IN THE SUPREME COURT OF FLORIDA

ERIC SCOTT BRANCH,

Appellant,

v.

CASE NO. 83,~~870~~ 805

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

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ERIC SCOTT BRANCH, :

Appellant, :

v. : CASE NO. 83,870

STATE OF FLORIDA, :

Appellee. :

:

REPLY BRIEF OF APPELLANT

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 state has a tremendous problem with this issue, which it deftly ignored in its Answer Brief. Immediately before the penalty phase portion of this trial began, counsel said he was unprepared to proceed (T 944). It did, and after the state had presented its case in aggravation, Branch's lawyer introduced the Indiana statute defining sexual battery (See Issue VIII) and rested (T 982). Apparently surprised and disturbed by that summary defense, the court made a very unusual inquiry to "satisfy myself about the Defense's posture at this point." (T 982) It also explained why it had denied counsel's motion to continue (T 985).

Specifically, it noted that in matters of this sort "information from family, friends about the

defendant's childhood background, incidents growing up, both bad incidents and good incidents, that there's information about the defendant's character, I think in one of these I wound up seeing a whole string of merit badges from the Boy Scouts and other information about the defendant. . . " (T 985-86) Mr. Albritton admitted some of that type of evidence was available, and even though Branch agreed to waive presenting it, his lawyer asked to reopen his defense, which the court granted (T 987).

So, counsel had investigated his case some, but the crucial, compelling mitigating evidence typically presented, that is, proof that Branch had suffered some significant organic brain damage was absent. Why? Not because there was none, as he knew that Branch may have suffered some brain injuries as a child (R 335-38). He presented none because the court had refused to grant him four more weeks (not six months) to find the files in Indiana, and solidify that mitigation (T 942-43). This case, in that respect, is unlike Valdes v. State, 626 So. 2d 1316, 1323 (Fla. 1993), cited by the state on page 25 of its brief. There, the defendant had been arrested and presumably indicted in mid 1987. He went to trial almost three years later, and counsel who represented him then had done so for ten months. The trial court continued the penalty phase portion of the trial for one week after the guilt phase, and it denied a defense request for a longer delay. In light of the time the court had given counsel, and the length they had represented Valdes, this court approved the lower court's order denying the request for more time.

Such is not the situation here. The penalty phase began the day after the jury had found Branch guilty. Additionally, the trial began slightly more than a year after the murder had occurred, and counsel had represented the defendant for only four months. Moreover, counsel asked for more time before trial started, when the pressures of accommodating a jury and the

need to move the case along were missing.

This case also has significant distinctions from Gorby v. State, 630 So. 2d 544, 546 (Fla. 1993) that the state also cites. In that case, counsel had seven months to prepare for trial. On the day he was appointed, he asked for and received a continuance. He waited, however, until the day the trial started to ask for another so he could conduct a penalty phase investigation.

Approving the lower court's denial of the request, this court noted,

> "counsel had two investigators and also personally traveled to West Virginia to investigate Gorby's background. The mental health expert had more than adequate time to prepare for trial, and counsel did not allege that the Texas witnesses would ever be available."

Id.

Unlike the situation in Gorby, Mr. Allbritton had only a single investigator, had never gone to Indiana to investigate this defendant's background, and the mitigation expert needed several months to prepare.[1]

Finally, in Woods v. State, 490 So. 2d 24, 26 (Fla. 1986) this court approved a trial court's denial of a late defense request for a continuance because it amounted to "nothing more than conjecture and speculation."

Again, even though the state relied on that case (Appellee's brief at p. 25), it has little relevance here. Branch's lawyer had more than speculation that his client had suffered some head trauma as youth (R 335-38). Moreover, that it may have been a speculative inquiry, or even the dreaded "fishing expedition" should not have defeated Branch's request for more time. His counsel had represented him for only four months, during which time he had another capital case

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[1]Counsel had hired her in early February, about a month before trial (T 336) .

to defend and a third client facing major drug charges to represent. That four months probably shrunk to less than one or two, hardly enough time to prepare to defend a person facing the most serious charge the state can levy and the most serious penalty it can impose. Richardson v. State, 604 So. 2d 1107, 1108 (Fla. 1992).

On page 18 of its brief, the state says or implies counsel had asked for five continuances. Actually, the record shows he had made only two such requests before the March 1 hearing on his third request for a continuance, and his "First Motion to Postpone Phase II." (R 109, 115, 162, 165)

When Branch and his lawyer faced the penalty phase portion of the trial, they had two problems. The first was "we did not have an opportunity to fully develop the matters we wished to present in mitigation." (T 983) Second, by presenting what he had, he might open "up some things in his past that the State may bring out on cross-examination the will possibly support the aggravators rather than enhancing or going toward any mitigating factors." (T 983-84) What he might have presented could have been severely attacked by the state. As to that latter problem, Branch agreed with his lawyer's advice not to pursue it. Not following a tact the prosecutor could have used to its advantage was in his best interest. That response in no way approved his lawyer's failure to pursue other mitigation.

This conclusion follows because the court, before it asked Branch about his willingness to forego presenting any mitigation, explained why it had denied the defendant's lawyer's last requests to delay the guilt and penalty phase parts of the trial.

> The Court has denied those requests 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. That's not my concern right now.

(T 985) (emphasis supplied.)

Then, after explaining the type of evidence "typically in penalty phase hearings" (T 985), he made the inquiry quoted in the state's brief (T 986-87). Immediately after, counsel asked to put on some "information from family, friends about the defendant's childhood background. . . ." (T 985)

Thus, that Mr. Albritton "presented two family members to testify at the penalty phase" (Appellee's brief at p. 23) cannot mean that was the extent of the mitigation available, especially when his mitigation expert specifically said she needed more time to investigate Branch's childhood head injuries.

Moreover, in light of the problems raised in Issue II, Branch challenges the state's assertion that "Appellant's family was involved in his case, and in contact with defense counsel (whom they retained)." (Appellee's brief at p. 24.) To the contrary, as Branch's grandfather indicated, Albritton rarely talked with the family (R 339).

The state also misstated the situation the court faced when it denied Branch's last motions to continue. The Defendant made the request, particularly the motion to delay the penalty phase part of the trial a week before his trial started. The court, at that time, could have delayed the start of the trial. Obviously, he would not have to "somehow sequester the jury from publicity or improper contact," as the state speculated. (Appellee's brief at p. 24). As he said in his Initial Brief, "Branch requested only a short delay so he could develop specific evidence." (Initial Brief at p. 16.) There was no valid reason the court could not have granted counsel's request,

particularly when he made it before trial.

The state has presented no compelling argument justifying the trial court's discretionary ruling, and this court should reverse the lower 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.

The state, on page 32 of its brief, says "it was not incumbent upon Judge Nickinson to mediate between Branch's family and Attorney Allbritton to see that they were satisfied that they were getting their money's worth (as such was their apparent desire)." Branch has never made such a claim. Instead, he wanted to do what the law required: conduct the hearing required by Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973). That is, the trial judge should determine "whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant." Id. at 258-59.

The state makes the argument predicted in the Initial Brief at pp. 22-24 that the Nelson inquiry applies only if the Public Defender represents the defendant. What Branch said there covers the State's argument: whether the defendant has an appointed or privately retained lawyer, the Sixth Amendment guarantees that counsel shall be competent. While he may "not have a constitutional right to obtain different court-appointed counsel," (Appellee's brief at p. 31), he does have a fundamental right to have effective representation. That is the purpose of the Nelson inquiry, an interrogation the court said did not apply in this case.

Finally, the state makes a waiver type argument. It claims the Branch could have raised his dissatisfaction with Allbritton at the sentencing hearing, and that he did not means his belated dissatisfaction arose more from his sentence than counsel's ineffectiveness. (Appellee's brief at p.

30)[2] Such reasoning imputes Branch with the training, skill, and experience of a lawyer. Waiver rules apply to lawyers, not defendants, and this court should not expect someone facing a death sentence to have the mental foresight during the middle of a sentencing hearing to object to the quality of his lawyer's representation.

Because the court failed to recognize the need for a Nelson hearing, this court should reverse its judgment and sentence and remand for a new trial.

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[2]On the same page, the State also argues "there has been no showing that Judge Nickinson received [Branch's] letter until April of 1994, when it was attached to the pro se motion for new trial." To respond to that contention, Branch asked this court (by way of a Motion to Reconstruct the Record) to direct the court to tell it whether it had received the Defendant's letter on February 17, 1994 (or shortly thereafter), as it had the grandfather's affidavit. The state opposed that request, contending in part that "the timing of the court's receipt of Branch's letter would not seem determinative to the point on appeal, in any event." (Response to Appellant's Motion to Reconstruct the Record, p. 3) This court denied the motion "without prejudice to reconsider after oral argument" (Order dated March 21, 1996).

ISSUE IV

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

Every time appellate counsel has argued a circumstantial evidence issue, the scenario is the same. In the Appellant's Initial Brief, he will cite this court's opinions in Davis v. State, 90 So. 2d 629, 631 (Fla. 1956); McArthur v. State, 351 So. 2d 972 (Fla. 1977) for the proposition that circumstantial evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. He has frequently even said, as was done here, "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)." (Initial Brief at p. 30) With often undisguised fervor, he has even quoted footnote 12 in McArthur:

> Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. Davis v. State, 90 So. 2d 629 (Fla.1956); Mayo v. State, 71 So. 2d 899 (Fla. 1954); Head v. State, 62 So. 2d 41 (Fla. 1952). (The meaning of "not inconsistent" may be sufficiently different from "consistent" as to prevent a substitution of terms.) In applying the standard, the version of events related by the defense must be believed if the circumstances do not show that version to be false. Mayo v. State, above; Holton v. State, 87 Fla. 65, 99 So. 244 (1924).

Id. at 978

The state, for its part, will respond with equally valid law that the conflicts in the evidence are to be resolved in the light most favorable to the jury's verdict, the prosection is not required to conclusively rebut every possible variation of events which can be inferred from the evidence, "but

only to introduce competent evidence which is inconsistent with the defendant's theory of events," and "a jury is not required to accept a defendant's 'clearly unreasonable' hypothesis of innocence." (Appellee's brief at pp. 35-36)

Thus, each side, hiding behind its battle works of sympathetic law, fires volleys of facts to support its position and hopefully defeat the opposing side with one or more shots.

Appellate counsel weary, so weary, of this incessant fighting raises the white flag, offering a truce. He will accept the state's law, particularly that which says that "the jury is not required to accept a defendant's 'clearly unreasonable' hypothesis of innocence." (Appellee's brief at p. 36). He will even admit that Branch stole Morris' car and later abandoned it. Going further, he concedes that "except for the conclusions the state drew from the evidence it presented, Branch has no serious dispute with its case." (Initial Brief at p. 31)

The only problem comes from Branch's story of the "other Eric." As the Defendant testified at trial, he saw the latter hit Susan Morris in the parking lot, helped carry her into the nearby wooded area, and held her as she regained consciousness and the "other Eric" suddenly hit her again. Branch left, stole her car, and eventually took the "other Eric" to the airport. The next day, he drove Morris' vehicle to Kentucky where he ran out of gas.

The only question this court need answer was whether Branch's story was "clearly unreasonable." The state presents no compelling evidence that Branch's testimony lacked any credibility, and it spends most of its efforts complaining about insignificant details, or creating problems where none exist.

The state, for example, talks about the blood, but Branch explained how Morris' blood got on his boots. He was holding her, and he fell over her when she was hit (T 804, 833).

The state on appeal questions the logic of Branch's desire to steal another car and leave Morris tied in the woods. (Appellee's brief at page 37) Branch was worried that the police would find him because he was wanted on an outstanding Indiana warrant, and they would find him because he was driving the Pontiac he had used to leave that state (T 774). Apparently he believed that he could steal a vehicle in Pensacola, elude the police, and return home before anyone linked him with it (T 795). Thus, his plan acknowledged that eventually someone would report the theft of the car, but by that time, he would have returned north and probably have abandoned that car.

The state on page 38 of its brief then further questions the logic of Branch's plan to drive to Panama City, pick up his brother, and return to Pensacola so he could get the Pontiac. It suggests that "it would seem that Appellant could simply have summoned his brother to Pensacola airport with a phone call, (thus obviating the need to drive a stolen car further on Florida highway). . . " (Appellee's brief at p. 38) Of course, this point assumes Branch's brother had a telephone, and the Defendant knew the telephone number.

The state then finds a contradiction in the fact that one of its witnesses saw Branch loading something into a red car about 11:00 on the night of January 11, 1993 (T 640-42). According to Branch, the car was at the airport then, the Defendant having returned about 10:15 (T 813). The problem the state has is that it also introduced the testimony of a cab driver that he had taken Branch from the airport about 7 o'clock that evening (T 629). In any event, whatever facts we believe, they do little to advance the state's case.

Similarly, that Branch admitted or denied he had a cut on his hand proves nothing. (Appellee's brief at p. 38) That he "offered no explanation for the presence of his own blood on

the pair of black and white checkered shorts which he had been wearing after the murder (T 598-9; 697) (Appellee's brief at p. 39) also establishes no point because the state presented no evidence of how long it had been there.[3] Moreover, that he never saw Morris' blood is readily explained by the events occurring at night, in the dark. Finally, as mentioned in the Initial Brief, Branch explained how the blood got on his boots. "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." (Initial Brief at p. 34)

Having presenting its "conflicting" evidence, the state says it should win. (Appellee's brief at p. 39). Two points. First, the evidence, even if conflicting, has little significance to Branch's theory. It does nothing to question its validity, nor does it expose any fundamental holes in his story.

Second, even though the state is "entitled to the most favorable interpretation of this conflicting evidence" that is not enough. If the state's theory is possibly, even probably correct about how the crimes occurred, that is insufficient. The state has presented no evidence inconsistent with Branch's hypothesis of innocence. Because the circumstances "do not show that version to be false" they must be believed. McArthur, at 976, f.n. 12.

This court should reverse the trial court's judgment and sentence and remand for discharge on the murder and sexual battery convictions.

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[3]The same logic applies to the state's contention that "Branch likewise failed to explain the presence of blood consistent with the victim on the back seat of her car (T 680-1; 692-7)." (Appellee's brief at p. 39.)

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.

The state has three points worthy of response on this issue: 1) The state was merely commenting on Branch's evolving theory of defense that had become evident. 2) The statements refer to admissions made at trial, and not some prior silence. 3) Whatever error occurred was harmless.

To appreciate the subtle shift in focus the state has made, we need to re-examine the objectionable statement.

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

(T 887) (Emphasis supplied.)

The state never alleged Branch remained silent at some pre-arrest, pre-Miranda warnings situation.[4] It told the jury that after the defendant's arrest, after his arraignment, after he had a lawyer appointed, and after his trial had started, Branch never confessed another Eric had committed the murder. If a prosecutor has ever commented on a defendant's right to remain silent, it happened in this case.

The state claims Branch had no theory of defense when the trial started, but that one evolved as it progressed. (Appellee's brief at pp. 45-49). As evidence of this, it points to his cross-examination of the DNA experts, challenging them on the reliability of their findings, then

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[4]Its argument on appeal, pp. 51-55, thus has no bearing on this issue.

conceding it in closing argument. (Appellee's brief at pp. 47-48) The state misunderstands how defense counsel often prepare cases.

When the state charges a defendant with a crime, his subsequent plea of not guilty requires the state to prove every issue, whether it is contested or not. This differs from civil practice where the defendant can selectively admit some points while denying others. While counsel may have a strategy or defense, he frequently attacks "uncontested" evidence just to determine if some weakness might come to light. Such could support the planned strategy, or it may provide another basis to raise a reasonable doubt. While most trial lawyers like to think they are prepared for the contest, surprises happen often enough to justify fishing for a lucky strike.

In this case, Branch's lawyer probed the reliability of the DNA test results. When he got nowhere, he conceded the fact and moved to his main argument. No defense evolved. No fish rose to the lure.

Thus, the court patently erred in overruling Branch's motion. The only question was its harm. The state, of course, argues it amounted to some legal fluff that can be dismissed with some hot air. Hardly. This comment came at the beginning of the state's closing argument, and it called to the jury's attention that Branch had remained silent in the face of the damning accusations and evidence proving he had murdered Susan Morris. Any innocent defendant naturally would have denied it as soon as he could. Did Branch do that? No. He waited until trial, and, when he had a chance to present his defense, admitted having her blood on his shoes but denied killing her. That, as implied by the State's comment, is not the tactic of an innocent person. The error becomes even more damaging when considered in the context of the entire closing argument, especially the other comments the prosecutor argued which were unobjected

to. (See Initial Brief at p. 43.)[5] When the cumulative impact of all the improper comments is considered, the complained of error could not have been harmless beyond all reasonable doubt. Whitton v. State, 649 So. 2d 861, 865 (Fla. 1994)("We agree that we must consider all three comments in our harmless error analysis because the harmless error test requires an examination of the entire record.")

This argument could have distorted the jury's perception of the state's case and Branch's defense. This court cannot say beyond a reasonable doubt it had no effect on the jury's verdict. It should, consequently, reverse the trial court's judgment and sentence and remand for a new trial.

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[5]"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)

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.

The state presents its essential argument on this issue on page 59 of its brief: "Appellee cannot see why a defendant such as Branch, who has already been convicted of murder, should not expect to be confronted with at least some evidence of what his victim was like, before she had the fatal misfortune to encounter him, and become the 'work product' depicted in other photographs."

Branch relies on the argument presented in his Initial Brief. He also contends, however, that since the photograph amounted to victim impact evidence (Appellee's brief at p. 60), the strict requirements of Section 921.141(7) Fla. Stats. (1992) controlled its admissibility. Admitting the picture of Ms. Morris before her death to contrast it with her body after being murdered, had no relevance because it was not "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."

That is, if "the jury was entitled to know something of the life which Appellant chose to snuff out" (Appellee's brief at p. 60) they could only view evidence admissible under section the Victim Impact Evidence statute.

Finally, the state makes its predictable harmless error argument, but it presents no facts or reasoning to support that claim in this case. In any event, under this court's tough harmless error standard, this court cannot say the objected to picture of Susan Morris had no effect on the jury's

death recommendation. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Rather than dispassionately weighing the aggravators and mitigators, the jury could have been influenced by the emotions understandably created by the state's display of the picture of this young woman.

The court should reverse the trial court's sentence of death 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.

The state certainly adds some additional facts to this issue that Branch did in presenting it in his Initial Brief. Why it did so is a mystery, though, since they add nothing to this court's understanding of the issue as Branch framed it. As Branch presented the matter in the Initial Brief, the crucial mistake the court made was in considering and allowing the jury to consider the evidence of the Indiana conviction without ever requiring the state to prove it was a crime of violence as required by Section 921.141(5)(b) Fla. Stats. (1992) ("The defendant was previously convicted of . . . a felony involving the use or threat of violence to the person.") This argument has extra significance because counsel specifically demanded the state prove the Indiana crime was one of violence (T 973).

Thus, that the court found it to be so amounts to it excusing the state from proving a contested aggravator (R 450-51). (Appellee's brief at p. 69). That was error. See, State v. Dixon, 283 So. 2d 1, 9 (Fla. 1972).

This mistake becomes more glaring in the judge's sentencing order where it "indicated Branch compelled the victim Tiffany Pierce, to submit by force (R 361)" (Appellee's brief at pp.

69-70). Branch had no opportunity to rebut that conclusion, something he could have done at the sentencing hearing had the court recognized the state had the burden to show Branch's conviction for sexual battery involved force.

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.

The state claims, on pages 77-78 of its brief that Branch's interpretation of the [victim impact evidence] statute is plainly unrealistic. If so, it is one required by Florida law. Section 775.021 Fla. Stats. (1995) mandates a strict construction of statutes, and if there is an ambiguity in them, they "shall, be construed most favorably to the accused." (Emphasis supplied) Thus, when the legislature, not Branch, not the state, and not this court, said victim impact 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," (emphasis supplied) he is only applying well settled law to interpret this new statute. After all, we presume the legislature knew what the law was, and it knew what it was doing when it drafted this legislation, so this court must give it an obvious, plain meaning.

That the state may dislike the result is conceded, but construing section 921.141(7) most favorably to the defendant means it had to show Ms. Morris was unique or one of a kind.

Further the testimony in this case may "in all respects" be in accord with Payne v. Tennessee, ___ U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (Appellee's brief at p. 78) adds nothing to the state's argument. Accepting that conclusion does not mean it also satisfied the extremely strict admissibility requirements of Section 921.141(7) and our state's rules of

statutory construction.

Of course, the state concludes by characterizing "The brief humanizing testimony" as harmless (Appellee's Brief at p. 78). As a general principle of law, this court discourages allowing the victim's family members from testifying unless absolutely necessary. Justus v. State, 438 So. 2d 358, 366 (Fla. 1983). The possibility of a mother, father, or sister breaking down in an understandable and humanly acceptable reaction when discussing the death of a loved but now lost child or sister poses to great a risk to routinely allow.

In this case, the court and prosecutor recognized this truism. During the penalty phase portion of the trial, the state called Morris' parents to present victim impact evidence. Specifically, it wanted the father to identify a photograph taken of his daughter 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)

If the lawyers and the trial judge obviously recognized the emotionally explosive nature of Mr. Morris' testimony, it must have had the effect of being more that the "brief humanizing testimony" the state would characterize them as being. This is particularly true in light of the pathologist's testimony, given immediately before Mr. Morris' evidence. The former witness had presented extensive testimony in the guilt phase portion of the trial about the injuries Ms. Morris had suffered. The state recalled him during the penalty phase to reiterate much of what he had said earlier.

Thus, the contrast between his description of her dead and sexually battered body and the beautify young lady who was tomboyish (T 967) could not have been greater. It also could not have been harmless.

This court should reverse the trial court's sentence of death and remand for a new sentencing hearing before a 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 8th day of April, 1996.

DAVID A. DAVIS