

IN THE SUPREME COURT OF THE STATE OF FLORIDA

BYRON BRYANT,)
)
 Appellant,)
)
 vs.) Case No. 94,902
)
 STATE OF FLORIDA,)
)
 Appellee)
 _____)

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the prosecution in the lower tribunal. In this Brief, the parties will be referred to as they appeared before the lower tribunal.

The following symbols will be used:

(R) denotes the Record on Appeal.

(T) denotes Transcript of Testimony.

(SR) denotes Supplemental Record on Appeal.

In accord with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Appellant hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is spaced proportionately.

STATEMENT OF THE CASE

This case involves a retrial. Bryant v. State, 656 So.2d 426 (Fla. 1995). (R 1993-2005). Defendant was charged by Indictment with one count of First Degree Murder and one count of Armed Robbery With a Firearm on February 6, 1992 (R 15-16). A Motion to Determine Competency was filed on April 1, 1997 (R 2592-2593). The lower tribunal conducted a hearing as to the Defendant's competency on February 2, 1998, February 4, 1998, and February 6, 1998 (SR 1-254). The lower tribunal determined that the Defendant was competent to stand trial on February 6, 1998 (SR 254).

A jury trial was held on February 9-13, 1998, before the Honorable Marvin U. Mounts, Jr., Judge of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (T 1-1052). Defendant was found guilty as charged, on February 13, 1998 (R 2967-2968). Judgment was entered in accord with the verdict on February 13, 1998 (R 2999). Defendant's Motion for New Trial was filed on February 17, 1998 (R 3000-3003), and was denied on September 14, 1998 (R3392).

On March 2, 1998, the Court entered an Order Requesting Supplements to the Record (R 3019-3021). On April 13, 1998, the lower tribunal held a hearing with regard to the supplementing of the record (R 3725-3820). On April 14, 1998, and September 10, 1998, Phase Two proceedings were held (T 1053-1329). A sentencing

hearing was conducted on February 5, 1999 (T 1330-1342). A written sentencing order was entered (R 3857-3867), and Defendant was sentenced to death by electrocution as to Count One and life imprisonment in the Department of Corrections as to Count Two (R 3868-3869). A Notice of Appeal was timely filed (R 3874-3875). This appeal follows.

STATEMENT OF THE FACTS

Prior to the trial in this cause, the Court held a hearing on the issue of the Defendant's competency, which was raised by the Defendant (SR 1-253). Dr. Stephen R. Alexander, a clinical psychologist, testified that he had examined the Defendant as to the issue of competency (SR 6-8). He conducted a one-hour examination and found the Defendant to be polite, alert, attentive, and cooperative (SR 10). He found the Defendant to have average to above average intelligence, good command of the English language, good long and short term memory, and no apparent cognitive defects (SR 12). The Defendant knew his attorney and was satisfied with his efforts, and seemed to understand the strategy that was going to be employed in the case (SR 12-13). The evaluation was conducted in the presence of the State Attorney, and the Defendant was advised not to reveal any of the details of his defense, and was able to comply with that request (SR 13). Dr. Alexander indicated that the Defendant knew the charges against him, his rights, the name and function of the judge, and understood that superior courts existed to review the decisions of trial courts (SR 14). He understood the role of the prosecutor and evinced no evidence of mental illness (SR 15). Under all of the circumstances, Dr. Alexander determined that the Defendant was competent to stand trial (SR 16).

On cross examination, Dr. Alexander admitted that he was not sure as to whether the Defendant could testify relevantly (SR 19). He knew that the Defendant had been the victim of a closed head injury, but had not reviewed any of the details (SR 22). He reviewed no records regarding the Defendant's head injury, reviewed no jail records, and simply assumed that since the Defendant was not in the medical cell at the jail, there were no meaningful jail records (SR 22-23). He did not know the Defendant's history of meningitis (SR 23). Dr. Alexander admitted that a person could be able to communicate and still be incompetent (SR 24). He discussed no strategy with the Defendant and did not ask the Defendant's lawyers if the Defendant was able to give them relevant information in order to plan strategy (SR 24, 29). He did not examine any mental health history of the Defendant (SR 27).

Susan LaFehr Hession testified that she was a Licensed Mental Health Counselor (SR 49). She examined the Defendant in 1993 and again in 1997 (SR 52-53). She began her examination with a social interview and found that the Defendant was grounded in reality with a good long and short term memory (SR 54-55). It was Ms. Hession's opinion that the Defendant understood the charges and penalties he was facing (SR 56). She further stated that the Defendant could control his behavior in the courtroom, although she did not conduct any testing regarding his impulse control or his ability to manifest appropriate courtroom behavior (SR 59). Although Ms. Hession

knew that the Defendant had a history of closed head injury, and the potential of impairment from such injury, she did no further examination regarding it (SR 67).

The Defendant's expert, Dr. Antoinette Appel, was a Forensic Neuropsychologist (SR 84-85). Dr. Appel spent over ten hours testing the Defendant (SR 87) and testified that she had observed a dent in the side of Defendant's head which resulted from a blow he received when hit with a pipe in 1985 (SR 88-89). Dr. Appel reviewed the records of the Defendant's prior hospitalizations and the records of the Defendant related to a closed head injury, meningitis, and a seizure disorder (SR 89). She determined that the Defendant's IQ was 84 and that the Defendant was a slow learner (SR 93-95). She found that the Defendant's results on testing were consistent with those of a person who had suffered a closed head injury and from meningitis (SR 97). It was the testimony of Dr. Appel that the Defendant suffered brain dysfunctions which were problems caused by both his meningitis and his closed head injury (SR 103).

Based upon her testing, it was Dr. Appel's opinion that the Defendant's long term memory was impaired (SR 108). Dr. Appel found that the Defendant understood the charges against him, but lacked the capacity to assist counsel (SR 111). It was her opinion that the Defendant did not understand the burden of proof, reasonable doubt, the concepts of intent and premeditation, the difference between evidence and

argument, and the concept of picking a jury of his peers (SR 11). It was Dr. Appel's opinion that the Defendant would not be able to plan strategy with his attorney nor weigh his attorney's advice in making choices (SR 111-112). The Defendant further did not understand the concept of lesser included offenses and would not be able to testify relevantly if called as a witness (SR 112). His attentiveness and memory did not allow him to challenge prosecution witnesses (SR 112). It was Dr. Appel's testimony that based upon the totality of her testing, the Defendant was incompetent to stand trial (SR 114).

At the time of her testimony, Dr. Appel had been appointed to testify in over 300 criminal court cases (SR 115-116). In response to questions regarding Florida Rule of Criminal Procedure 3.221, Dr. Appel opined that the Defendant did not have the capacity or competency to testify relevantly as to complicated questions (SR 116). He was subject to being easily misled and easily twisted around and could testify irrelevantly because he didn't comprehend questions asked of him (SR 116). It was Dr. Appel's opinion that as a result of his incompetency, the Defendant would be unable to manifest appropriate courtroom behavior (SR 116). It was her opinion that past courtroom outbursts from the Defendant were likely not volitional because of the Defendant's history of a disordered brain with a seizure disorder (SR 116-117). She testified that where the Defendant was convicted of First Degree Murder and then

threw a chair at the very jury that had to decide to recommend life or death to the Court, his behavior manifested the very inability of judgment that she had observed (SR 117). Although Dr. Appel found that the Defendant understood that the Prosecutor was trying to convict him, she further found that he was not able to assist his attorneys in strategizing and otherwise evaluating the evidence and making decisions at trial because he didn't understand the various choices involved (R118). The defendant's memory was impaired, and his ability to abstract and be flexible to conceptualizing change concept was clearly impaired as a result of his brain injury (SR 118-119). She found that the Defendant had a brain injury, brain damage from meningitis, a seizure disorder, and a history of drug use (SR 119). He had impaired cognitive functioning (SR 119). The Defendant further had impaired memory and despite having been through a previous trial, did not understand the process of the Court (SR 119). It was Dr. Appel's testimony that her review of an MRI scan performed on the Defendant confirmed her opinions with regard to the Defendant's incompetency (SR 139).

The MRI scan showed that there was damage to the right frontal portion of the Defendant's brain (SR 139-140). The damage was in the same area in which the Defendant was hit with a pipe (SR 140). It further revealed that the Defendant had previous neurosurgery and that based on either that surgery, a hemorrhage or other factors, there was a functional injury to the brain (SR 140-141). The doctor's

testimony as to the Defendant's troubles with concept formation and flexibility characterization and judgment was supported by the MRI, in that the damage to the right frontal part of the brain was in the area that controls those functions (SR 142). It was Dr. Appel's testimony that judgment, abstraction, and reasoning are affected by the portion of the brain that the MRI indicated had been injured (SR 142-143). She further testified that people with injuries in that area tend to become paranoid and have episodic discontrol (SR 143). In response to a question from the Court, Dr. Appel indicated that the Defendant's situation fit into the diagnostic criteria of DSM 294.1, dementia due to head trauma (SR 163). The Defendant's situation met the diagnostic criteria which was the development of multiple cognitive deficits manifested by both memory impairment and cognitive disturbances (SR 163-164).

One week prior to the beginning of the trial, the lower tribunal advised that Defendant would be restrained during the trial and directed defense counsel to discuss the method of restraint with Correctional staff (SR 37). Defendant promptly and timely objected to the use of any restraint (SR 37). In response to that objection, the lower tribunal indicated:

THE COURT: All right. Well, the Correctional staff has some say-so in these matters and I have always deferred to them, it being my belief that it's their decision ultimately to

protect and secure the safety of the people in their charge as well as those who might be exposed to them (SR 38).

The lower tribunal went on to state:

THE COURT: I know you will object to it, but I don't know that the Sheriff is going to force him to wear the other equipment if he doesn't want to wear it. Then between that and the visible restraints, noting your objections and allowing you time to make them, then he will wear the restraints.

Now, on the other hand, if you can talk the Correctional staff into the view that they have sufficient people that he doesn't need the restraints and so forth and they agree that no restraints are necessary, it's their choice, that's fine with me (SR 40).

Defense counsel twice before trial reiterated his objection to Defendant being restrained, and indicated that although he objected to any restraints, being given the choice of visible restraints and an electronic device that would be placed beneath his clothing, Defendant would wear the electronic device (SR 73-74), (SR 257-258).

On the morning of trial, defense counsel advised the Court that the Defendant had directed him not to participate in the trial of this cause if the Defendant was required to wear the electronic restraint belt (T 7-9). The lower tribunal advised the Defendant that he would be required to either wear the visible chain restraints before the jury or be in the electronic restraints (T 12-13). The lower tribunal ordered that the Defendant be placed in visible restraints (T 14). Defendant pledged to the Court that he would observe proper decorum in the case and indicated that he was not trying to be an obstructionist or delay the trial in any manner (T 15-16). Defendant explained that he felt that he needed to be free of restraint in order to conduct himself during the trial in a manner most helpful to his counsel and to his defense (T 15-16). In response to Defendant's statements, the lower tribunal stated:

THE COURT: All right, Mr. Bryant, that's not unreasonable and you're certainly addressing the issue with some intelligence. However, as I have made clear, I believe, I defer to Corrections and Corrections has told me, and I will get the Sergeant to confirm that, they want either the belt or the chain restraints, and Sergeant, let's get your name. You're the supervising officer here, if you would, Sergeant.

SERGEANT O'BRIEN: O'Brien. Yes, Your Honor, we wish for him either to be in the chain restraints or in the belt.

THE COURT: All right.

That's the way it will be, then, Mr. Bryant, I am sorry. I know that disappoints you but that's my ruling and if there is an appeal, of course, and there may not be an appeal, then, the appellate court can tell Corrections and the trial courts in greater detail if that's wrong, but I think it's correct and I intend to go forward with this trial. . . (T 16-17).

Counsel crystallized Defendant's position for the Court, objecting to the use of any device to restrain Defendant in any manner (T 28-29). A request was made for an evidentiary hearing to determine the necessity of the restraints (T 29-30). The Defendant refused to proceed before the jury wearing the stun belt, which he claimed was uncomfortable and unduly restricted his ability to consult with his counsel (T 28-31). The lower tribunal denied the request for evidentiary hearing (T 31).

The following colloquy took place with regard to Defendant's request for an evidentiary hearing:

THE COURT: The court rules that laches applies. You have been on notice of this for some considerable period of time. Also the practice in this county, and I assume it's in other counties, is well known, and you're - - you were on notice to that. So that's the last note request and that's denied.

MR. DUBINER (Defense Counsel): Judge, I'm not sure what practice you're referring to.

THE COURT: The security measures requested by the directions are within the province of the Sheriff. The Sheriff chooses, not the Court.

MR. DUBINER: I, am, again, I'm not arguing with the Court, but I need to preserve the record.

THE COURT: Sure.

MR. DUBINER: I would respectfully suggest this is your courtroom and based upon an evidentiary hearing, you are the one that makes the final determination, not the Sheriff's Department.

THE COURT: Okay. The same ruling. Your motion comes too late. (T 44-45).

The trial of this cause began in Defendant's absence (T62).

During the jury selection process, the Defendant indicated through counsel that he wished to attend the trial (T113). Counsel indicated a desire to discuss the issue of the shackles versus the stun belt and asked to do so (T113). The lower tribunal refused to allow the defendant to wear the stun belt at that time, and ordered him to wear the visible shackles (T113). When the Defendant returned to the courtroom during the jury selection process, the lower tribunal ruled [H]e will be manacled, over your objection (T130). The trial then continued.

During the jury selection process, which was conducted before the entire venire, one juror, Mr. Karoly, was asked if he could be a fair and impartial juror. In response, Juror Karoly stated:

MR. KAROLY: I have a problem. We generally associate criminality with handcuffs and shackles and I know that when a defendant is brought in a courtroom he's being taken -- they have been taken off the defendant not to influence the jury and make him look bad and in this case they didn't do that and I find this very strange.

MR. DUBINER: Obviously because you brought it up it causes you some concern?

MR. KAROLY: Well, I mean, this looks like a bad case, but, this, yes, it does.

Defense counsel objected and moved for a mistrial based upon the juror's comments (T 413). The Court did not rule on the motion, but the panel was not stricken and the case moved forward.

Later, still during the jury selection process, Juror Martin was asked by the Court whether there was any reason that he felt he could not or should not serve (T 454). In response to that inquiry, Juror Martin stated:

MR. MARTIN: I don't know. I've been sitting here all day, Your Honor. I just felt, you know, like the gentlemen that was here earlier. I come into this room and I see the man sitting here in shackles, I have convicted him before I even sat here. To me, I feel he's guilty. I would not be able to give him a fair trial (T 454-455).

Defense counsel objected and moved to strike the panel based on the fact that two jurors had announced to the group that they were prejudiced by the fact that the Defendant was shackled (T 455). The lower tribunal denied the motion and advised

counsel that he believed that it was unnecessary to continue to renew the objection relating to the shackles, each time an issue concerning it came up (T 455-456).

During the trial of this case, Leonie Andre testified on behalf of the State (T 501). Ms. Leonie was the wife of the deceased in this case and with him owned and operated Andre's Market in Palm Beach County, Florida (T 502). On December 16, 1991, at approximately 8:00 p.m., her husband took the receipts of the day to the back of the store and her brother was arranging groceries in that same area (T 503). Ms. Andre claimed that two men then came into the store, one going to the back and one staying the front (T 503-504). She was asked for money and told to open the cash register, and took money from the cash register and gave it to the intruder (T 505). She then heard gunshots in the back of the store, and the men ran out of the store (T 506). She found her husband in the back of the store lying on the floor with blood all around him (T 506-507). She did not identify the Defendant.

Officer Richard Jackson testified that on December 16, 1991, he was a Delray Beach Police Officer and was the first officer to arrive on the scene (T 508-509). When Officer Jackson arrived, he saw the victim and three other people in the store (T 510). The victim was lying in front of the counter, face down when Officer Jackson arrived (T 515). Fire Rescue took the victim from the scene for treatment (T 515).

Officer Ronald Held of the Delray Beach Police Department Crime Scene Department arrived at the scene while the Fire Rescue team was still working on the victim (T 522-524). He noted a trail of blood coming out of the front entrance and disarray in the aisles of the store (T 525). He photographed and documented the scene and focused his investigation on the area where he found blood, which was near the cash register (T 534-537).

Officer Rick Wentz observed gunshot residue as well as gunshot powder and powder burns on the floor (T 542-543). He recovered a projectile inside a container on one of the shelves of the store and further found a ski mask in the alleyway by the store (T 545-546, 548). He testified that Officer Jackson found \$805.87 in the pocket of the victim (T 545). No fingerprints were taken from the body and the ski mask recovered by Officer Jackson was not processed for scientific analysis (T 557-559). The blood stains observed by Officer Jackson were not measured for spatter analysis or sampled as to type (T 559-561). Although there was a struggle at the scene (T 569), the area was not examined for any trace evidence of the Defendant. No blood mounting was done on any of the clothing that was recovered (T 568), and there was no blood gathered to match to the Defendant or examination of the powder from the powder burns (T 571-572). A set of keys found in the alleyway was never matched to the Defendant's home or the Defendant's vehicle (T 570).

John Hatton was a Crime Scene Technician with the Delray Beach Police Department in December, 1991 (T 579). He was called to the scene and collected two spent rounds of ammunition (T 580-582). He observed one spent round near a potato chip rack in the store (T 583-585). Another projectile was eventually found in a ceiling fixture (T 586). The projectiles that were located were found the day following the incident (T 588).

Dr. James Benz, the former Medical Examiner for Palm Beach County, testified that he performed an autopsy on the decedent (T 590-592). He testified that there were three gunshot wound tracks and that the shots were fired at short range (T 594, 599). He indicated that his examination of the decedent's body showed evidence of a struggle (T 600). Dr. Benz examined the shirt of the decedent and determined that at least one of the shots fired was a contact wound (T 602). He determined the cause of death to be multiple gunshot wounds occurring as a result of a homicide (T 606).

Crime Scene Technician Kenneth Herndon arrived at the scene as a Supervisor (T 619-621). Although he lifted prints that were eventually placed on 21 latent print cards, there was no identification of any of the prints (T 624-628). It was the testimony of Crime Scene Technician Herndon that the Defendant's fingerprints were not at the store where the decedent's body was found (T 635). No scientific testing was done on

the ski mask found at the scene for either hair or saliva (T 644), and no blood samples were taken (T 645).

John O'Rourke, a Deputy Sheriff employed by the Palm Beach County Sheriff's Office, testified as a Firearms Examiner (T 669). O'Rourke testified that he examined a .38 caliber revolver and compared that weapon with the projectiles found at the scene (T 683-684). None of the recovered projectiles found at the scene were fired from the revolver tested by Deputy O'Rourke. O'Rourke tested four projectiles and determined that they were likely fired from a revolver, although possibly from a semiautomatic weapon (T 695). All of the projectiles found at the scene could have been fired by a .357 magnum (T 690).

Sergeant Robert Brand testified that he knew the Defendant from playing basketball with him and had a friendly relationship with him (T 708-711). He identified the Defendant in the courtroom (T 708). Brandt was assigned as the lead detective in the shooting at Andre's Market and had canvassed the neighborhood after the incident in an attempt to find information (T 713). He had been unable to discover any information about the perpetrator of the crime (T 713). When he arrived at the scene the day after the incident, he noticed a hole in the ceiling light and reached up into that area and recovered a projectile (T 714).

Sergeant Brand testified that he came into contact with the Defendant on January 19, 1992, when the Defendant was placed under arrest (T 717). The Defendant was immediately read his rights and was handcuffed with his hands behind his back (T 718-720). The Defendant initially stated that he did not commit the crime and denied any involvement (T 723). Brand told the Defendant that there was a statement from a witness which tied him to the crime and further told the Defendant that he had been identified by a witness at the scene (T 723). It was untrue that the Defendant was identified at the scene (T 723). Brand further advised the Defendant that he had recovered the Defendant's ski mask from the scene and that it was being processed for prints which would tie it to the Defendant (T 723). The Defendant asked Sergeant Brandt and his partner, Lieutenant Hartmann, whether they believed that he was guilty, and both replied that they did (T 724). He indicated that he would give a statement to the police after he had an opportunity to talk to his mother (T 724).

The Defendant's family was brought to the police department and met with the Defendant for a period of time (T 729). Brand spent approximately one-half hour alone with the Defendant while Hartmann was gathering the family (T 726). After the Defendant's family left, Sergeant Brand took a taped statement from the Defendant (T 730). He was armed at all times (T 730), but claimed that he never removed his gun from his holster while in the Defendant's presence (T 731).

During the midst of the testimony of Sergeant Brand, discussions were had between counsel and the Court regarding the Defendant's continuation in restraints (T 743). Defense counsel indicated that the Defendant was going to testify in the case and that he objected to the Defendant testifying in restraints and moved for a mistrial (T 743). In response, the lower tribunal had the following colloquy:

~~THE COURT: It is up to Corrections~~
still is THE COURT: It is up to Corrections prior to keep him in restraints even though he testifies, is that correct?

THE JAILER: That's correct.

THE COURT: That's Correctional Officer?

DEPUTY ROBBINS: R-O-B-B-I-N-S.

THE COURT: All right, Mr. Robbins.

MR. DUBINER: Judge, just to make it clear, I'm not quarreling with Court, but that is a determination that the Court needs to make. I'm suggesting to the Court that you need to make that determination by means of an evidentiary hearing as opposed to deferring to Corrections.

THE COURT: All right, I don't need an evidentiary hearing. I was present and saw the throwing of a huge heavy chair and witnessed it along with everybody else that's in the

courtroom. I have never seen a more violent act in a Court of law in all of my years, which is, I guess, 38, 39, somewhere in there, and also it's not part of this record yet, but this, the Appellate Court, your client is charged, not convicted, but charged, I believe, with an aggravated battery that occurred when he was confined and it is my understanding that that charge is going to go forward to trial, is that correct?

MR. GALO: State's intentions, yes, sir, Your Honor.

THE COURT: It's not one of those where the victim or -- has indicated that he or she wishes to withdraw, so I mean that's all the evidentiary hearing I need.

MR. DUBINER: Judge, I would point out, again, I don't mean to quarrel but you're making a record and I need to as well, but the throwing of the chair was approximately five or six years ago, as we stated before, and the Court would need to determine whether or not that is something that is a present risk as opposed to past conduct.

THE COURT: Well, I don't know what the date of the alleged aggravated battery while confined was but that occurred after the throwing of the chair and the throwing of the chair, of course, occurred after the book was thrown at Judge Colbath, not in the direction of Judge Colbath, but at Judge Colbath, according to the accounts I have heard.

THE COURT: All right, he will testify in restraints.

MR. DUBINER: Yes, sir, and I was not present. I assume the Court was not present during the Judge Colbath incident.

THE COURT: No, I wasn't.

MR. DUBINER: Obviously, we would suggest that the Court needs to have any evidentiary hearing to determine the facts of that in order to determine the restraints appropriately but I will stop here.

MR. GALO: Could I briefly put on the record in the Court file the Defendant was convicted of three counts of contempt in the same case numbers? One of the cases already's in Evidence in a previous matter regarding that chair throwing, Judge Colbath's record should reflect.

THE COURT: Not the chair throwing.

MR. GALO: Excuse me, the book throwing.

THE COURT: The chair throwing, I didn't cite him for contempt. It seems to me that the conviction was -- that was enough.

MR. GALO: I misstated. I apologize. But it was the book throwing that the Defendant was convicted of three counts of contempt and the State has certified copies of the convictions. I believe they're already in, in the previous sentencing hearing, the same case number as the sexual battery and the grand theft charge that was imposed on the Defendant, so the record should reflect at least there was a finding by the Court of such contempt.

MR. DUBINER: Judge, I'm not certain of this but I believe that the contempt citations were withdrawn but I'm not certain. I have not researched the contempt.

THE COURT: They were either withdrawn or he gave him time served or no -- there was no punishment exacted is my

recollection. But I don't remember. Whatever the record shows it shows, okay? (P 743-747).

Before the testimony of Sergeant Brandt could be concluded, a juror advised the Court, in open court, that her husband had seen the trial on television the prior night and asked if "the gentlemen in handcuffs was guilty." (T 748)

On cross examination, Sergeant Brand testified that he had lied to the Defendant regarding the evidence supposedly existing against him (T 752). He testified that although he normally interviewed a defendant prior to conducting a taped interview, he did not do so in this case (T 753-754). He testified that he didn't have the Defendant sign the Miranda warning sheet (T755). Detective Brand further testified in cross examination that prior to giving his statement, the Defendant denied his involvement in the incident on numerous occasions. He denied that he had held a gun to the Defendant's head to coerce the Defendant's statement (T 774).

Lieutenant Craig Hartmann testified that he was involved in the arrest of the Defendant (T 684-791). At the time the Defendant was arrested, he had a gun in his possession (T 793). Lieutenant Hartmann took the Defendant to an interview room in handcuffs where he advised him of his Miranda rights (T 792, 794). The gun that the Defendant had with him at the time of the arrest was loaded (T 798). In the process of questioning the Defendant, Lieutenant Hartmann advised the Defendant that he had

been identified by the victim's wife and that there was physical evidence tying him to the scene (T 799-800). Those statements were not true (T 799-800). The Defendant asked to see his mother and indicated that if he were allowed to see his mother, he would make a statement to the police (T 801). The Defendant's family was brought to visit with him (T 882). Thereafter, the Defendant agreed to provide Lieutenant Hartmann with a taped statement (T 811-838).

In that statement, the Defendant indicated that he had been advised of his constitutional rights (T 811). He was aware that he was under arrest for homicide and armed robbery relating to an incident at Andre's Market on December 16, 1991 (T 811-812). He explained that he was with three other men on the night of the incident and identified the picture of one of them (T 812-814). He was advised by one of the men he was with about the location of Andre's Market and that there was money in the store (T 815-816). He went into the store and walked towards the back as though he were looking for the backroom (T 818). He asked for the bathroom and when the victim turned his back, he pulled out his gun (T 818). The victim began to struggle with him over the gun and the two of them began to wrestle through the store (T 818-819).

Both the Defendant and the victim were fighting over the gun and the Defendant managed to get his hands on the trigger and shoot (T 819-820). The fight over the gun continued toward the front of the store until the Defendant got control of the gun, and

shot the victim (T 821). The victim continued to fight and the Defendant shot him again (T 821-822). After shooting the victim the third time, the Defendant and those that were with him ran out of the store and left the scene (T 822-823). The Defendant admitted in his statement that he shot the victim three times with a .357 magnum (T 823). The Defendant admitted that he had a ski mask in his possession although he did not wear it (T 826). He told Detective Hartmann that he dropped the ski mask when he ran from the store (T 826).

After returning home from the scene at Andre's Market, the Defendant asked his girlfriend to dispose of the gun he had used in the incident (T 827-828). The Defendant testified that he believed he fired three shots during the incident (T 828), and was certain that he hit the Defendant two times (T 829). The Defendant testified that he felt bad that the incident happened, recognized that it was wrong to go to the store to commit a robbery, but indicated that he never imagined that an incident would take place where someone would get shot (T 835). He claimed that the only reason he shot the victim was because he had no choice, in that the victim was struggling and attempting to get the gun from him (T 835). He further testified that the gun that was recovered from him at the time of his arrest was the same gun that one of his accomplices used at the incident at Andre's Market (T 836). According to Hartmann,

during the time that the Defendant was with him, he never indicated that Sergeant Brand pointed a gun at him.

On cross examination, Lieutenant Hartmann indicated that prior to taking the statement on tape, the Defendant told him that he had no involvement in the incident (T 845). When he was first confronted with the lie from Sergeant Brand and Lieutenant Hartmann that he had been identified at the scene, the Defendant continued to indicate that any identification at the scene had to be mistaken, because he was not involved (T 845). Although the Defendant was not handcuffed at one point when his family was present, so that he could take off his jewelry and hug his girlfriend, he did not sign the rights card (T 849-851). Although the room in which the Defendant was interrogated had capacity for video tape, the statement was not video taped (T 866-867).

The Defendant testified on his own behalf. He testified that he knew the police officers involved in this case because they patrolled his neighborhood (T 882). He was at the police department on the night of his arrest voluntarily, and had the gun with him because of the location in which he lived in Delray Beach and a feeling that he needed it for protection (T 883). The Defendant was taken from his truck with guns pointed to his head and brought into the police department, where he was placed in small room (T 883-884). He was handcuffed behind his back and remained that way for hours (T 885). The Defendant was being asked questions about the homicide that occurred at

a grocery store, which he had not heard of until that time (T 885). He didn't participate in the homicide and was not involved in any way (T 886). The police asked him numerous questions about the details of the incident, providing him with information concerning it (T 886). The Defendant asked for a lawyer and gave the police his wallet which contained his lawyer's card (T 886-887). He was never contacted by his lawyer, or given back his wallet and/or the lawyer's card (T 886-887).

During the three hours between the time he was placed under arrest and gave his statement, he was being questioned on a continual basis and was grabbed by Sergeant Brand, thrown across the desk, and threatened if he did not cooperate (T 888). The Defendant was afraid and Sergeant Brand pulled a gun from his leg and pointed it at the Defendant when they were alone in the room (T 888). After the gun was placed to his head and after realizing his attorney was not coming to see him, the Defendant asked if he could contact his family (T 889). When his family came, the Defendant asked his mother to contact his lawyer, but Sergeant Brand indicated that he would handle the contacting of the lawyer and took the Defendant's wallet from his mother (T 890). Prior to the taped statement, the Defendant continually denied his involvement in the case (T 892).

The Defendant testified that he gave the statement to the police because he was afraid that if he did not, Sergeant Brand was going to shoot him (T 893). The

Defendant denied that he was ever read his Miranda rights and claimed that he only said that he had because he was afraid that he would be accused of not cooperating (T 895). He gave the statement that he gave because he was under pressure and was trying to please the officers at that time (T 896). He did not explain about the pressure he was under while on tape because he had been warned by Sergeant Brand not to do so and felt that his life was in danger (T 897). The Defendant explained that he was not involved in the murder or robbery in any way and told the story that he told solely because he was threatened by a police officer with being shot (T 898-899).

On cross examination, the Defendant explained that he thought that if he cooperated with the first officers by giving them the information that they sought, he would be released and be able to go home (T 905). The Defendant clarified that it was only Sergeant Brand who threatened him (T 910-911). He explained that the police told him that they didn't believe he intended to kill the victim and that is why he made the statement that he did with regard to his intent (T 917).

In the Penalty Phase proceedings, the prosecution presented certified copies of the Defendant's conviction for Sexual Battery and Grand Theft and for Robbery with a Weapon and Aggravated Assault While Wearing a Mask (T 1056). Further, the Court took judicial notice of the Defendant's conviction in Count Two of the case before the Court, which was Robbery with a Firearm involving a separate and distinct

victim from the deceased (T 1057). The State further incorporated the testimony from the Guilt Phase for the purpose of the Penalty Phase (T 1057).

David J. Fleszar, a Diagnostic Radiologist, testified for the defense. He reviewed an MRI image of the Defendant's brain (T 1067). Dr. Fleszar explained that the Defendant's brain reflected encephalomalacia (T 1070). It was explained that the frontal lobe on the right had atrophied or had some disturbance to the blood supply so that that portion of the brain had softened, atrophied or died (T 1070). Dr. Fleszar testified that he was uncertain as to how the problem in the right frontal lobe occurred, whether it was post traumatic or as a result of prior surgery (T 1072). He demonstrated on the Defendant that there was a deformity visible to the naked eye in looking at Defendant's head (T 1072). The MRI further revealed that the injured area of the brain had filled with cerebral spinal fluid (T 1074-1075), and that there was possible scar tissue on the brain itself (T 1075). It was Dr. Fleszar's opinion within a reasonable degree of medical certainty that the Defendant suffered from atrophy to the brain in the right frontal lobe (T 1078).

Dr. Antoinette Appel testified for the Defendant at the Penalty Phase (T 1094). She explained that her expertise was to describe the functional relationships within the brain (T 1094). She testified that in analyzing the area of damage to the brain, it was one which if affected by a tumor, would be called immense (T 1098). The inferior

frontal lobe, which was damaged, had the function of impulse control, obstruction, and judgment (T 1099). Dr. Appel demonstrated that there is a connection that runs from the inferior frontal lobe into the temporal lobe that causes impulsive behavior when they are damaged (T 1104-105). By virtue of the size of the damage shown on the MRI, Dr. Appel pointed out that all of connections between the inferior frontal lobe and the temporal lobe, which is where the emotional control substructure for the brain exits, were virtually obliterated (T 1105). It was Dr. Appel's opinion that the Defendant's personality had changed for two reasons, first directly because of the frontal lobe injury and second because of the relationship with the frontal lobe injury to the emotional control structures in the temporal lobe (T 1105). She demonstrated on the MRI where the interruption connection was located and seen (T 1105). She explained that absent the frontal lobe or even a small portion of the frontal lobe, the ability to process information was widely impaired (T 1106).

It was Dr. Appel's testimony that the injury to the brain and the portion that is atrophied had effects beyond simply that portion which had suffered the atrophy (T 1108). She described the ripple effect that flowed from the atrophied area because of the loss of the fibers in the brain and the loss of the connections which those fibers present to the other parts of the brain (T 1108-1109). Dr. Appel pointed out that when she testified as to competency, she had done so without having seen the MRI, and had

presented her conclusions long before the MRI was done (T 1109). Even without the MRI, the tests she had performed on the Defendant indicated that there had been a brain injury to the right frontal lobe (T 1110). Dr. Appel reviewed the Defendant's medical records and determined that he also suffered from sickle cell anemia (T 1111). Records from Bridgeport Connecticut Park Hospital concerning an admission on April 28, 1985, demonstrated that as a result of trauma, there was deformity in the right frontal area of the brain, and that the Defendant had suffered from concussion, post traumatic seizures, and a lacerated dura (T 1111-1112). Dr. Appel testified that it was those injuries that caused the atrophy in the brain (T 1112). She further examined records from Bethesda Memorial Hospital relating to Defendant's meningitis history (T 1112).

Dr. Appel testified that the specific brain injury that she noted in the Defendant changed the way in which his impulse controls existed (T 1113). She found that the connection between the frontal lobe and temporal lobe which allow for impulse control were no longer existent in the Defendant (T 1113). The Defendant had impaired judgment and a condition in which he fails to benefit from either social or any other kind of feedback (T 1113-1114). The failure to benefit from feedback was a result of the loss of the structures of the brain which allow for judgment and benefit from feedback (T 1114). As a result of his injuries, the Defendant had difficulty abstracting

and sequencing and suffered from emotional dyscontrol (T 1114). It was Dr. Appel's opinion that that lack of impulse control related to an incident like the one with which the Defendant had been convicted because the Defendant was unable to conform his behavior to society's expectations and to conform his actions to a socially acceptable way (T 1115). All of Dr. Appel's prior testimony was incorporated without objection from the State (T 1093).

On cross examination, Dr. Appel testified that the Defendant was in the 17th or 18th percentile in terms of IQ and that his cognitive skills were affected as a result of his injury (T 1116).

Mark Gaines testified as a witness for the Defendant and explained that he had known the Defendant all of his life (T 1123-1124). He went to school with the Defendant from preschool until the Defendant was 13 years old, when he left Bridgeport (T 1124). He and the Defendant were very close, seeing each other on a daily basis, going to school together, attending church together, and spending time together after school (T 1124-1125). He testified that the Defendant's father had an ongoing affair which was well-known to the people in the neighborhood when the Defendant was approximately nine years old (T 1126-1127). He described the young Byron as fun loving, jovial, warm, protective, and loyal to his friends (T 1132). He testified that he had studied scriptures with the Defendant who understood them and

made the effort to understand them (T 1136). He described no significant changes in his dealings with the Defendant subsequent to the 1985 injury (T 1137).

The Court questioned Mr. Gaines in order to determine whether his intelligence, competency, and ability to communicate was the same before 1985 as it was after the injury (T 1139). It was Mr. Gaines' opinion that there had been no change (T 1140). In response to the Court's questions, the witness indicated that he continued to regard the Defendant as a person of above average intelligence and skill and that his observations were that there was a happy and normal childhood with a supportive father (T 1140). The witness had heard rumors that the Defendant had been abused during his childhood but there had never been a disclosure from the Defendant to the witness about that (T 1141).

Greg Otto, a Licensed Clinical Social Worker testified on behalf of the Defendant (T 1144). He performed a social background investigation with regard to the Defendant and interviewed him on a number of occasions (T 1146). He met with the Defendant's younger sister and did a telephone interview with the Defendant's older sister. He also met with the Defendant's father in preparing his opinions (T 1146-1147). The Defendant's father denied any physical violence or fighting between him and his wife and portrayed himself as a good father to the Defendant. He blamed the mother and her lifestyle for any problems within the family (T 1149). In his one brief

informal meeting with the Defendant's mother, it was Mr. Otto's opinion that she was quite afraid of her husband (T 1149-1150). She stated that she was afraid that her house would be burned down and that she was afraid to see him (T 1150). She further indicated that she had been separated from the Defendant's father since he was nine years old (T 1150). Based upon his interviews with family members, Otto determined that there was a period of great dysfunction in the family beginning when the Defendant was in elementary school, and the father had demonstrated a number of different inappropriate behaviors (T 1152). When the Defendant was 13, the Defendant's mother and siblings left Bridgeport, Connecticut in great haste and secrecy (T 1153).

Prior to the Defendant's elementary school years, the family was intact and enjoyed a relatively good family life (T 1154). During the elementary school years, the father's personality seemed to dramatically change, and there were inappropriate behaviors including a life of infidelity, his leaving and coming back into the family, and his physical violence toward the children and the mother (T 1155). The third phase was when the family moved to Florida and the Defendant entered his middle and high school years (T 1156). Otto explained that after the first phase of Byron's life, the father began having affairs that were well documented within the neighborhood and the children were embarrassed about being confronted with them and being told by the

father to keep those affairs from the mother (T 1157-1158). The father additionally would leave the family for months at a time, without explanation, only to return in the same manner (T 1158-1159). The Defendant's sister indicated that she was physically abused by her father in the presence of the Defendant (T 1160-1161). Byron's other sister reported that there was always violence in the family and that she was hit by her father (T 1161).

The Defendant was aware of abuse by his father against his mother when she showed him bruises on her thighs, arms, and back (T 1162). The Defendant reported an incident where his father had cut his sister's jump rope into pieces and then taken it into the bedroom where his mother told him that his father had tied her to the bed and whipped her with clothes hangers. The sisters reported incidents of hearing their mother screaming (T 1163). There were also reports of sexual abuse to the mother (T 1164-1165).

Mr. Otto testified that the Defendant reported an incident where his father had stuffed a gasoline soaked rag into his mother's anus, threatening to ignite it if she either left him or attempted to talk to people about the behavior in the relationship (T 1165). Otto found that the Defendant did not have a positive role model in his father as he grew up, as a result of emotional conflict, neglect, and an active intent to train the Defendant to withhold information and deceive his mother (T 1168). The Defendant

saw his father use violence at a young age which laid the groundwork for the child to use violence as well (T 1169). He further testified that the Defendant was crushed when he left Bridgeport and was torn away from the home that he knew (T 1169). The Defendant's school work significantly declined after he moved to Florida (T 1170-1171). When he was in tenth grade, his class rank was 406 of 418 (T 1172). His sister described his having changed 180 degrees after the Defendant's head injury (T 1173). He seemed to lose the good qualities that he had prior to the injury (T 1173-1174). When talking to the social worker, the Defendant refused to talk about the latter years of his life (T 1176).

On cross examination, Mr. Otto clarified that he felt that the Defendant lived through a very dysfunctional family (T 1182). His opinion was rendered exclusively on his conversations with family members (T 1185). Mr. Otto testified that the Defendant's father forced the fabric of the family apart and wedged the children between the mother and him (T 1201). He left the family without explanation and then returned, and physically abused the mother (T 1201). All of the children were negatively affected by the father's actions and the mother was frightened of being with the Defendant's father (T 1202). Otto did not review the case file concerning the crime before the Court or any other crimes (T 1209-1210). He also did not review any presentence reports (T 1210). In his conversations with the Defendant, Otto found the

Defendant able to answer his questions and to appropriately follow the conversation (T 1216).

Byron Bryant testified on his own behalf and explained that in the first trial that was had on this case, he had declined to participate in Phase Two of the proceedings because he didn't want an airing of the private affairs of his family (T 1219). He had instructed counsel not to produce any family member to testify in Phase Two in the proceedings before the lower tribunal, as well (T 1219).

The lower tribunal allowed additional testimony for purposes of the Phase Two proceedings on September 10, 1998. At that hearing, the Defendant's mother, Veonice Bryant, testified (T 1247). She testified that prior to his head injury, the Defendant was very soft spoken, and a very timid young man (T 1249). Subsequent to the head injury he became moody and was no longer the same child (T 1249-1250). Prior to his head injury, the Defendant was non-violent, and other family members would fight his battles for him (T 1250). Subsequent to the head injury, the Defendant became more aggressive and would retaliate (T 1250). She testified that when the family lived together in Bridgeport, the atmosphere in the home was very abusive (T 1253). She related an incident which took place at the time the Defendant was eight years old, where she had been tied to the bed nude and beaten by her husband, at a time when the children could hear her screams (T 1253-1254). She also related being beaten and

threatened with a knife as well as testifying to the incident regarding having tissue paper in her vagina and told if she screamed that her husband would pour alcohol on it and set it afire (T 1254-1255). It was the Defendant's mother's testimony that the Defendant heard all of these incidents (T 1255). The Defendant's father had threatened to kill the mother and commit suicide himself, in front of the Defendant (T 1257-1258).

The Defendant's mother testified that the Defendant was a good student while in Connecticut and after he came to Florida continued as a good student until his father moved to Florida (T 1260). When the Defendant was 11 years old, the Defendant's father schooled him in the sale and use of drugs (T 1260). After moving to Florida, and through the time the Defendant was 19, his father would take him along when he went to visit other women (T 1261).

Terran Jackson, the older sister of the Defendant, testified on behalf of the Defendant (T 1272-1274). She described the home life in Bridgeport as being one of chaos and abuse (T 1274). She noted that the family was dysfunctional as a result of the abuse and the absence of her father over a period of years from time to time (T 1276-1277). She recalled the atmosphere of the home being one of chaos with violence going on all around the children and specifically recalled at least two incidents where the Defendant's father threatened the Defendant's mother with a gun and that the Defendant was aware of those incidents (T 1278-1279). She described beatings with

belts, switches, extension cords, and a fishing rod that the Defendant (as well as the other children) was subjected to (T 1279). The Defendant's father was open about his extramarital affairs in front of his children and used to smoke marijuana and separate the seeds from the marijuana in the home, in front of the children (T 1280).

Willie Bee Bryant, the father of the Defendant, was called as a Penalty Phase witness by the State (T 1285-1286). He denied abusing his wife while living in Bridgeport, and denied the specific incidents of violence testified to by the other members of his family (T 1286-1287). He denied using drugs in front of his son and openly selling drugs in front of him (T 1289-1291). In response to the Court's questioning he accused the other family members of fabricating lies against him and claimed that he was a supportive and attentive father (T 1292).

Edward Smith testified in rebuttal (T 1297). He testified that he had interviewed Willie Bryant at his home and was advised by Mr. Bryant of an incident where Mr. Bryant was rolling marijuana cigarettes in front of the Defendant, as a child, and advising him that he was making money by rolling the marijuana cigarettes and then selling them on the street (T 1299).

Byron Bryant also testified in rebuttal (T 1301). He testified that the testimony previously given by his father was a fabrication (T 1302). He felt that Willie Bryant had never been a father to him, and that he corrupted him to the core from the very

beginning, by exposing him to his affairs, the drug trade, cocaine use, marijuana use, and by sharing sexual partners with him (T 1302).

SUMMARY OF ARGUMENT

I.

The lower tribunal required the Defendant to appear before the jury in visible shackles and refused to conduct an evidentiary hearing to determine whether restraints were necessary and the least obtrusive method of restraining Defendant.

II.

Death by electrocution constitutes cruel and unusual punishment, especially in light of the recent malfunction of the electric chair. Although the Supreme Court of the United States has declared the Provenzano case and the issue raised therein to be moot, the issue of the electric chair as violative of the Eighth Amendment remains pending before that court.

III.

The lower tribunal misapprehended and misunderstood the clear testimony presented in support of the non-statutory mitigator that Defendant did not have an adequate education. The lower tribunal therefore failed to adequately evaluate and consider this non-statutory mitigating factor.

IV.

The lower tribunal improperly summarily dismissed Defendant's evidence of lack of male role model as a non-statutory mitigating factor. Although numerous

witnesses were presented with regard to this issue, the lower tribunal simply stated in its sentencing order that the mitigator was not established because the evidence presented conflicted, and did not evaluate and weigh that evidence.

V.

The lower tribunal erred in allowing the Defendant to proceed to trial where he was not competent. The undisputed evidence was that the Defendant had brain damage and neurological deficits caused by a combination of closed head injury and illness. All testing done by the testifying experts indicated that Defendant was incompetent to stand trial.

VI.

The lower tribunal abused its discretion in failing to acknowledge and consider the Defendant's neurological deficits as a non-statutory mitigating factor. The evidence was undisputed that the Defendant suffered neurological deficits as a result of a combination of closed head injury and illness. The testimony was undisputed that the effect of that neurological deficit was the impairment of Defendant's ability to control his impulses in a manner such as this, where the actual killing was not planned but rather was an impulsive act.

VII.

The death penalty is not proportionally warranted in light of the nature of the crime, the Defendant's neurological impairment, and a proper weighing of the non-statutory mitigators established at the sentencing.

ARGUMENT

POINT I

THE LOWER TRIBUNAL ERRED IN REQUIRING THE DEFENDANT TO BE SHACKLED BEFORE THE JURY.

As a general rule, a defendant in a criminal trial has the right to appear before the jury free from physical restraints, such as shackles or handcuffs. See, Illinois v. Alan, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061 (1970). The Sixth Amendment to the Constitution of the United States guarantees that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, continued custody, or other circumstances not adduced as proof at trial. Taylor v. Kentucky, 436 U.S. 478, 485 98 S.Ct. 1930, 1934 (1978). It is well established that certain practices pose a threat to the fairness of the fact finding process such that they must be subjected to close judicial scrutiny. Estelle v. Williams, 425 U.S. 501, 503-504 96 S.Ct. 1691, 1692-1693 (1976). For example, the law proscribes forcing a defendant to wear prison clothing when appearing before the jury, since “the constant reminder of the accused condition implicit in such distinctive, identifiable attire may affect a juror’s judgment.” Id. at 504, 505.

This Court has recognized that restraining a defendant with shackles in view of the jury adversely impacts an accused's presumption of innocence. See, Diaz v. State, 513 So.2d 1045, 1047 (Fla. 1987). Elledge v. State, 408 So.2d 1021, 1022 (Fla. 1981). It is conceded that a criminal defendant's right to be free of physical restraints at trial is not absolute. For that reason, this Court has held that the court's obligation to maintain safety and security in the courtroom outweighs, under proper circumstances, the risk that the security measures may impair the defendant's presumption of innocence. Diaz v. State, supra, at 1046. It is upon the determination of that necessity that this issue turns.

In Bello v. State, 547 So.2d 914 (Fla. 1999), this Court established the requirement that a hearing on necessity must precede the decision to shackle if a defendant timely objects and requests an inquiry into the necessity for the restraints.

In an analysis that applies strikingly to the case at bar, this Court held:

[A]lthough defense counsel objected to the shackling and requested that an inquiry be made, the trial judge refused to do so, deferring to the sheriff's apparent judgment that such restraint was necessary without inquiring into the reasons behind that decision. Bello v. State, supra, at 918.

Here, defense counsel constantly objected and requested that the lower tribunal make inquiry into the necessity for the shackles. In this case, the Court made known its decision to restrain the Defendant the week prior to trial (T 37). The Court made clear that the decision regarding whether to wear restraints and the type of restraints to be worn would be made by the Sheriff and the Correctional staff (T 39-40). As trial began, defense counsel and the Defendant himself indicated his objection to being required to be restrained (T 15-16). Again, the Court made clear that its decision that the Defendant would be restrained was made because

THE COURT: . . . I defer to Corrections and Corrections had told me, and I will get the Sergeant to confirm that, they want either the belt or the chain restraints, and Sergeant, let's get your name. You're the supervising officer here, if you would, Sergeant?

SERGEANT O'BRIEN: O'Brien. Yes, Your Honor, we wish for him either to be in the chain restraints or in the belt.

THE COURT: All right.

That's the way it will be then, Mr. Bryant, I'm sorry.

Counsel again requested, before the trial began, that the Court unrestrain the Defendant and have him neither shackled nor relegated to the electronic stun belt (T

28). At that most early time, counsel asked the Court to hold an evidentiary hearing to determine the necessity of restraints (T 29-30). He further went on to explain why the shock belt was no less acceptable than the visible restraints for this Defendant (T 29-30). The Court determined that the Defendant had waived his right to an evidentiary hearing, since he had been alerted to the Court's intent "some time ago." (T 31). Presumably, the Court was referring to its announcement one week prior to the trial that the Defendant would wear restraints. The Court denied the Defendant's request for a brief stay in order to file appropriate motions before an appellate court on the issue of shackling (T 44) and again ruled that the Defendant had been placed on previous notice of the Court's intent and that the Defendant was responsible for knowledge of "the practice in this county," that the security measures requested by the directions are within the province of the Sheriff, and not the Court. The Court specifically stated, "[T]he Sheriff chooses, not the Court." (T 44-45). An evidentiary hearing was again requested and denied (T 44-45).

The prejudice to the Defendant is apparent. The nature of the prejudice in this case was underscored by the fact that two jurors, in the presence of the rest of the jury panel, expressed an opinion that seeing the Defendant shackled before them made them feel that the Defendant was guilty (T 411-412,454-455). As this Court stated in Bello, shackling is an "inherently prejudicial practice."

The law is clear that the Court may not blindly defer to security measures established by the Sheriff or other official performing security functions. See, Jackson v. State, 698 So.2d 1299 (Fla. 4th DCA 1997); McCoy v. State, 503 So.2d 371 (Fla. 5th DCA 1987). Had the Court held a hearing in this matter, it may have considered a variety of sources, including prisoner records, criminal records, witnesses, and correctional and law enforcement officials as to their opinion with regard to the necessity for restraining the Defendant. However, at such a hearing, the Defendant would have had the ability to challenge the validity and import of the information provided. See, Elledge v. Dugger, 823 F.2d 1439, 1451-52 (11th Cir., opinion withdrawn in part, 833 F.2d 250 [1987]). Absent such a hearing, the Court's attempt to "supplement the record" with information it believed would support its position that the Defendant must be shackled must be deemed ineffective, as the Defendant did not have the ability to challenge that information.

In addition to the reasons set forth above, "[H]olding a hearing prior to permitting physical restraints allows the trial court to fashion procedures that minimize the risk of exposure of the restraints to the jury." Jackson v. State, supra, at 1303. This Court has made clear, in Diaz as well as in Dufour v. State, 495 So.2d 154, 162 (Fla. 1986) that a court should consider the least restrictive alternatives in restraining a defendant. No such consideration was given in this cause, with the exception of the

initial suggestion that the Defendant use the electrical shock device, which the Defendant found impaired his ability to interact with his counsel. When the Defendant indicated his desire to appear before the venire, his counsel specifically requested that he be allowed to consider the issue of the uncomfortable shock belt versus the visible shackles (T113). Not only did the court decline a hearing, it ordered that the defendant would be required to be manacled (T113).

The failure of the Court to hold a hearing and to allow the Defendant to rebut the need for such restraints, where the stated reason for such restraints were actions which took place more than six years prior to the instant cause and where the Court indicated that its determination that restraints be used was solely in deference to the Sheriff's office correctional staff, constituted reversible error. Reversible error was further committed when the Court refused to allow the Defendant to proceed with the less visible albeit uncomfortable stun belt, rather than the shackles. The lower tribunal's actions denied Defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States.

ARGUMENT

POINT II

ELECTROCUTION IS CRUEL AND UNUSUAL PUNISHMENT.

Electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel, but equally effective methods of execution. Electrocution violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. Many experts argue that electrocution amounts to excruciating torture. See, Gardner Executions and Indignities - - An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment. 39 Ohio State L. J. 96, 125 N. 217 (1978). Malfunctions in the electric chair cause unspeakable torture. See, Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 N. 2 (1947); Buenoano v. State, 565 So.2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning electric chair could cause the inmate enormous pain, increases the mental anguish.

This unnecessary pain and anguish shows that electrocution violates the Eighth Amendment. See, Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In Re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1997). A punishment which was constitutionally permissible becomes unconstitutionally cruel when less

painful methods of execution are developed. Furman v. Georgia, 408 U.S. 238, 279 (Brennan, J., concurring), 342 (Marshall, J., concurring), 430 (Powell, J. dissenting). Electrocutation violates the Eighth Amendment and the Florida Constitution for it has become nothing more than the purposeless and needless imposition of pain and suffering. Coker, 443 U.S. at 592.

This Court has recently decided this issue contrary to defendant's position, in the case of Provenzano v. Moore, 744 So.2d 413 (Fla. 1999). Although review of that case was deemed moot by the Supreme Court of the United States, the issue remains before that Court in a case from another jurisdiction.

ARGUMENT

POINT III

THE TRIAL COURT ERRED IN FAILING TO PROPERLY EVALUATE THE NON-STATUTORY MITIGATING CIRCUMSTANCES OF THE DEFENDANT'S LACK OF EDUCATION.

In its sentencing order, the lower tribunal discussed the proposed mitigator of lack of education. However, the lower tribunal completely misconstrued and misunderstood the evidence presented in that regard.

The order of the lower tribunal recites that the evidence adduced established that the Defendant had dropped out of school in the tenth grade and received “D’s” and “F’s” while he was enrolled in high school (R 3864). The order goes on to state:

[H]owever, defense witness Mark Gaines testified that the Defendant was a good student through the 12 years they attended school together. (R 3864)

The testimony before the Court during the sentencing proceeding was different than that enunciated by the Court. Mark Gaines, a friend of the Defendant who had grown up with him in Bridgeport, Connecticut, testified that while the Defendant lived in Bridgeport, he and the Defendant were best friends (T 1124). However, he made clear

that his knowledge of Byron Bryant and his schooling was limited. Indeed, it was the testimony of Mr. Gaines that:

From, I would say we went together from preschool, again from birth up until Byron moved away. I believe Byron was 13, actually, when he moved away. (T 1124)

Clearly, the trial court was in error when it predicated part of its rejection of the lack of education mitigator upon Mr. Gaines' alleged testimony that the Defendant was a good student through the 12 years they attended school together. Indeed, Mr. Gaines' testimony was that:

Between 13 and 18, I believe our contact became, basically, towards the latter of those years, first two, three years to be honest, not much contact other than a letter or two. As we got up to about 16 years old, we started to have contact with each other by phone, okay. Then I believe a few years later, he came and visited and we stayed in contact from that time. (T 1127-1128).

Moreover, the Court further buttressed its decision to reject the non-statutory mitigator with its reference to "psychological evaluations of the Defendant [were] performed by Dr. Susan LaFehr Hession and Dr. Stephen Alexander, forensic

professionals with many years of experience.” (R 3865). The testimony of Dr. Susan LaFehr Hession was that she performed no testing on the Defendant (SR 55). In fact, it was her testimony that her analysis of the Defendant was done based on a clinical interview mental status examination (SR 53). She did testify that she thought the Defendant was of average or better intelligence (SR 72), and further went on to say that she was pretty good at estimating IQ and estimated the Defendant’s IQ to be somewhere between 100 and 110 (SR 72).

Dr. Stephen Alexander testified that “Mr. Bryant appears to be average to above average intelligence.” (SR 12) However, he also testified that he did no testing (SR 20-21).

The Court suggests in its sentencing order that after finding the Defendant was of average to above average intelligence was supported by the record. However, the lower tribunal failed to analyze the testimony of Dr. Antoinette Appel. Dr. Appel, a Forensic Neuropsychologist, testified that she performed ten hours of testing on the Defendant (SR 84-87). Her IQ test indicated that the Defendant’s IQ was 84, and that his ability to learn was low, and less than the first percentile of the general population (SR 93-94). She testified that he had damage to his brain, impaired judgment, and a condition in which he fails to benefit from social feedback (SR 1113-114). It was her testimony that because of the obliteration of certain areas of the brain which were

demonstrated in open court, the Defendant was unable to conform his behavior to society's expectations, had an inability to benefit from social feedback and an inability to learn and develop judgment (SR 1115). The lower tribunal did not discuss the testimony of Dr. Appel in its analysis that the Defendant was found to be of average to above average intelligence.

This Court has established the sentencing requirements for a capital case and reiterated them in Walker v. State, 707 So.2d 300 (Fla. 1997):

Since the ultimate penalty of death cannot be remedied if erroneously imposed, trial courts have the undelegable duty and solemn obligation to not only consider any and all mitigating evidence, but also to “expressly evaluate in [their] written order[s] each mitigating circumstances proposed by the defendant to determine whether it is supported by the evidence.” (Citations omitted).

This bedrock requirement cannot be met by treating mitigating evidence as an academic exercise which may be summarily addressed and disposed of. To satisfy Campbell:

This evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the non-statutory mitigating circumstance is truly of a mitigating nature. A mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence. Once established, the mitigator is weighed against any aggravating circumstances. It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. *The result of this weighing process must be detailed in the written sentencing order and supported by sufficient, competent evidence in the record. The absence of any of the enumerated requirements deprives this court of the*

opportunity for meaningful review. Id.

(Emphasis the Court's) (Citations omitted).

In the present case, the trial court emphasized that he was rejecting the non-statutory mitigator of lack of education. However, the trial court never evaluated the evidence in the record as it actually stood and failed to consider evidence in the record which much forcefully, directly, and convincingly outweighed the minimal evidence relied upon by the Court. The lower tribunal's order denied Defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

ARGUMENT

POINT IV

THE LOWER TRIBUNAL ERRED IN FAILING TO FAILING TO EVALUATE THE NON-STATUTORY MITIGATOR THAT THE DEFENDANT LACKED A POSITIVE ROLE MODEL.

In its written sentencing order, the trial court did a summary evaluation of the non-statutory mitigating factor that the Defendant lacked a positive role model. Indeed, the sentencing order of the Court discusses this mitigating factor in only two sentences:

The third asserted mitigator is that he lacked a positive male role model. This Court finds the evidence to be extremely conflicting and, therefore, does not manifest itself as a mitigator. (R 3865).

In Hudson v. State, 708 So.2d 256 (Fla. 1998), this Court explained that summary analysis of mitigation was improper and that because the weighing process had not been detailed in the written sentencing order, this Court could not perform a meaningful review of the sentencing order. This Court made clear in that case that in order to be consistent with the dictates of this Court's decision in Campbell v. State, 571 So.2d 415 (Fla. 1990). The sentencing court must evaluate in writing the evidence

presented or explain the reason for the trial court's weighing of the mitigation evidence.

Hudson v. State, supra, at 259.

In this case, the Defendant presented evidence in support of this non-statutory mitigating factor from the testimony of himself, his mother, sister, a social evaluator, and a lifelong friend. If the Court found that the testimony presented conflicted to the degree that it was not credible and failed to establish the mitigating factor, it had the obligation to explain its analysis beyond the summary statement that the evidence was "extremely conflicting." The failure to follow the dictates of this Court in Hudson vs. State and its progeny, denied Defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

This cause must be remanded for resentencing.

ARGUMENT

POINT V

THE LOWER TRIBUNAL ERRED IN DETERMINING THAT THE DEFENDANT WAS COMPETENT TO STAND TRIAL.

Prior to trial, the lower tribunal held a hearing on the Defendant's Motion to determine Competency. Two witnesses testified for the State. Dr. Stephen Alexander testified that in a one-hour exam, he found the Defendant to be polite, alert, attentive, and cooperative (SR 6-10). He found the Defendant to have good long and short term memory as well as good command of the English language, and noted no cognitive defects (SR 12). He determined that the Defendant knew who his attorney was, felt comfortable with him, and understood the gravity of the charges and penalties which could be imposed (SR 12-13). He knew the name of the judge and that the judge made certain types of rulings (SR 14-15). He was further aware of the role of the prosecutor (SR 15). He determined that the Defendant was competent (SR 16).

However, on cross examination, Dr. Alexander testified that his examination took "probably about 40 minutes." (SR 17). He did not discuss the facts of the case with the Defendant and therefore did not know whether or not the Defendant would be able to testify relevantly with regard to his version of those facts (SR 18). He was

aware that after a prior trial, the Defendant threw a chair in front of the jury that was going to determine life or death (SR 19). He admitted that those actions were clearly not a manifestation of appropriate courtroom behavior (SR 20). He did no testing to determine whether that two act was an act of choice or the act of someone not making rational decisions (SR 20).

Dr. Alexander did not discuss with any of the Defendant's attorneys or prior attorneys whether he had the ability to disclose relevant facts (SR 21-22). He was aware that the Defendant had a history of closed head injury but had not considered the extent of that injury (SR 22). He evaluated no medical records of the Defendant (SR 23) and was unaware that the Defendant had suffered from meningitis as a child (SR 23). He further indicated that a person could effectively communicate, even if he were incompetent (SR 24). There was no discussion of strategy with the Defendant, so the witness did not know whether the Defendant could strategize with his attorneys (SR 24). In terms of testing his long and short term memory, the doctor asked him his address, which he was not able to give (SR 25). He did no test designed to determine the accuracy of the Defendant's distant memory (SR 26).

Susan LaFehr Hession also testified that the Defendant was competent. Ms. Hession indicated that she conducted a clinical interview, mental status examination, and reviewed the probable cause affidavit, as well as talking to the attorneys (SR 53).

She explained that she did not go through an absolutely structured interview but rather conducted the interview so that she could have all of the areas that are important in a mental status examination and address the points outlined in the court's order about competency (SR 53). She testified that she asked general questions about background and family, looking for intelligence, organic impairment, mental illness, and character disorders (SR 54-55). She felt that the Defendant was grounded in reality and that he had an intact long and short term memory (SR 55). She did no formal testing (SR 55).

Ms. Hession acknowledged that the Defendant had a history of head trauma and difficulty with impulsivity, behavior controls, and violent outbursts, all of which are signs of organic or brain damage (SR 55-56). However, she determined that those issues went toward sanity or mitigation at sentencing, rather than competency (SR 56).

Ms. Hession testified that the Defendant knew what the pending charges were, knew the range of penalties for those charges, and gave a history about his pending case (SR 56-57). She found that the Defendant was competent to stand trial in all areas, capable of conferring with lawyer in the planning of his defense, and had the attention, memory and focus to challenge prosecution witnesses and seemed motivated to help himself in the process (SR 58).

On cross examination, Ms. Hession indicated that she did no testing to make a determination as to whether the Defendant's prior courtroom behavior was one of

volition or choice (SR 59-60). She further had no opinion as to whether or not Mr. Bryant's incident of having thrown a book at a circuit court judge was by choice or otherwise (SR 61). Although she explained an understanding of the methodology by which a seizure might occur and cause a defendant to act impulsively, she did not inquire of the Defendant as to whether he had any of the symptomology of such a seizure before these incidents (SR 61-62). Ms. Hession's testimony was that the reason she believed that the Defendant was able to confer with his attorney in the planning of his defense was that he was able to speak with her (SR 62). She admitted that she did not discuss planning and strategy with him (SR 62-63). She admitted that she did no testing as to the Defendant's memory, although she believed that his memory was intact (SR 64). She testified that one reason that she did not perform testing to determine the extent of the Defendant's memory was that she was only being paid for one hour of evaluation, and that such testing would exceed that amount of time (SR 65).

Ms. Hession was unaware that the Defendant misperceived the amount of time that took place between the alleged criminal act and the arrest, and indicated that she did not know whether that inability to ascertain such time limits would impair his ability to disclose to counsel facts pertinent to the proceedings (SR 66).

In stark contrast to the lack of testing and summary conclusions of Dr. Alexander and Ms. Hession, was the testimony of Dr. Antoinette Appel. Indeed, in its order entitled Supplements to the Record, the lower tribunal stated:

Additional testimony, live or by affidavit, is needed on the question of Defendant's competency. His experts' conclusions are in sharp disagreement with those of the State (R 3020).

Both the basis of the testimony and the conclusions of Dr. Antoinette Appel was in sharp contrast to that of the witnesses called by the State. First, Dr. Appel subjected the Defendant to ten hours of testing (SR 87). She was the only evaluator to point out that the Defendant had a dent in his head resulting from a blow to that area with a pipe in 1985, which was noticeable to the naked eye (SR 88-89). Dr. Appel reviewed the records of the Defendant's prior hospitalizations, his closed head injury, his meningitis, and his treatment for seizure disorder (SR 89). Her testing indicated that the Defendant had a rather low IQ and was such a slow learner that he learned with less ability than 99% of the general population (SR 93-95). The results of the testing of Dr. Appel were consistent with a closed head injury and meningitis affecting the brain (SR 97).

Dr. Appel explained that the damage to the nerve fibers in the Defendant's brain caused by the meningitis along with his closed head injury presented problems of

dysfunction (SR 100-103). She found that the Defendant's long term memory was in fact impaired and that the impairment of his memory plus aphasia occasioned by his brain injury caused dysfunction in his ability to make decisions (SR 108).

Dr. Appel specifically discussed issues regarding competency with the Defendant. Her testing showed that although he understood the charges against him, he lacked the capacity to assist counsel in the preparation of the defense (SR 111). The Defendant did not know the date of the alleged offense, did not understand that he didn't have to prove anything, and didn't understand the concept of reasonable doubt, intent, and premeditation (SR 111). The Defendant did not understand the concept of picking a jury of his peers, nor did he understand that members of the venire could be excused for cause (SR 111). He did not understand the difference between evidence and argument, even after Dr. Appel attempted to explain it to him (SR 111). He did not understand hearsay, and would be unable to plan legal strategy with his attorney because although he could name some alternative legal defenses, he could not explain them and had been given the names of those defenses by his counsel (SR 11-112).

Dr. Appel testified that the Defendant did not understand the strategy which might include a lesser included offense, and did not understand the concept of a lesser included offense (SR 112). It was Dr. Appel's opinion that if either the defense counsel or the State Attorney asked the Defendant a relational question, he would not

understand it.(SR 112). He could not really understand the trap and the proverbial “when did you stop beating your mother-in-law” question (SR 112). Dr. Appel found that the Defendant’s attentiveness and memory did not allow him to challenge prosecution witnesses and did not understand the defense of insanity (SR 112-113). While he understood that he had been charged with committing a crime and that the charge was just an accusation, he was unable to effectively comprehend legal concepts (SR 113-114). Dr. Appel found that for someone who had previously been through a trial on these charges, such as the Defendant, he did not have a good concept of the issues involved in a trial (SR 115-116).

In analyzing the specific factors set out in Rule 3.221 Florida Rules of Criminal Procedure, Dr. Appel testified as follows:

A. The Defendant did not have the capacity or competency to testify relevantly for complicated questions. If asked a relevant question, he would testify relevantly, but if asked a complicated relevant question, he would be easily misled and easily twisted around and may very well testify irrelevantly because he didn’t comprehend the question (SR 116).

B. The Defendant did not have the ability to manifest appropriate courtroom behavior, as he had previously thrown a book and a chair in court (SR 116).

It was Dr. Appel's opinion that the Defendant had not taken entirely volitional acts in manifesting previous courtroom behavior because of his history of a disordered brain with a seizure disorder. According to Dr. Appel, as the amount of stress and disorganization increases, the likelihood that someone with the Defendant's history would exhibit unusual behavior increases (SR 117).

C. The Defendant understood the adversary nature of the legal process in that he understood that the process was out to convict him (SR 117-118).

D. The Defendant was unable to participate in the adversary process and assist his attorney in strategizing and evaluating evidence and making decisions because while he could mouth back some of the defenses, he could not explain them (SR 118). The Defendant's memory was clearly impaired and his ability to abstract and be flexible to conceptualize and to change concept was clearly impaired, as well (SR 118).

During Dr. Appel's testimony, she discovered, for the first time, that the Defendant completed an MRI of his brain (SR 139). The results of that MRI confirmed her opinion in disclosing that the right frontal portion of the brain was damaged and that the neurons within the brain had degenerated (SR 139-140). The MRI evaluation of the brain indicated that the damaged portions of the brain controlled concept formation and flexibility categorization and judgment (SR 142). It was her opinion that the Defendant's judgment, abstraction, and reasoning were affected by his brain injury and

that the injury to the right portion of the brain affected episodic discontrol and possibly cause his seizure disorder (SR 142-143). She explained to the Court that there was a significant part of the Defendant's brain that no longer existed (SR 159).

None of the observations, determinations or testimony of Dr. Appel was in any way contradicted by test results.

The test for competency to stand trial is whether a defendant has sufficient present ability to consult with an aid his attorney in the preparation of a defense with a reasonable degree of understanding. Ferguson v. State, 417 So.2d 631 (Fla. 1982). The burden on the trial court is a great one to assure that the defendant is not tried while incompetent, for to do so would deny him his constitutional right to a fair trial. Fuse v. State, 642 So.2d 1142 (Fla. 4th DCA 1994).

The evidence in this case was clearly insufficient to establish that the Defendant was competent to stand trial.

ARGUMENT

POINT VI

THE LOWER TRIBUNAL FAILED TO EXERCISE ITS DISCRETION IN EVALUATING THE NON-STATUTORY MITIGATING FACTOR OF DEFENDANT’S NEUROLOGICAL IMPAIRMENT.

The power to exercise “judicial discretion” does not imply that a court may act accordingly to mere whim or caprice. Carolina Portland Cement Co. v. Baumgartner, 99 Fla. 987, 128 So. 241, 247 (1930). As explained in Parce v. Byrd, 533 So.2d 812 (Fla. 5th DCA 1988, rev. denied, 542 So.2d 988 [Fla. 1988]), the exercise of discretion requires a valid reason to support the choice between alternatives:

[Judicial discretion] is not a naked right to choose between alternatives. There must be a sound and logical valid reason for the choice made. If a trial court’s exercise of discretion is upheld whichever choice is made merely because it is not shown to be wrong, and there is no valid reason to support the choice, then the choice made may just as well have been decided by a toss of a coin. In such case, there would be no certainty in the law and no guidance to Bench or Bar. Id. at 814.

In reviewing death sentences, great certainty is required to ensure that conclusions are based on proper grounds. Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 1866 (1988).

The Court heard unrebutted testimony from Dr. Antoinette Appel as well as Dr. David J. Fleszar, that the Defendant suffered from neurological defects of his brain (T 1094-1109, 1078). Dr. Appel described the ripple effect that flowed from the atrophied area of the brain because of the loss of fibers therein and the loss of connections with other parts of the brain (T 1108-1109). She further testified that the Defendant suffered from sickle cell anemia, post traumatic seizures, a concussion caused by being hit in the head with a pipe, meningitis, and a lacerated dura (T 1111-1112). The Defendant's brain damage caused a lack of impulse control which related to an incident like the one before the lower tribunal in that the Defendant was unable to avoid impulsive behavior and impaired judgment, especially under stressful situations (T 1115).

In its order, the lower tribunal rejected neurological impairment as a mitigating factor. In its analysis with regard to that factor, the lower tribunal did not reject and apparently accepted the fact that Defendant suffered from "brain damage caused by head injury combined with meningitis [which] could cause the Defendant to suffer from impulsive behavior and impaired judgment." (R 3865). The Court found that despite the neurological impairment, the Defendant's actions on the night of the murder

indicated that he understood what he was doing, why he was doing it, and that it was unlawful (citations omitted) (R 3866).

However, although the Defendant clearly intended on committing an armed robbery when he and his co-defendant entered Andre's Market, it is also clear that the actual death of the victim occurred as a result of the struggle with the Defendant over the firearm, during which the Defendant resolved the altercation by impulsively shooting the victim. Indeed, in its sentencing order, the lower tribunal cited portions of the Defendant's testimony in the statement given to the law enforcement officers which clearly reflected that the Defendant's actions in this case were impulsive (R 3863).

A mitigating circumstance must be "reasonably established by the greater weight of the evidence." Campbell v. State, 571 So.2d 415 (Fla. 1990). When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proven. Niebert v. State, 574 So.2d 1059 (Fla. 1990). This record is devoid of any "positive evidence" to refute evidence of the mitigating circumstance. cf. Cook v. State, 542 So.2d 964, 971 (Fla. 1989). The Defendant's actions in impulsively reacting to the physical confrontation with the victim and his subsequent actions in his telephone calls to the Sheriff's office do not in any way refute the evidence of neurological impairment.

This case is different from the facts of the case of Davis v. State, 604 So.2d 794 (Fla. 1992), which was cited by the Court in support of its analysis. In that case, there was testimony from two mental health professionals that the Defendant's poor performance on neurological tests and his lack of recall were attributable to malingering. Id. at 798. There was further testimony that the Defendant did not have organic brain damage and that he suffered no significant head injuries. Id. at 798. Additionally, in that case, the facts revealed that after killing the victim, the defendant methodically burglarized the home and loaded his car with stolen items. Id. at 798. Here, there is no evidence of malingering, and it is clear that the Defendant ran from the scene immediately after the killing (T 506, 882-823).

The failure to exercise discretion and properly consider the mitigating factor of neurological impairment denied Defendant due process and a fair and reliable sentencing, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

ARGUMENT

POINT VII

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

“Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different.” Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988). Because death is a unique punishment, it is to be imposed only “for the most aggravated, the most indefensible of crimes.” State v. Dickson, 283 So.2d 1, 8 (Fla. 1973).

The nature of the instant killing does not make it one of the most aggravated and indefensible of crimes to warrant the death penalty. Although it is conceded that Defendant had intent to rob Andre’s Market, it is clear that he had no intent to commit murder. The killing in this case resulted from an impulsive act, which occurred when the Defendant found himself in an unexpected wrestling match for the weapon with the victim (T 818-820). The Defendant expressed remorse and the undisputed testimony was that the only reason he shot the victim was because the victim was attempting to get the gun from him (T 835).

The fact that the victim was shot multiple times does not set the instant offense apart from other capital cases so as to call for the death penalty. See, Robertson v.

State, 611 So.2d 1228 (Fla. 1993); Shere v. State, 579 So.2d 8d6 (Fla. 1991); McKinney v. State, 579 So.2d 80 (Fla. 1991). While the nature of the killing certainly does not excuse the crime, it is clear that the manner of the crime is not the most aggravated type for which the unique punishment of death is reserved.

In addition, the quality of the mitigators, properly analyzed, shows that death is not appropriate in this case. The Defendant's neurological deficits, more fully described hereinabove, his lack of education, and lack of a male role model in his life are mitigating factors of great moment.

Moreover, as was found by the lower tribunal, the Defendant was clearly remorseful for the death of the victim (R 3866). He was also cooperative and forthcoming in his statement (R 3866). In suggesting that the Defendant's remorse should be given very little weight in light of the fact that the Defendant claimed that his statement was coerced and because of "Defendant's uncooperative behavior during the trial," the lower tribunal simply chose to overlook a very strong mitigating factor. The record reflects that the Defendant was neither disruptive during trial nor disrespectful in any way. The Defendant objected to wearing shackles, and to being otherwise restrained before the jury. His desire not to proceed to trial under those circumstances and not to participate in any trial that proceeded under those circumstances was simply an attempt to vindicate his belief that going through a trial while manacled would be

“inherently prejudicial.” In fact, once the Defendant returned to the courtroom at the earliest part of the jury selection process, his behavior in court and throughout the trial was without incident.

This is not one of the most unmitigated cases for which the death penalty is reserved. Defendant’s death sentence must be vacated.

CONCLUSION

For the reasons stated herein, Defendant respectfully requests this Honorable Court vacate the judgment of conviction as to Points I and V and or remand this cause for a new sentencing phase, with regard to Points II, III, IV, VI, and VII.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to Leslie Campbell, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 12th day of February, 2000.

MICHAEL DUBINER, ESQ.

MARK WILENSKY, ESQ.