-30) By itself, that comment was reversible error. United States v. Shue, 766 F.2d 1122, 1132 (7th Cir. 1985)("The government violated [Shue's] right to due process by using his post-arrest silence in an obvious reach beyond fair limits to impeach his explanatory story as a recent fabrication.")

In only a slightly altered guise it continued that attack in its closing argument by noting that until Branch's trial, the defendant had neither said or done anything to explain the

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[12]In subsequent litigation, the court also ruled the comment sufficiently prejudiced Lowry's right to a fair trial that he was to have a new one. Lowry v. State, 510 So. 2d 1196 (Fla. 4th DCA 1987).

blood on the boots (T 887). Such argument asked the jury to consider that Branch had remained silent, had stood mute, in the face of the state's accusations. Such repeated references, not to the absence of any defense, however, was susceptible of being interpreted by the jury as a comment on Branch's right to remain silent.

Even, if this court decides that the prosecutor had not commented on Branch's right to remain silent, the repeated attacks on Branch's character and insinuations that he was a liar made during its cross-examination and closing argument created reversible error. Such repeated attacks was error. Pacifico v. State, 642 So. 2d 1178 (Fla. 1st DCA 1994).

The State can, of course, concede this yet still claim the error was harmless. So, although the State has the burden of establishing the harmlessness of the error beyond a reasonable doubt, State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), Branch would like to launch a pre-emptive strike. Accordingly, the proper analysis assumes first that the improper comment did the most damage that it could do. C.f. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (Fla. 1986). In this case, that would be that the jury expected Eric Branch to denied his guilt at the earliest possible opportunity to do so. Further the jury must have concluded that because he did not personally exonerate himself, he admitted his guilt. With those required assumptions in mind, the error remained harmful. Moreover, because the state's case against Branch was weak, the prosecutor's repeated attacks on Branch's character and right to remain silent, could "rarely, if ever, be construed as harmless error." Pacifico, cited above at 1184. This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE VI

THE COURT ERRED IN ADMITTING IN THE PENALTY PHASE PORTION OF BRANCH'S TRIAL A PHOTOGRAPH OF THE VICTIM TAKEN SOME TIME BEFORE HER DEATH WHICH WOULD HAVE SERVED ONLY TO INFLAME THE JURY AND AROUSE THEIR ANIMOSITY TOWARD THE DEFENDANT, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

This issue involves the question of the admissibility of a photograph of Susan Morris introduced by the state when her mother testified. During the penalty phase portion of Branch's trial, the state called four witnesses. One presented evidence of Branch's conviction in Indiana for its crime of sexual battery (See Issue VII). Another was the pathologist who had extensively testified in the guilt phase of the trial about the injuries Morris suffered. Over defense objection (T 948), he used photographs of the victim's body to illustrate and reiterate much of what he had earlier said.

Immediately after this expert testified, the state called Morris' parents to present the victim impact evidence. While that evidence is the subject of the last issue, the state also wanted her father to identify a photograph taken of her at Christmas some time before her death. Mr. Morris told the jury in simple words the loss his family felt at the death of his daughter. Evidently he was on the verge of breaking down throughout his testimony, but especially at the end.

Sensing this, the prosecutor approached the court to let his witness "regain his composure before I ask him to identify it." (R 969) The "it" he referred to was a picture taken of Susan probably at the Christmas before her death.

Branch's attorney, understandably fearing that the father would start crying if he saw the picture, initially stipulated to the picture coming in. He quickly changed, however. "I'm objecting to the photograph coming in. I think it's entirely to elicit sympathy and does not go to the items of the statute as it relates to victim impact." (T 970)

The state responded: "I think I'm entitled to put in a photograph of the victim in the penalty phase. Just for no other reason than to make her a human being, I think." (T 970)

The court admitted the picture, but it also recognized its explosive nature and ruled that "I don't see any reason for Mr. Morris to identify it." (T 971) The court, though recognizing the prejudicial nature inherent in this type of photograph, nevertheless erred in admitting it.

First, section 921.141(7) Fla. Stat. (1992), requires victim impact evidence "be designed to demonstrate the victim's uniqueness." Admitting it simply "for no other reason than to make her a human being" does not satisfy that test of admissibility established by that law.[13]

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[13]The law on the admissibility of pictures generally is one of relevancy. Admittedly gruesome and gory photographs are usually admissible if they are relevant. Henderson v. State, 463 So. 2d 196, 200 (Fla. 1985); Wilson v. State, 436 So. 2d 908 (Fla. 1983). There are some limits to that general rule. Thompson v. State, 619 So. 2d 261, 266 (Fla. 1993); Marshall v. State, 604 So. 2d 799 (Fla. 1992). That law has no application here because the objected to picture was not introduced to show the injuries to the victim, the usual reason such evidence is admitted. Indeed, it was offered for the opposite reason: to show how the victim appeared before her death. Section 921.141(7), the victim impact evidence statute, instead, controls the admissibility of this type of evidence.

Second, the state's case in the penalty phase was designed to inflame the jury. The prosecutor recalled the pathologist to re-emphasize his guilt phase testimony about the extensive injuries Susan Morris had suffered. Then it called the parents to talk about their daughter, who she was, and what she dreamed to do and become. It ended its case for Branch's death by introducing a Christmas picture of Morris. What more striking contrast could there have been? The state intended to inflame the jury because if it wanted to show she was a "human being" it already had introduced a picture of her standing by her car (State's Exhibit A-19, T 762).

Showing the jury a picture of her taken at Christmas, obviously happy, and holding the sweater she wore when murdered could only have outraged the jury, especially when her father had just given touching and poignant testimony saying goodbye to a daughter he had deeply loved and lost. Rather than dispassionately weighing the aggravators and mitigators, the jury could have been influenced by the emotions understandably generated by the state's evidence and heightened by the picture of this young woman.

In State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), this court said of our death penalty statute that "The inflamed emotions of jurors can no longer sentence a man to die." That would more likely be true here if the court had excluded the Christmas photograph of Susan Morris. Because it did not, this court can only conclude the jury's death recommendation is suspect. This court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE VII

THE COURT ERRED IN REFUSING TO GIVE A REQUESTED JURY INSTRUCTION DEFINING MITIGATION, IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The court held an "informal" penalty phase charge conference, during which it refused most of the requested instructions Branch's counsel asked the court to read to the jury (T 1007-1011). Specifically the defendant asked the court to define "mitigation" for the jury (T 1011). His requested instruction (R 331) correctly and completely defined that term, and the standard instructions provide no definition of it. The court's failure to provide some clarifying guidance regarding mitigation created reversible error.

The pivotal case for this issue is the United States Supreme Court's decision in Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). There, the nation's high court, giving meaning to several pronouncements of this court, held that neither the jury nor the judge can weigh invalid aggravating circumstances. Id. at 120 L.Ed.2d 859. The court explicitly rejected this court's reasoning in Smalley v. State, 546 So. 720, 22 (Fla. 1989) that because the jury does not actually sentence the defendant, they need not receive specific penalty phase instructions. The logic of Espinosa compels the conclusion that the jury must be almost as informed on the law governing the penalty phase considerations as the trial judge. If it is kept ignorant on complete definitions of aggravators, or the full meaning of mitigation, for example, then this court cannot say the jury's recommendation is reliable.[14]

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14This argument does not allege the standard instructions do not adequately define the mitigating circumstances. Gamble v.

The standard in this area of the law is simple: the defendant is entitled to have the jury instruct on the rules of law applicable to the case and his theory of defense. Hooper v. State, 476 So. 2d 1253 (Fla. 1985). This does not mean the court has to give the jury confusing, contradictory, or misleading guidance. Butler v. State, 493 So. 2d 451 (Fla. 1986). Instead, it must give the jury instructions that, when take as a whole, are clear, comprehensive, and correct. Maynard v. State, 20 Fla. L. Weekly D1732 (Fla. 2d DCA July 28, 1995). Further, this court does not presume the standard instructions accurately reflect the law in any particular case. Yohn v. State, 476 So. 2d 123 (Fla. 1985):

> While the Standard Jury Instructions can be of great assistance to the Court and to counsel, it would be impossible to draft one set of instructions which would cover every situation. The standard instructions are a guideline to be modified or amplified depending upon the facts of each case.

Id. at 127.

Here, the court told the jury it would be their duty "to determine whether mitigating circumstances exist which are not outweighed by the aggravating circumstances." (T 1028) The court then told the jury what mitigation it could consider. The court, however, never defined mitigating circumstances. That was error, especially when counsel gave the court an instruction that would have supplied that definition:

> A mitigating circumstance is anything about Mr. Branch or the crime which, in fairness and mercy, should be taken into account in deciding punishment. Even where there is no excuse or

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State, 20 Fla. L. Weekly S 242, 243 (Fla. May 25, 1995).

> justification for the crime, our law requires consideration of more than just the bare facts of the crime; therefore, a mitigating circumstance may stem from any of the divers frailties of human kind:
>
> Mitigating circumstances are any facts relating to Mr.Branch's age, character, environment, mentality, life and background or any aspect of the crime itself which may be considered extenuating or reducing his moral culpability or making him less deserving, of the extreme punishment of death. You may consider as a mitigating circumstance any circumstance which tends to justify the penalty of life imprisonment.

(R 328).

The standard jury instructions merely provide a list of mitigating factors for the jury to consider. They never define mitigation, a crucial failing since the guidance also provides that "Among the mitigating circumstances that you may consider . . . "(T 1028) (Emphasis supplied.) What the jury may have found mitigated a death sentence in this case was left to their unchanneled discretion, and the standard instructions in that respect were deficient in failing to control it. They needed a definition of mitigation similar to the one Branch supplied, and that the court here failed to define that term was error. In Jones v. State, 652 So. 2d 346, 351 (Fla. 1995), the trial court gave a defense requested definition of mitigation. That guidance, when read with the standard instructions on statutory and nonstatutory mitigation, sufficiently informed the jury that it could consider all the mitigation Jones offered. Without similar, expanded guidance here explaining mitigation, this court cannot reach the same conclusion.

This issue, thus, is different from the dozens of cases this court has decided in which

the trial court failed to instruct the jury they could consider nonstatutory mitigation. Hitchcock v. Dugger, 481 U.S. 393, 10 S.Ct. 1821, 95 L.Ed.2d 347 (1987); O'Callaghan v. State, 542 So. 2d 1324 (Fla. 1989). The error is more basic, and is similar to giving an inadequate definition of reasonable doubt. Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). Not only did the trial court in this case err in failing to define one of the most basic terms in capital sentencing, its error flawed the reliability of the jury's recommendation. See, Sullivan v. Louisiana, 508 U.S. ___, 113 S.Ct. ___, 124 L.Ed.2d 182 (1993)(Harmless error analysis not applicable to error resulting from trial court giving an inadequate definition of reasonable doubt.) Of course, the court never defined what aggravation was, but in a sense it did when it gave the jury the exclusive list of aggravating factors it could consider.

Such method of definition, by limiting what the jury could consider, has no application when explaining nonstatutory mitigation, a term that has considerably more breath than the aggravating factors. Because the scope of mitigation is potentially so large the jury needed explicit guidance what it was. Otherwise, they might have defined the term much more narrowly than contemplated by the law. See, Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)(Sentencer cannot be precluding, as mitigation, "any aspect of a defendant's character or record and any of the circumstances of the offense . . . "); Maxwell v. State, 603 So. 2d 490, 494 (Fla. 1992) ("'Nonstatutory mitigating evidence' is evidence tending to prove the existence of any factor that 'in fairness or in the totality of the defendant's life or character, may be considered as extenuating or reducing the degree of moral culpability for the crime committed' or 'anything in the life of the defendant that might militate against the appropriateness of the death penalty.'")

This court should, therefore, reverse the trial court's judgment and sentence and remand for a new sentencing hearing.

ISSUE VIII

THE COURT ERRED IN ADMITTING, IN THE PENALTY PHASE OF BRANCH'S TRIAL, EVIDENCE THAT THE DEFENDANT HAD COMMITTED A CRIME IN INDIANA THAT STATE CALLED SEXUAL BATTERY WITHOUT ALSO PROVING IT WAS A CRIME OF VIOLENCE AS REQUIRED BY SECTION 921.141(5) FLORIDA STATUTES, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

At the beginning of the penalty phase portion of Branch's trial, the state called as its last witness, Bruce Fairburn, an agent for the Florida Department of Law Enforcement, who presented an "abstract of judgment from the State of Indiana v Eric Branch, the defendant." (T 976) Counsel objected to Fairburn's testimony because the state had offered no testimony that the crime indicated by the judgment, i.e. sexual battery, was necessarily a crime of violence (T 973). Branch's lawyer based his argument on a plain reading of the Indiana statute that state had used to charge Branch. Specifically, that law defined sexual battery as:

> A person who with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person, touches another person when that person is compelled to submit to the touching by force or the imminent threat of force or so mentally disabled or deficient that the consent can't be given, then it's sexual battery a class D felony.

(T 973-74).

The court, accepting the state's argument "that when you molest someone who cannot consent, that is a crime of violence," overruled the objection. It allowed the state to introduce, without any further proof, the Indiana judgment (T 975). That was error.

The court was wrong because Branch demanded the state carry its burden and prove that sexual battery, as Indiana defined it, was a violent crime in this case. "And my point is unless we know that is the case (that sexual battery is a violent crime), then it may have been without violence." (T 975) That is, maybe the victim was "so mentally disable or deficient that consent can't be given" so no force was used. Counsel's argument, in essence, looked at the reverse side of some well settled law in this state.

That is, in Lewis v. State, 398 So. 2d 432 (Fla. 1981), this court held that burglary, as a matter of law, was not a crime of violence the state could use to prove the aggravator that the defendant had a previous conviction for "a felony involving the use or threat of violence to the person." Section 921.141(5) Fla. Stats. (1994). In Mann v. State, 420 So.2d 578 (Fla. 1982) this court accepted that ruling. In the subsequent resentencing hearing, however, the state introduced evidence that during a burglary in Mississippi Mann had broken into a house with the intent to commit that state's crime of unnatural carnal intercourse, and had committed that offense. This court held the trial judge had properly admitted such evidence. "The state remedied this omission on resentencing, and the proof-the indictment, the conviction, and the victim's testimony-establishes a prior conviction of a violent felony." Mann v. State, 453 So. 2d 784, 785 (Fla. 1984) (Mann II.)

If the state is permitted to present evidence to show that a facially "non-violent" crime was violent, Branch wanted the state to prove that a crime that could be construed as one involving no force had violence as part of it in his case. In short, Branch questioned whether the Indiana crime was one of violence, and he wanted the state to present evidence here that it was. He wanted the state to do what it had done in the resentencing in Mann II. In essence he

pled "not guilty" to the aggravator defined by section 921.141(5). Such plea placed the burden of proof squarely on the state's shoulders to show that the crime Indiana called sexual battery involved force or the threat of force. Because it failed to carry that burden, indeed it never picked it up, this court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE IX

THE COURT ERRED IN ADMITTING VICTIM IMPACT EVIDENCE BECAUSE NONE OF IT SHOWED THAT THE VICTIM IN THIS CASE WAS UNIQUE, AS REQUIRED BY SECTION 941.141(7) FLORIDA STATUTES (1994), A VIOLATION OF BRANCH'S RIGHTS AS PROVIDED IN THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

Over Defense objection (T 961), the state called Susan Morris' mother and father to the stand during the penalty phase portion of Branch's trial. They told the jury that their daughter had a tough time in school, was dedicated to higher education, never failed to go to class, and was looking forward to graduation and hopefully finding a job in television production (T 964, 967). She was also a beautiful young lady, "tomboyish," and one who had bought a car with her own money, and who had only just recently quit her job at a video store (T 964, 967). Such poignant evidence, coming from parents who obviously loved their daughter, failed to meet the test of admissibility established by the legislature. The state never proved that this victim, as good and decent a young woman as she was, was "unique," as section 921.141(7) Fla. Stat. (1992) requires.

That law allows the sentencers to consider so-called victim impact evidence. In Payne v. Tennessee, ___ U.S. ___, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991), the United States Supreme Court modified its recent opinion in Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) that prohibited Victim Impact Statements from being considered in capital sentencing. The Payne court, rather than erecting a per se Eighth Amendment ban

on such evidence, left the matter to the states:

> if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Payne, at 111 S.Ct. 2609.

The Florida legislature responded to that invitation by enacting section 921.141(7) Fla. Stat. (1992). That addition to the laws of Florida significantly differed from what the nation's high court permitted in Payne. Rather than allowing members of the victim's family to testify about the effect the murder had on them, that section permits evidence of only the victim's uniqueness and the loss to the community resulting from his or her death:

> (7) VICTIM IMPACT EVIDENCE.- Once the prosecutor has provided evidence of the existence of one or more aggravating circumstances as describe in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as part of victim impact evidence.

(Emphasis supplied.)

This court's opinion in Windom v. State, 656 So. 2d 432 (Fla. 1995) found this statute facially constitutional. In particular, it held that victim impact evidence is not a nonstatutory aggravating factor.

> The evidence is not admitted as an aggravator but, instead, as set forth in section 921.141(7), allows the jury to consider 'the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death.'

Id. at 438.

On the other hand, it found the court in that case had erred (though harmlessly) in admitting some victim impact evidence. In particular, the court should have excluded the testimony of a police officer that because of the murders, "a lot of the children were afraid."

Branch will attack the constitutionality and other facial problems this statute has below, but the case specific difficulty presented here involves the evidence mentioned above and whether section 921.141 permits the state to show that the victim here was a good, decent person but not "unique."

Florida's law on victim impact holds the state to a higher, more stringent level of proof than the United States Supreme Court's opinion in Payne required. Such evidence has relevance in Florida only, if 1) the victim was unique, and 2) because of that uniqueness, the community suffered some loss.

Now, we may argue about constitutionality of that statute generally, but the rules of statutory construction in criminal matters provide specific directions that this court adopt a narrow, restrictive view of victim impact evidence. Section 775.021 Fla. Stats. (1995) directs that:

> (1) The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

(emphasis supplied.)

When section 921.141(7) requires that evidence "shall be designed to demonstrate the victim's uniqueness" then the state had to show Susan Morris was one of a kind, and there were no others in the world like her. C.f. Tascano v. State, 393 So. 540 (Fla. 1981)[15] And though appellate counsel hates doing this, as good and decent and missed as Morris was and is, she was not unique. The evidence that the state introduced only shows a dedicated college student who struggled in school and wanted a career in television production (T 965). She had shown no special intellectual talents, no outstanding athletic ability, no high level of compassion for others, or anything else that would have displayed her "uniqueness," the minimum requirements section 921.141(7) demand be met before victim impact evidence could be admitted. That failure is the major fault with admitting the victim impact evidence here.

Other, more fundamental problems arise with this statute. If the victim impact evidence is neither aggravation nor mitigation, as this court said in Windom, what relevance does it have to deciding the appropriate sentence? Where in Florida's death sentencing scheme has the victim's uniqueness or loss to the community ever been considered relevant?

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[15]In Tascano, this court held that a rule of criminal procedure that the court "shall" instruct the jury on the penalties the defendant faced if convicted was mandatory, not directory. In short, shall means shall.

It has not, and to the contrary, this court in Jackson v. State, 498 So. 2d 906, 909 (Fla. 1986) specifically rejected victim impact evidence as "patently improper." [16]

Thus, how is the court to instruct the jury on how it is to "consider" this evidence. This court is dreaming if it believes jurors will "consider" the victim impact evidence, yet it will not have any effect on their deliberations. If the state in this case believed it would have no impact on the jury why did it seek to have it admitted? Obviously, the prosecutor wanted that body to "consider" it as another reason to recommend Branch's death.

Moreover, subsection (7) has serious state law problems overlooked by this court in Windom that undermine the foundation on which this court's decisions in death penalty cases have been built.

If we go back to the very first cases of this court and the United States Supreme Court that approved this state's death penalty sentencing scheme, there emerges the central, controlling idea that capital sentencing discretion must be somehow controlled or "channelized" to be legitimate. For example, in Proffitt v. Florida, 432 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the court found

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner.

Id. at 252-53.

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[16]Indeed, section 921.141(1) indicates that the only evidence relevant in the sentencing phase focuses on "the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6)."

This court had reached a similar conclusion in State v. Dixon, 283 So. 2d 1, 7 (Fla. 1972):

> Thus, if the judicial discretion possible and necessary under Fla. Stat. Section 921.141, F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of Furman v. Georgia, [408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 46(1972)] has been met.

Later cases that the U.S. Supreme Court examined moved beyond the broad examination of Florida's (and other state's) capital sentencing schemes. They focussed instead on the mechanisms devised to separate those who were eligible for execution from those who were not. Although the nation's high court occasionally disagreed with how this court or a trial court may have applied our death sentencing statute, See, Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), it has steadfastly accepted Florida law that the aggravating factors, as defined in Section 921.141(5), were vitally important in selecting the few who should die from the many who should not.

This court's long experience with death sentencing has left the unmistakable message that this court takes its obligation seriously to ensure that death sentences are imposed in a rational and controlled way. While required to follow the law as declared by the United States Supreme Court in many instances, this court has occasionally refused to follow it when its rulings have failed to comport with what this court believes is just. That is, state law, whether it is found in our constitution or in statute, has frequently mandated more selective application of the death penalty than approved by the fundamental law of the United States. The best,

most relevant example of this independence, comes from this court's ruling that the list of aggravating factors articulated in section 921.141(5) is the exclusive list of what the state can prove to justify a death sentence. Miller v. State, 373 So. 2d 882 (Fla. 1979). In Barclay v. Florida, 463 U.S. 939, 966, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), it was mentioned that the list of what could aggravate a first degree murder conviction was not exclusive. Zant v. Stephens, 462 U.S. 103, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

This court has, however, refused to follow that decision, and instead continued to follow Miller. Grossman v. State, 525 So. 2d 833, 842 (Fla. 1988). In Grossman, this court explicitly held that "victim impact is a non-statutory aggravating circumstance that would not be an appropriate circumstance on which to base a death sentence." Id. Thus, trial courts have erred when they admitted evidence at sentencing hearings showing that the victim was a decent person. For example, in Jackson v. State, 498 So. 2d 906, 909 (Fla. 1986), this court rejected a trial court's findings that a murder was especially heinous, atrocious, or cruel because the victim had been married, ran a store by himself, had led a good and honest life, and would be missed by the community. These factors were, as this court said, "patently improper." Id. They were so because the only issues relevant at sentencing trials focus exclusively on the aggravating and mitigating factors pertinent to a particular case. Victim impact evidence raised matters outside those concerns. Taylor v. State, 583 So. 2d 323 (Fla. 1991); Jackson v. State, 522 So. 2d 802 (Fla. 1988). Until Payne, this court consistently adhered to its strict policy of allowing only evidence relevant to the mitigating or statutory aggravating factors.

If this court intends to continue this policy how does section 921.141(7) fit into

Florida's capital sentencing scheme? As Grossman, the two Jackson cases, and the Taylor case make clear, victim impact evidence and argument have no relevancy to the aggravators. Perhaps, however, victim impact evidence, as authorized by this section, amounts to a new aggravating factor.

That clearly is not so because the legislature did not list it as one under section 921.141(5). Moreover, that section introduces what the legislature considers appropriate to justify a death sentence by saying "Aggravating circumstances shall be limited to the following." If they had wanted to include victim impact as an aggravating factor they could have done so. That they did not, can only mean it was unintended to be considered as such.

More significantly, victim impact evidence never significantly limits the type of person eligible for a death sentence. As the Supreme Court held in Zant, supra, aggravating factors

> 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, supra. at 877.

In Godfrey v. Georgia, 446 U.S. 420, 428-29, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the court struck Georgia's equivalent "Heinous, atrocious, or cruel" aggravating factor because it did not create any "`inherent restraint on the arbitrary and capricious infliction of the death sentence' because a person of ordinary sensibility could find that almost every murder fit that stated criteria." Zant, supra, at 878. A death sentence runs the risk of becoming arbitrarily imposed when it could apply to any number of other persons who are not sentenced to death.

Spaziano v. Florida, 468 U.S. 447, 460, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

Victim impact evidence has the same problem as that identified in Godfrey. "[A] person of ordinary sensibility could find that almost every murder fit the stated criteria." Zant, supra. As argued below every individual is unique, and every death in some measure is a loss to the community. Victim impact evidence does nothing to genuinely narrow the class of death worthy defendants, nor does it justify a more severe sanction when compared to others found guilty of murder. Nothing in section 921.141(7) limits or narrows the class of those who are death eligible.

Until Payne, the U.S. Supreme Court carefully insured that state death sentencing statutes minimized the risk of arbitrary and capricious inflictions of death sentences. The cases cited above, Barclay, Zant, Spaziano, and others demanded that states impose death rationally, that sentencing discretion be controlled. Significantly, the court in Payne simply ignored this long and rich history of judicial concern because nowhere in either the majority or the concurring opinions are the principles of those cases cited. Nowhere does the court consider, as Branch has, the effect Victim Impact Statements will have on the fragile balance reached in death penalty sentencing.

This court should, as it has done before on other issues, reject the Supreme Court's widening of the death penalty net. As you have said, our state constitution provides greater protections than those afforded by the United States Constitution, Traylor v. State, 596 So. 2d 957 (Fla. 1992), and this is one instance where it should be invoked. The nation's high court was politically correct in Payne, but this court has worked too hard to perfect section 921.141 to allow popular expediency to wreck it.

So, unless this court is willing to reverse Miller and a host of other cases following it and to ignore the legislative mandate that aggravating factors "shall be limited to the following" it must find victim impact evidence, under Florida Law, irrelevant in a capital sentencing proceeding.

THE UNIQUENESS OF THE INDIVIDUAL AND THE LOSS TO THE COMMUNITY

Section 921.141(7) has further difficulties in that what it seeks to allow the state to prove defies proof or more seriously, it violates Article 1, Section 2 of the Florida Constitution. If this section survives this court's scrutiny, victim impact evidence will have relevance if the state can prove two things:

> 1. The victim was unique as an individual human being.
>
> 2. Because of that distinctiveness, the members of the community suffered a loss.

The first "element" amounts to a truism of western society. Payne (Stevens, dissenting. "The fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support.") We believe everyone is unique. Like snowflakes, among the billions of people who are alive now, who have ever lived, and who will yet breathe, there is none like any other. The combination of genetics, experience, and culture, combine in such bewildering variety that no one truly has an identical twin somewhere.

What the legislature must have meant was that the victim was sufficiently distinguished from the rest of humanity that he or she was distinct or unusual. But saying that we are all different of necessity forces us to consider in what way and to what extent our differences define us. Perhaps we should focus on the physical, moral, or mental aspects of a

person's makeup, or some combination of them. Do victims then have to have been an Arnold Scwharzeneger, a Mother Theresa, or an Albert Einstein to be "unique?" If not Einstein, for example, maybe it would be sufficient if they had a Phi Beta Kappa key. If that was too strict, perhaps he or she had graduated from college. Or finally, maybe they were merely literate. If people are unique there must be some objective standard by which victims can be measured in which some will emerge as sufficiently unusual to be considered further and others will remain with the great unwashed. Yet, if we distinguish them we violate the provisions of Article I, Section 2 of the Florida Constitution that provides "All natural person are equal before the law . . . " Clearly when we say Einstein's murder was a greater loss than appellate counsel's there is created a disparity anathema to our fundamental law.

Moreover, as Justice Stevens recognized in his dissenting opinion in Payne, there arises the ominous possibility that prosecutor's may seek death for some defendants based solely on unacceptable reasons such as the race of their victims. While the Supreme Court rejected the proof of that theory in McClesky v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) for capital cases, race is a proven factor in non-capital sentencing in Florida.[17] Some defendant's may face a death sentence simply because the victim was white and the defendant black.

The problem of distinctiveness is more complex. What of children, whose murders easily raise our greatest outrage. Few of them sufficiently standout to the degree that society

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[17]See, An Empirical Examination of the Application of Florida's Habitual Offender Statute (Economic and Demographic Research Division, Joint Legislative Management Committee, The Florida Legislature, August 1992).

can justify letting the jury hear about what their deaths meant.

Then what of the "second" element, the loss to the community? John Donne, the seventeenth century metaphysical poet expressed this sentiment best:

> No man is an island, entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friends or if thine own were; any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee.

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In the practical, legal world, there are, however, problems with this approach. If the death, or the murder, of any person diminishes us, the real question must be how much have we lost? Answering that question inevitably leads to another grading of human life, which means that some people are more important to the community than others. How do we objectively measure the loss to the community? For example, if a six month old baby is recognizably distinct, the community will likely have suffered no specific loss by his or her death? Similarly, the homeless wino murdered while laying in the gutter will probably not be missed.

Perhaps this court has already solved this problem. In Coleman v. State, 610 So. 2d 1283 (Fla. 1992) and Williams v. State, 622 So. 2d 456 (Fla. 1993) this court refused to accept, as a reasonable basis for the jury's life recommendation, that the several victims somehow "deserved" to be executed because they had stolen several thousand dollars worth of cocaine from the defendants who not only wanted it back but also intended to make an

example of them. If the murders of these victims, whose character and value to the community in truth were perhaps only a shade less black than the defendants, remained reprehensible then whose death is not? We then must fall back to Donne's conclusion that every death diminishes us. If so, this court must then reconcile this loss with the United States Supreme Court's requirement that a capital sentencing scheme must "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano, supra, at 460.

On the other hand, perhaps the juries in Coleman and Williams acknowledged the community's loss but simply felt it was too slight to justify a death sentence. If so, then this court has refused to let what the state can establish as aggravation be used to mitigate a death sentence.

There are, moreover, other legal problems that ooze from this quagmire. In Cannady v. State, 620 So. 2d 165 (Fla. 1993), the defendant murdered his wife and her alleged rapist. In sentencing him to death, the court found only two aggravating factors applied, but on appeal this court rejected both of them. What would have happened, though, if there had been evidence of either or both factors, but the jury had given them little or no weight. By current law, it should have returned a life recommendation. Nevertheless, it may have recommended death because the victim impact evidence (had it been introduced) convinced it to do otherwise. Clearly, to sustain this decision, this latter proof would amount to a nonstatutory aggravating factor.

If so, then the rules applicable to capital sentencing would bear on victim impact evidence. For instance, the state would have to prove beyond a reasonable doubt that the

victim was unique and that there was an accompanying community loss. How does one do that without having a mini trial on what is essentially a collateral issue? Afterall, until Payne, sentencing hearings focussed exclusively on the defendant's character and the nature of the crime he committed. Spaziano at 352, fn. 7. Zant, supra, at 879.

Finally, there is the problem of what is the "community." Consider for example, the recent murders of tourists from Germany and England. Their communities were in those countries, not in Miami or Jefferson County. Neither Florida location has objectively "lost" anything by their shocking deaths. Moreover, if these Florida locations are the relevant focus, what have they lost and for how long? How do we measure, objectively, loss to the community occasioned by the murder of a transient?

In short, though the United States Supreme Court in Payne allowed victim impact evidence because it believed such proof somehow balanced the scales, the risk of imposing death in an arbitrary and capricious manner that was identified in Booth remains. Victim impact evidence, as shown above, creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner. Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989).

This court should, therefore, reverse the trial court's sentence of death and remand for a new sentencing hearing before a new jury.

## CONCLUSION

Based on the arguments presented here, Eric Branch respectfully asks this honorable court to 1) reverse the trial court's judgment and sentence and remand for discharge as to the murder and sexual battery, 2) reverse the trial court's judgment and sentence and remand for a new trial, or 3) reverse the trial court's sentence and remand for a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard B. Martell, Assistant Attorney General, by delivery to The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, ERIC SCOTT BRANCH, #313067, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this 31st day of October, 1995.

DAVID A. DAVIS