IN THE SUPREME COURT OF FLORIDA

DEMETRIS OMARR THOMAS,

Appellant,

v. Case No. **SC00-1092**

STATE OF FLORIDA,

Appellee.
_____/

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

AMENDED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is a capital case, and Demetris O'Marr Thomas is the defendant/appellant. The record on appeal consists of 17 volumes of pleadings and transcripts. Thomas will refer to it by noting the volume and page number, e.g. (14 R 1026), where 14 is the volume and 1026 is the page.

Thomas' mental retardation dominates this brief. Besides the lengthy argument that the Florida and United States Constitutions bar the execution of the mentally retarded, his intellectual disability surfaces in other guilt and penalty phase issues.

STATEMENT OF THE CASE

An Indictment filed in the Circuit Court for Okaloosa County on October 13, 1997, charged the defendant, Demetris Thomas, with one count of first-degree felony murder, one count of kidnaping with a weapon, and one count of sexual battery with a weapon (1 R 14-15). He pled not guilty to those offenses (1 R 18), and he filed several motions relevant to the death penalty (e.g., 2 R 349-93). Of particular interest to this appeal, he or the State filed the following motions or notices: (1) Motion to suppress statements he made to the police because he was mentally retarded

and could not understand the Miranda rights. (3 R 583-84). Denied (6 R 1213). (2) Notice by the defendant that he intended to present expert testimony of his mental retardation in support of the two statutory mental mitigators and other nonstatutory mitigation (5 R 802). (3) Motion to Determine the Non-applicability of the Death Penalty Based on the Issue of "Proportionality." (7 R 1301).

Thomas proceeded to trial before Judge G. Robert Baron and was found guilty as charged except that the jury found him guilty of kidnaping without using a weapon (10 R 1882). He proceeded to the penalty phase of the trial, and the jury recommended death by a vote of 10-2 (10 R 1881). The court sentenced Thomas to death, and justifying that punishment, it found in aggravation that (1) He had was on felony probation at the time of the murder; (2) He had a previous conviction for another violent felony; (3) The murder was committed during the course of a kidnaping; (4) The murder was especially heinous, atrocious, or cruel. (11 R 2167-68)

In mitigation, the court found (1) The murder was committed while Thomas was under an extreme mental or emotional disturbance. Great weight. (2) He is mentally retarded with an IQ of 61. Significant weight. (3) He had no relationship with his mother. Slight weight. (4) He obtained a special

certificate or diploma of graduation from high school. He also had good attendance and presented no disciplinary problems. Found as mitigation, but given no weight. (5) He was a good worker as an automobile detailer. Proven but given no weight. (6) Defendant did not flee after the murder. Proven, but rejected as mitigation. (7) All other mitigation that Thomas was a good child. Some weight.

This appeal follows.

STATEMENT OF THE FACTS

On July 23, 1997, Demetris Thomas drove a 1986 Buick Regal to a Tom Thumb convenience store in Okaloosa County . He left the car running when he went inside, and when he came out he discovered that someone had stolen it (14 R 538). He reported the theft to the police, but because he never provided enough identifying information, they never considered it a stolen vehicle (14 R 540).

Between three and four a.m. on September 13, 1997, Brandy Howard was talking on an outside telephone at a convenience store in the same county (14 R 498-500). As she used the phone, Thomas drove his grandfather's pickup truck to the store (14 R 501). He saw Howard and wanted to talk with her, but she held up her hand, apparently indicating to him he should wait (14 R 501).

Eventually, they began to talk, during which he snatched her car keys from her, pushed her against her car, and into it, closing the passenger-side door (14 R 504). He walked to the driver's, and as he did so, she opened the door and started to get out. He returned to her side and closed the door again (14 R 511). As he returned to the driver's side, she again opened her door, and Thomas, yet again, returned to the passenger side, leaned inside the window, and closed the door (14 R 511,530). She stayed inside, and he drove away in a "normal manner." (14 R 526). As the couple left, she smiled at one of the store clerks who was working outside the store (14 R 506). The clerk assumed everything was okay, and "they're just having an argument." (14 R 506).

Several hours later her badly battered body was found at a construction site (13 R 297,308). She had received at least seventeen blows to the face, seven or eight of which would have been fatal (14 R 415,419). Most of them were probably inflicted by an eight-foot long scaffolding brace and with such force that several teeth were knocked out (14 R 410,412,413). She may have been conscious for some of the blows, though the fatal ones would have caused instantaneous unconsciousness (14 R 427). She also had what appeared to be defensive wounds (14 R 408,412), although the medical examiner admitted they could have been offensive

injuries as well (14 R 427,434). She may also have been hit on the side of her head with a hand or fist (14 R 416). There was no evidence of any sexual trauma (14 R 431).

At trial, Janice Johnson, a "blood splatter" expert, testified that only Thomas' blood was on the inside of the car (15 R 611) and a cement mixer near it (15 R 611), while Howard's blood was located on the body of the vehicle, and around Howard's body and the towel found at the hospital (15 R 607, 609-610). None of the victim's blood was found inside the car. She apparently left the vehicle, but, once outside, she was hit so that blood splattered onto the car (15 R 673). She left the area of the car and walked or ran about 109 feet (13 R 343). At that point, she either fell or was knocked down. Where she was beaten until dead (15 R 677-79). Blood was also found on the victim's socks, which were also very dirty and had some type of grass on them (15 684). She had her shoes on when beaten at the construction site (15 R 683) .

On September 24, the police executed a search warrant for the home of Thomas, and about 1:30 in the morning, Major Jerome Worley, head of the criminal investigation unit of the Crestview Police Department, lead the search. After reading Thomas his Miranda rights, the latter denied knowing anything about the woman's death (6 R 1091). On the way to the jail, he admitted

having sexual intercourse with her the night before her death, but at the time of the homicide, he was playing cards with some friends (6 R 1092-94).

By the time he got to the jail, and after being confronted with the evidence the police had against him, he changed his story. As recorded and played at his trial, he told Officer Worley that, in July, Brandy was riding with two men who had stopped him (15 R 731). They beat him badly and took his car (15 R 731-32).

On Friday evening, September 13, Thomas was playing cards with some friends, visiting, and drinking. About three in the morning, he left to go home, and on the way there, he saw Brandy talking on a telephone at a Tom Thumb store. He wanted to talk to her about the night he had been beaten, so he pulled into the store's parking lot. She tried to put him off, but he got her keys and forced her to her car. That is, he "wasn't pulling her, she was coming along." (15 R 735). He drove around for a while, eventually stopping behind a hospital. They talked for a while, and eventually had sexual intercourse, during which her nose started to bleed (15 R 740). They got back in the car and drove around some more, stopping at a construction site. Then for the first time, he asked her about the earlier incident. She got out of the car, and told him she did not want to talk about it. "She

started screaming and hollering ... She was picking up bricks and stuff, throwing them at me and stuff .... She just got crazy, man" (15 R 737-38). Thomas wanted to leave, "but that damn pipe, she picked up a pipe. When she hit me on the side of the face with that damned pipe, you know it wasn't hard but it was enough to just make you mad as hell, man." (15 R 738-39). She fled, and something clicked inside Thomas. He "went nuts" and beat her to death with an eight-foot long scaffolding brace (15 R 630,739)

Afterwards, Thomas fled on foot. He eventually flagged down a man driving a truck who gave him a ride to the Tom Thumb convenience store (15 R 741).

SUMMARY OF THE ARGUMENT

ISSUE I. The State, relying on a bizarre concatentation of circumstantial evidence, tried to prove that Thomas had sexually battered Brandy Howard. Its proof utterly failed to do so. None of Howard's blood was found inside her car, and the medical examiner found no evidence of forceful trauma to her vagina. Likewise, none of the scrapings taken from her fingernails had the defendant's DNA. Much more significant than the lack of evidence, none of what the State presented, as sparse as it was, refuted the defendant's claim that Howard willingly had intercourse with Thomas.

ISSUE II. Similarly, the State had few facts, and none sufficient to withstand a motion for a judgment of acquittal, that proved Thomas had kidnapped Howard. At most, he falsely imprisoned her, but nothing came from the State to establish that he did so with the intent to either kill or sexually batter her.

ISSUE III. It is cruel to execute a mentally retarded defendant, such as Thomas, whose intelligence places him among the dullest two percent of the American population and who lacks the basic intelligence to make him the very most morally culpable of defendants.

It is unusual to put them to death because in the last twenty-five years America has executed almost seven hundred men and women, and of those, fewer than forty were retarded. In Florida, we have executed 49 men and women, but none of them have been mentally retarded.

Finally, our national and state history of treating the mentally retarded clearly demonstrates that we have rejected the early twentieth century models of criminal neglect and abysmal treatment of this group. Since the watershed legislation of 1975, Florida has shown them considerably more compassion, understanding, and kindness. Our evolving standards of decency have moved us, as a state and a nation, beyond executing the mentally retarded.

ISSUE IV. The court found that Thomas knowingly and intelligently waived his Miranda rights before confessing to the murder of Brandy Howard. The totality of the circumstances, however, shows the opposite. He has such extreme intellectual deficiencies that he never understood the key words and concepts used in the rights form. He reads at a second or third grade level, but to understand the rights, he had to have a sixth grade reading ability. The police never took any steps to insure he understood his rights. Instead they took measures to insure his cooperation. Finally, Thomas, because of his low intellectual functioning and past experiences with Major Worley, saw him as a friend and ally. He was, therefore, more trusting of the police officer and willing to please him.

ISSUE V. In sentencing Thomas to death, the court found as mitigation that the defendant had obtained a "certificate of graduation" and he had good attendance at school and had presented no disciplinary problems. Additionally, it found he had been a good worker. It erred in never explaining why it gave these legitimate mitigators no weight.

ISSUE VI. Dr. James Larson, a psychologist, testified that Thomas' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The State tried to get him to qualify

that conclusion, but he never wavered from it. The trial court, however refused to find this statutory mental mitigator. No evidence, however, supports that conclusion.

ISSUE VII. A death sentence for this mentally retarded defendant is proportionately unwarranted. Three of the aggravating factors, lack the dark quality required to justify a death sentence. While the court also found Thomas committed the murder in an especially heinous, atrocious, or cruel manner, his mental deficits substantially decreased its significance. On the other hand, the trial court found he had killed Brandy Howard while under the influence of an extreme mental or emotional disturbance, the murder was a "situational heat of the moment type murder," and he was mentally retarded, among other mitigators. This mitigation, unlike the aggravators, defines and captures the essential nature of this murder, and their quality, unlike that of the aggravators, is so strong that this Court must find that Thomas' death sentence as disproportionate to other similarly situated defendants.

ARGUMENT

ISSUE I

THE COURT ERRED IN DENYING THOMAS' MOTION FOR A JUDGMENT OF ACQUITTAL BECAUSE THE STATE'S CIRCUMSTANTIAL EVIDENCE NEVER EXCLUDED THE REASONABLE VERSION OF THE EVENTS THAT THE DEFENDANT AND MS. HOWARD HAD CONSENSUAL SEXUAL INTERCOURSE, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

Simply put, the State's case that Thomas sexually battered Brandy Howard does not make much sense. Its scenario is bizarre and the facts simply fail to support its version of what happened. The jury, however, convicted the defendant, but they did so because he admitted killing her, though unintentionally, and the photographs of her body were, as one juror muttered, gory (13 R 325). On the other hand, Thomas' confession presented a believable story, and more significantly, the evidence supported it.

While the defendant admitted killing Howard, he denied raping her, so the State had to rely on the circumstances of the crime to disprove his claim. In addition to this issue involving a de novo standard of review, Landis v. Allstate Ins. Co., 546 So. 2d 1051 (Fla. 1989), this Court must also employ the special set of rules it has developed whenever the prosecution has obtained a conviction based on circumstantial evidence.

> To prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. Further, to establish premeditation by circumstantial evidence, the state's evidence must be inconsistent with every other reasonable inference. The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is to be decided by the jury. Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989). However, the jury need not believe the defense version of facts on which the state has produced conflicting evidence. Id.

Woods v. State, 733 So. 2d 980, 985 (Fla. 1999); McArthur v. State, 351 So. 2d 972 (Fla. 1977); State v. Law, 559 So. 2d 187 (Fla. 1990).

As applied to cases such as this where the key issue focuses on whether Howard consented to having sexual intercourse with Thomas the "[c]ircumstantial evidence must lead 'to a reasonable and moral certainty" that she never did so." Kirkland v. State, 684 So. 2d 732, 734 (Fla. 1996); See, also Hall v. State, 90 Fla. 719, 729, 107 So. 246, 247 (1925). Cox v. State, 555 So. 2d 352, 353 (Fla. 1990). Suspicions, even strong suspicions of the defendant's guilt are insufficient, as a matter of law, to support a conviction as long as the evidence supports a theory that she agreed to have sex with him. Id. Similarly, the State must present evidence, not theories, to rebut the defendant's hypothesis of innocence.

We first note that the State had very little evidence to work with to show that the defendant had raped Howard. It first

argued that Thomas kidnapped Howard from a convenience store.[3] Then it contended that he took her to the remote area about 1.5 miles away and behind a local hospital where he beat and raped her, ostensibly vaginally, anally, and orally (16 R 920-21).[4] As evidence of the beating there, the State pointed to the blood that was found on the car (16 R 920). After sexually battering her, he put her back in her car and drove another 1.5 miles to a construction site (16 R 920-21). She fled from him, but he found an eight-foot long scaffolding brace, ran after her, and beat her to death (16 R 917). He then left the scene.

Thomas generally agreed with the sequence of events; he disagreed with the prosecution's conclusions. Howard left with him willingly enough, and they went to the hospital area. He wanted to talk with her about his stolen car, but matters turned towards sex, and she willingly engaged in sexual intercourse with him (15 R 735). Only after they had put their clothes on and left did Thomas raise the stolen car problem. He pulled into the construction site, and as he tried to talk with her, she began acting crazy. She threw things at him, and she hit him on the head with a pipe (15 R 737-39). The blow cut the defendant because his blood was found on a cement mixer and on

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[3] Thomas contests that proof in ISSUE II.

[4] See, State's exhibit 31.

the ground at the crime scene. Also, his aunt noticed a welt on his head (15 R 611, 16 R 877). Something “clicked” inside Thomas, and he grabbed the brace and beat Howard to death (15 R 738). He left the body in the middle of the street and fled. Hence, Howard bled on the car, not at the hospital, but at the construction site.

The blood and dirt found on the socks Howard wore makes this more believable. That is significant because her shoes were on her feet when the body was found, and the blood found on the socks was on its soles and other places normally covered by shoes. The socks were also dirty, as if she had walked in them (13 R 391). Howard had to have taken off her shoes, and most likely she did so when she removed her pants so she could have sex with Thomas. Of course, Thomas, during a rape, could have done that, but he certainly would not have put them back on. More reasonably, after she had sex with the defendant she put them on.

Morover, Thomas said her nose began to bleed during intercourse, and that explained how her blood got on the socks (15 R 739-40). Supporting that claim, one of Howard’s friends testified that Howard frequently had nose bleeds (16 R 820). Hence, her nose may have bled and drops of blood landed on her socks. Using a small towel or rag, she stopped the bleeding and

left it at the hospital area where the police later found it (14 R 454, 463; 15 R 622). That certainly, reasonably explains the evidence, and does so better than the State's theory. More pertinent, the prosecution presented no evidence showing that was patently wrong. Taylor v. State, 583 So. 2d 323, 329 (Fla. 1991).

Moreover, the police should have found Howard's blood inside her car. They discovered large stains on the outside of the passenger door. If Thomas beat and raped her as the State contended and then put her back into the car to transport her to almost two miles away, her blood, and a lot of it, should have been found inside, on the seat, on the floorboards, and on the inside door. Yet, the evidence technicians found only the defendant's blood, and little of that, on the interior surfaces (15 R 606, 611, 613-14,).[5] None of those few stains matched those of the victim, a critical weakness in the State's theory of what happened.

Other evidence, or more correctly, the lack of it, supports Thomas' explanation of events. The medical examiner found no signs of any trauma to Howard's vagina. Of course he found

[5] One state witness said there were some brown blood type stains on the car's headliner, but he never positively identified it as blood, much less that if it was blood it was Howard's type (14 R 573, 591).

sperm there, but that discovery is as consistent with Thomas' claim of consensual sex as the State's theory of sexual battery (15 R 586). Likewise, the very little or "rare" amounts found in her mouth or anus prove nothing because he never identified it as coming from Thomas or having been forcefully put there (14 R 588, 15 R 709).

Other facts refuted the State's sexual battery theory. Her body was found, not in some remote area and with her clothes removed. Instead, she was fully clothed, lying in the middle of a street of a construction site that included occupied houses nearby. State v. Ortiz, 766 So. 2d 1137 (Fla. 3d DCA 2000)(High probability of sexual assault when body is found in an isolated field, disrobed, and with vaginal area exposed.); Garcia v. State, 644 So. 2d 59, 60 (Fla. 1994)(vagina and anal canal injured.) Indeed, Howard was taken from a somewhat isolated area behind the hospital to a residential area where her body was discovered laying in a road by one of the homeowners as he left for work (13 R 307-309). Howard admitted having sexual intercourse with Thomas at least once (16 R 820, 874-75). She also had little fear of him. She ignored him when he approached her at the Thom Thumb store. Later, she hit him with the pipe and threw bricks at him (13 R 380). Yet, none of the scrapings taken from Howard's fingernails had the defendant's blood or DNA (15 R 610-11). If

they had, such proof would have certainly strengthened the State's case. Without it, or any positive proof she never consented, this Court has only an argument that has no support and which, if possible, gets weaker in light of the evidence presented.

More significant than this paucity of evidence, the State failed to exclude the reasonableness of defendant's version of what had happened. Ortiz, cited above. In Taylor v. State, cited above, the defendant claimed that he had and the victim had had consensual sex, and he had beaten her in a rage. The medical examiner and the evidence, however, specifically rebutted every claim Taylor made about how the victim died. Id, at p. 329. We have no similar contradictory evidence here.

Even the case law the State cited to support denying the motion for judgment of acquittal does not (15 R 790). Duckett v. State, 568 So. 2d 891 (Fla. 1991). In that case, Duckett allegedly kidnapped a 11-year-old girl, sexually battered and killed her. The crucial factual issue at trial focussed on whether he had raped the girl. Consent, particularly because the victim was less than 12 years old, was not, and could not have been an issue. Duckett, other than being a circumstantial evidence case, had no controlling similarities to this case.

Thus, Thomas had a very strong defense to the sexual battery allegation. Not only did the State's theory make no sense, the evidence failed to support it. More stronger, he presented a reasonable version of what happened, and critically, the State presented no evidence that refuted it. As such, this Court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN DENYING THOMAS' MOTION FOR A JUDGMENT OF ACQUITTAL BECAUSE THE STATE'S CIRCUMSTANTIAL EVIDENCE NEVER EXCLUDED THE REASONABLE VERSION OF THE EVENTS THAT THE DEFENDANT NEVER KIDNAPPED MS. HOWARD, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

The State's case that Thomas kidnapped Howard hardly makes more sense than the argument he had sexually battered her. That is, Thomas may have forcefully pushed Howard into her car, though that is contested, but there is no evidence he had any intent to sexually batter or kill her when he did so. Without a design either to forcefully abduct her or commit some other felony what he did amounted at best to false imprisonment, and even there the State presented little evidence to support that charge. Using the same standards of review as employed in the previous issue, this Court should reverse the defendant's conviction and sentence for kidnapping.

False imprisonment, as defined by Section 787.02, Florida Statutes (1997), "means forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against her or his will." It becomes kidnaping, as defined by Section 787.01, Florida Statutes (1997), if the defendant also has the intent to: "... (2) Commit or facilitate commission of any felony, or, (3) Inflict bodily harm upon or to terrorize the victim or another person." Thus, before this Court can consider the sufficiency of the evidence of kidnaping it must conclude Thomas at least falsely imprisoned Howard. McCutcheon v. State, 711 So. 2d 1286 (Fla. 4th DCA 1986).

1. **The State presented insufficient evidence of false imprisonment**.

The State's claim Thomas forcefully abducted Howard relied on the testimony of Janet Money, the clerk at Thom Thumb convenience store. She saw the meeting between the defendant and Howard that led to the pair leaving the area in her car. She was blowing leaves from the parking lot, and during the incident was only two or three parking spaces away from the couple (14 R 509). She noticed that Howard was talking on the telephone when Thomas drove up and parked his truck next to her

car. He honked his horn at her, but she held up her hand as if telling him to wait, and he left (14 R 500-503).

He soon returned and talked with Howard for a few minutes (14 R 519). At some point, he took her car keys, she shouted "hey," but they kept talking (14 R 504, 505). She looked at the clerk and smiled at her, and the latter thought the couple were "just having an argument." (14 R 506) Howard never asked for help or tried to run away (14 R 521). Appellant pushed her against the car and "kind of into the car and closes the door. He hurried to the driver's side of the car, but before he got there she opened the door." (14 R 504-505) He returned to her side of the car and closed the door (14 R 511). He went to the driver's side again, and she opened her door again. He closed it a second time. She opened it a third time, and when he closed it yet again he "leans over into the car and says or does something, ... and she doesn't try to get out any more." (14 R 511) The couple left unhurriedly, the clerk went back to her leaf blowing, and "did not think anything of it." (14 R 514,526)

When questioned by the police and with them using leading questions, Thomas added a few more details.

> WORLEY: Did you snatch her keys from her?
> THOMAS: Yea, I did get her keys.
> WORLEY: Did you take her over and force her to her car?

> THOMAS: Yeah, I force her to her car.
> WORLEY: Did she --
> THOMAS: I just had her, like, by the arm. I was just, like, pulling her -- I wasn't pulling her, you know, she was coming along.

(15 R 734-35) From this evidence, the State presented insufficient proof Thomas used enough force or threats to have falsely imprisoned her. It proved only that Howard and Thomas argued about something before they left the store. She may have been unhappy with him, but she went willingly enough. Even when the conflicts in the evidence are resolved against the defendant, the State's case remained murky and ambiguous.

When compared with other cases this conclusion becomes obvious. He never bound, gagged, blindfolded, or otherwise physically restrained the victim. Parker v. State, 570 So. 2d 1048 (Fla. 1st DCA 1990); Marsh v. State, 546 So. 2d 33 (Fla. 3d DCA 1989). They were both adults and knew each other, and had had sexual intercourse (16 R 820,874-75). Miller v. State, 233 So. 2d 448 (Fla. 1st DCA 1970).

There is no evidence he ordered her into the car, and her repeated efforts to leave show he could not keep her in. He may have said something to her that kept her from leaving, but we would have to speculate that he threatened her. Duba v. State, 446 So. 2d 1167 (Fla. 5th DCA 1984)(Duba tells victim "to get in the van or I'll kill you"); Kent v. State, 702 So. 2d 265 (Fla.

5th DCA 1997). Howard never called out for help, even though Janet Money was within two or three parking spaces during this time(14 R 509,532). She protested the taking of her keys and showed some resistance to getting in the car with the defendant. With that show of spirit, if she believed she was being abducted she would certainly have yelled to Money for help or fled, particularly when the latter was within a few feet of her and nothing kept her from running away (14 R 509). She did none of those things.

If there is a lack of incriminating evidence, what proof exists hardly supports the State's case for at least a false imprisonment. Janet Money saw them talking and never became very concerned about Howard's safety. The clerk thought it was nothing more than a squabble. When Howard smiled at Money that justified that belief "[T]hey're just having an argument." (14 R 506)

Of course, the defendant said he "forced" Howard to her car, but he said that in response to Major Worley's leading question, "Did you take her over and force her to her car?" Immediately, Thomas clarified what he meant. "I just had her, like, by the arm. I was just, like, pulling her -- I wasn't pulling her, you know, she was coming along." Moreover, the facts, particularly her repeated efforts to leave the car, her silence when help was

nearby, and her smile at Money, justify the belief that Thomas and Howard may have had an argument but he never forced her to go with him.

2. **The felonious intent.**

If, however, this Court concludes he at least falsely imprisoned her, it must then consider the evidence showing he intended to commit some felony or otherwise "bodily harm" her so as to elevate that crime to kidnaping. Significantly, evidence of the murder, or even a sexual battery, by themselves provide insufficient evidence of a kidnaping. Were it otherwise, virtually every murder would automatically include a kidnaping, as would every date rape. In Delgado v. State, 25 Fla L. Weekly S631 (Fla August 24, 2000), on motion to clarify granted, Delgado v. State, Case No. SC88638 (Fla. December 14, 2000), this Court reversed Delgado's burglary conviction where he proved he had gained consensual entry into the victims' business although he later murdered the husband and wife owners. "The mere fact that a crime was committed or was intended is an insufficient basis for finding that the entry or remaining was without privilege or authority." Delgado, slip opinion at 11-12.

Similarly in the kidnaping scenario, the "mere fact" that a crime was committed does not convert a false imprisonment into

a kidnaping. This Court implicitly reached this conclusion in Rogers v. State, 660 So. 2d 237 (Fla. 1995), where it refused to find the defendant had kidnapped a couple, and later killed one of them. Because the victim never followed the defendant's instructions (which he enforced with a gun) and drive where Rogers wanted to go, this Court found insufficient evidence of a kidnaping.

The facts surrounding the homicide further weaken a conclusion that Thomas ever intended to kill Howard. He admitted killing the victim, but he repeatedly said he never wanted to do so (15 R 739, 740), and the evidence at the murder scene shows that he murdered her in a rage. He parked the car at a construction site, and on a street that had occupied houses, not some remote, desolate area (13 R 296-97, 308). If he had wanted to kill her, a better place would have been behind the hospital. Similarly, he would have hidden her body rather than leaving it in the middle of the street where it was soon discovered. Brennan v. State, 754 So. 2d 1 (Fla. 2000). The murder weapon was a clumsy eight-foot long scaffolding scissors-type brace that by chance happened to be lying in the vicinity of the car (13 R 373, 15 R 630, 739). Although the defendant hit Howard at least 15-17 times with it, and that justified finding the premeditated murder, the trial court never found the

killing to have been committed in a cold, calculated or premeditated manner. Such a conclusion would have followed had the defendant planned or intended to kill her at the time of the abduction. To the contrary, he found that Thomas "lacked any organized plan to kill the victim ... that the murder was a situational heat of the moment type murder." (11 R 2171)

Thus, unless the State can provide other evidence of Thomas' intent, the subsequent murder cannot, by itself, supply it. Without any proof of his felonious intent, the State proved only a false imprisonment. This Court must reverse the trial court's judgment and sentence for the kidnaping.

ISSUE III

SENTENCING THOMAS TO DEATH, A MENTALLY RETARDED PERSON VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

A. THE FACTUAL AND PROCEDURAL BACKGROUND.

Without any question or challenge by the State, Demetris Thomas is mentally retarded. Dr. James Larson, a psychologist used by the defense, tested the defendant and found that he had an IQ of 61 (6 R 1142; 17 R 1060), which was well within the mild mental retardation range of 54-69 (6 R 1143; 17 R 1060). This meant that only four or five people in a thousand have a lower IQ than Thomas (6 R 1144). He also had significant deficits in his adaptive behavior. That is, because of his low intellectual functioning, he had an extremely difficult time living in modern society. As Dr. Larson said at the suppression hearing, "Basically I would describe him as fairly impoverished in terms of his fount of information about the world in which he lives." (6 R 1144-45) For example, he did not know which direction the sun rose, but knew the colors of the flag. He did not know the number of weeks or months in a year, but knew the colors of the American flag and that a ball was round. He knew what a bed, ship, and penny were, but could not define abstractions such as fabric, assemble, enormous, or

conceal (6 R 1145-46). When faced with simple problems, he was stumped (6 R 1146). He was, as defined by Section 393.063(42), Florida Statutes (1997), mentally retarded.

Because he suffered from this significant learning disability, defense counsel challenged the validity of his confession, specifically his ability to understand his Miranda rights (3 R 583-84). He also gave notice that he intended to present expert testimony of this disability to support mitigation of a death sentence(5 R 802). More fundamentally, he asked the court to declare Florida's death penalty statute unconstitutional because it failed to exempt the mentally retarded from being sentenced to death (10 R 1968).

Dr. Larson testified at the penalty phase of Thomas' trial, and his lawyer argued that his mental defects should preclude him from being executed (17 R 1162). With more detail than presented in the suppression hearing, this expert, without being challenged or contradicted, found Thomas to be functionally illiterate (17 R 1050), possibly suffering from Fetal Alcohol Syndrome (17 R 1050-51), identified as a "special education child," and suffered consequent emotional problems besides being mentally retarded (17 R 1050-51). While he attended school, and in fact had "quite good attendance," he was placed in special

education classes and stayed there until he was "granted a certificate of attendance." (17 R 1054-55).

Once released into the world, though, he began having problems.

> [T]here was a pattern of occupational dysfunction, that is he didn't hold jobs for long periods of time. He tried being a brick mason or a brick mason's helper. That didn't apparently work very well. According to his report he would be hired by certain employers but then he would be slow on the job and that he would be dismissed. For example, one time he described being hired by a hotel in the laundry. He didn't understand about the drying and so forth and apparently ruined some clothes, some linens as I recall. He did eventually work as a auto detailer, car detailer for Ed Cox Motors and apparently that was his greatest period of sustained employment. Even then it was only part-time employment; it wasn't full-time employment for a long period of time.

(17 R 1057)

Making this dull gray picture darker, he began, as a teenager, to use alcohol and marijuana, and did so more often as he grew older. "[H]e felt he was dependent on both alcohol and cocaine for the last year or so prior to the incident." (17 R 1058)

The trial court, accordingly, found in mitigation that Thomas was mentally retarded, and gave that fact "significant weight." (11 R 2170). It also concluded that Dr. Larson's testimony supported finding the statutory mental mitigator that he "was under extreme mental or emotional disturbance," and it

gave that factor great weight (11 R 2169). It rejected, however, finding the statutory mental mitigator that his capacity to appreciate the criminality of his conduct as being substantially impaired even though he was mentally retarded (11 R 2169).

While the court considered Thomas' retardation as mitigation, it erred in considering it only as such. That is, as argued below, mental retardation is so significant a disability, that like a defendant's very young age, a person's very low intellect, should absolutely bar, as a matter of state and national constitutional law, his execution for the murder he or she may have been convicted of committing. As a pure question of law, this Court should conduct a de novo review of the issue. Dept. Of Insurance v. Keys Title, 741 So. 2d 599 (Fla. 1st DCA 1999).

B. WHAT IS AND IS NOT MENTAL RETARDATION

The mentally retarded, as defined by Section 393.063(42), Florida Statutes (2000), have

> Significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.

A significant subaverage general intellectual functioning means, in practical terms, that the person has an IQ of 70 or less.

IQ, however, is not determinative, although it is the factor which generally receives the most attention. The person must also have deficiencies in his adaptive behavior, which means he has a general inability to cope with the demands of society.[6]

There are four levels of mental retardation. The great majority of those afflicted are mildly so; their IQs range from 50-55 to 70.[7] Those who are moderately retarded have IQs from 35-40 to 50-55, severely retarded 20-25 to 35-40, and profoundly retarded, below 20-25.[8] About two percent of the American population has this disability, and except for mild retardation, it is uniformly spread among all socioeconomic groups.[9] Lower social groups have an unusually high number of mildly retarded persons, which may reflect the generally poor diet and conditions for intellectual stimulation of this group.[10]

With the emphasis on intelligence, mental retardation thus is a learning disability. The retarded not only take longer to

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[6] Textbook of Psychiatry, ed. John A. Talbot, Robert E. Hayes, Stuart C. Yudofsky (Washington, D.C.: American Psychiatric Press, 1988), pp. 703-704.

[7] Id. p. 32. 89 percent of the mentally retarded fall into this category.

[8] Id.

[9] DSM III, p.31; Talbot, et al., Textbook of Psychiatry, p. 706.

[10] Talbot, et al., Textbook of Psychiatry, p. 706.

learn, there are some things they will never grasp, some abstractions they will never comprehend. Often they are compared with children and described as a child who is ten or eleven, and more often seven or eight years old. While such analogy has some merit, as with other efforts to compare the mentally retarded, it hides the problems they have. That is, even six- or seven-year-old children may have superior intellects than the retarded. For example, a young boy or girl typically learns a foreign language easily and quickly. A mentally disabled adult, who has the “mental age” of a child cannot do so at all. They grow older, but never wiser or smarter, and their minds remain trapped in childhood and childishness. They become a class of intellectual Peter Pans with clipped wings incapable of ever growing up.

Thus, while the mentally retarded have a learning disability, it is so extraordinarily severe that it manifests itself in ways that have little apparent connection with their ability to learn:

- Typically they have poor communication skills and a short memory.
- They are impulsive and have short attention spans.
- They tend to have immature or incomplete concepts of blameworthiness and causation.
- They will tend to deny and mask their retardation.
- They spend more time learning basic skills and less on the world in which they live.

- They tend to lack motivation to solve their problems.[11]

Compounding their problems, the mentally retarded have traditionally been grouped with the mentally ill, yet the two are very different.[12] Unlike mental illnesses, retardation is permanent. There is no cure for it and only a very limited treatment. Psychotropic drugs that often work miracles for the mentally ill have no use for them, and treating the retarded as if they were mentally ill does little good. The mentally ill have disturbed thought processes whereas the mentally retarded have a learning disability. As with normal peopled, the retarded person can suffer mental illnesses.[13]

Additionally, mental health professionals tend to overlook or misdiagnose retardation because relatively few of them have training in that specialized area.[14] Most focus on treating mental illnesses, so the majority of psychologists and

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[11] James W. Ellis and Ruth Luckason, "Mentally Retarded Criminal Defendants," 53 George Washington Law Review, 414, 428, 432; See also John Blume and David Bruck, "Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis," 41 Arkansas Law Review, 725.

[12] Ellis and Luckason, "Mentally Retarded Criminal Defendants," p. 424.

[13] Talbot, et al., Textbook of Psychiatry, p. 709. It is estimated that thirty percent of the retarded also have some mental illness.

[14] Ellis and Luckason, "Mentally Retarded Criminal Defendants," pp. 485-86.

psychiatrists bring a predisposition to look for such problems when they evaluate the retarded. Without realizing it, the experts may unwittingly misdiagnose a defendant who is mentally retarded.

C. OUR NATIONAL AND STATE STANDARDS OF DECENCY HAVE EVOLVED AND BECOME CLEARER IN THE LAST DECADE, SO THIS COURT SHOULD RE-EXAMINE THE QUESTION OF EXECUTING THE RETARDED.

Thomas realizes that this Court and the United States Supreme Court have found no state or federal constitutional impediment to executing the mentally retarded. Penry v. Lynaugh, 492 U.S. 302 (1989); Thompson v. State, 648 So. 2d 692 (Fla. 1994). He raises the issue, however, because in measuring whether a death sentence is "cruel and unusual" under the Eighth Amendment, or "cruel or unusual" under Article I, Section 17 of the Florida Constitution, courts look to the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958); Penry, at 330-31. As argued here, Florida and the rest of the United States have made significant changes in the seven years since this Court decided Thompson and the twelve years since the United States Supreme Court decided Penry. This Court has also revisited the analytically similar issue of executing children who murder, a question it, like mental retardation, had apparently resolved years ago. Brennan v. State, 754 So. 2d (Fla. 1999); Allen v.

State, 636 So. 2d 694 (Fla. 1994); LeCroy v. State, 553 So. 2d 750 (Fla. 1988). So, the time has come to consider again whether the Eighth Amendment or Article I, Section 17 of the Florida Constitution prohibit executing the mentally retarded.

1. **The evolving analytical framework.**

With the United States Supreme Court finding no constitutional barriers to capital punishment generally, Gregg v. Georgia, 428 U.S. 153 (1976), the question naturally arose concerning who could be executed. Analytically, the answer fell into two categories: the types of crimes committed, and the types of defendants who committed them. In the first category, the legislature initially defined the crimes it believed deserved capital punishment. Those who committed capital crimes, typically murders, and first degree murders at that, could be executed. Yet, this Court restricted even that narrow group by declaring that those who had committed a capital sexual battery -- that is, they had raped a child -- were spared a death sentence Buford v. State, 403 So. 2d 943 (Fla. 1981). Moreover, aiders and abetters of first degree murders who nevertheless had never intended a murder and were absent from the crime scene avoided a death sentence. Enmund v. Florida, 458 U.S. 782 (1982). Clearly, we want the punishment to fit the crime, and there is the sense that death, because it is a unique

and utterly final punishment, must be fitted to that very narrow of narrow class of murderers who show the most contempt for life.

Thus, if capital punishment is reserved for the “worst of the worst,” those who are the most morally culpable, then defendants whose intellectual capacity prevents them from becoming among the most deserving to die should be spared a death sentence. Naturally, courts initially focussed on children -- those who had immature or undeveloped consciences -- who had committed first degree murders. Later they examined whether the mentally defectives -- who also had immature and undeveloped minds -- who had committed and were found guilty of committing murders, nevertheless, should be spared a death sentence.

Thus, with a shared intellectual immaturity, they presented common questions: who are our children, and who are those with intellects so feeble that they should be exempted from the possibility of a death sentence? Predictably, the analytical methods that resolved those issues were the same. The youth problem came to the attention of the courts first, so it will be discussed because the analyses used to resolve that issue also was used in deciding whether the United States or the Florida Constitutions prohibited executing the mentally retarded.

In Thompson v. Oklahoma, 487 U.S. 815 (1988), a badly split court declared that children 15 years old who had murdered would be spared a death sentence. In reaching that result, the high court relied on a myriad of indicators to establish that society had moved beyond executing child killers. It noted that such youth could not legally drive cars, buy pornography, or gamble. Id. at 824. Significantly, all of the states had declared at least 16 years old as the maximum age the law considered a child still a child for criminal prosecutions. The court also noted that the American Bar Association and the American Law Institute opposed executing children, and several European nations prohibited their execution. It also emphasized that relatively few juveniles have ever been executed and generally society tolerated, or at least had not executed, wayward youth. Quoting from Eddings v. Oklahoma,[15] the court found "[A]dolescents, particularly in the early and middle teen years are more vulnerable, more impulsive, and less self-disciplined than adults." Thompson, at 834.

The next year, the dissenters in Thompson, formed the plurality in Stanford v. Kentucky, 492 U.S. 361 (1989), that upheld the constitutionality of executing 16-year-old defendants. In finding no fundamental law impediment, it used

[15] Eddings v. Oklahoma, 455 U.S. 104 (1982).

a much narrower base of evidence, the legislative expressions of the states, to determine the nation's "evolving standards of decency." It specifically rejected those factors found relevant in Thompson. It even dismissed as irrelevant or unpersuasive the federal statute that provided for capital punishment for certain drug offenses but exempted it for those defendants under 18 years old. Id. at 372. For the plurality, the "evolving standards of decency" were determined by taking a "snapshot" of what the state legislatures had determined to be the minimum age to execute a youth, and if the number met some undisclosed threshold the court would declare that American society had progressed to the point where certain juveniles would no longer be subject to a death sentence.[16]

Justice O'Connor provided the pivotal vote in Stanford, and in her concurring opinion, she specifically rejected the plurality's extraordinary narrow evidentiary basis on which it had relied to gauge the pulse of American decency. Stanford, at p. 382. She also concluded, as she had in Thompson, that the court had the obligation to conduct a "proportionality" analysis

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[16] This status quo method of this Eighth Amendment issue conflicts with the historical analysis implicit in the "the evolving standards of decency of a maturing society" language used in Trop. The "snapshot" method has the advantage, if not of reflecting the Trop idea, of being easily determined.

to determine if "the nexus between the punishment imposed and the defendant's blameworthiness is proportional." Id. (Internal quotations omitted.)

This analytical divisiveness over the evidence to use in determining the evolving standards of decency carried into the question of executing the mentally retarded. In Penry, the Stanford plurality[17] now joined Justice O'Connor in rejecting Penry's claim that the Eighth Amendment prohibited the execution of the mentally retarded. First, only two states, Georgia and Maryland, "currently bans execution of retarded persons." Id. at 334. Second, Penry could point to no evidence regarding how juries had viewed sentencing the retarded to death. Instead he relied on opinion polls (one having been conducted in Florida) that showed overwhelming support for the death penalty but an almost as equally strong opposition to imposing it on the retarded. Id. at 335-336. Finally, echoing the proportionality argument she had championed in Thompson and Stanford, Justice O'Connor could not conclude, "on the record before the Court today," that the mentally retarded should be categorically be spared a death sentence. Id. at 338.

[17] Justice Kennedy had taken no part in Stanford, but joined that plurality in Penry.

In the intervening 12 years, the record has become much clearer that 1) the states have executed very few mentally retarded defendants, and 2) more states prohibit putting them to death. The immature "record" in 1989 has become significantly better defined, and with a maturing clarity it unmistakably shows that America has rejected executing the mentally retarded. Notably, since Penry twelve more states, or on average one per year, have banned or prohibited by law executing the mentally retarded, so that now 13 States that allow executions generally, specifically ban putting to death mentally retarded killers.[18] To that number we must add the twelve states that have banned all executions. Thus, 25 states, or half of those in the union, prohibit the execution of the mentally retarded. Additionally, federal law, a strong reflection of the national will, and an extra-ordinarily powerful piece of "objective evidence" of contemporary values, still prohibits executing the mentally retarded.[19] These numbers clearly point to an evolving rejection

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[18] Arkansas, Colorado, Indiana, Kansas, Kentucky, Maryland, Nevada, New Mexico, New York, South Dakota, Tennessee, Washington. Source: Death Penalty Information Center. Http://www.deathpenaltyinfo.org/dpicmr.html.

[19] Federal Anti-Drug Abuse Act of 1988, Pub.L. 100-690 Section 700(1), 102 Stat. 4390, 21 U.S.C. Section 848(1)(1988 ed.); Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. Section 3596(c) (1994). Interestingly, in Penry, Justice O'Connor acknowledge the federal law but then

of executing our intellectual defectives. Other evidence supports that conclusion. Of the 38 states that have enacted death penalty statutes since 1976, 8 have had no executions.[20] That they have not used it in the past quarter century strongly suggests that as a matter of practice they have abolished it.

Moreover, if we look at the number of executions since 1976 -- evidence of what the juries have said about executing the retarded -- the numbers confirm two trends: capital punishment, at least among six states,[21] remains popular, but executing the mentally retarded, never strongly favored, has become increasingly less so. Indeed, since 1996, between 71 and 98 persons have been executed every year, yet in the same period only one or two, and in 1998, none, were put to death who were mentally retarded. (See Appendix A).

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blatantly ignored it in her analysis finding no national consensus regarding executing the retarded.

[20] Connecticut, Kansas, New Hampshire, New Jersey, New Mexico, New York, South Dakota, Tennessee. Source: Death Penalty Information Center. Http://www.deathpenalty info.org/percapita.html

[21] Of the 38 states that allow capital punishment, 8 have never executed anyone, 17 have executed between one and 11 defendants, 7 have executed between 12 and 23 persons, and only six (including Florida) have executed more than 24 defendants. That is, only six states have executed more than one person per year for the last quarter century. Source: Death Penalty Information Center. Http:www.deathpenaltyinfo.org.percapita.html.

In Ford v. Wainwright, 477 U.S. 399 (1986), the Supreme Court held that the Eighth Amendment's evolving standards of decency prohibited the execution of the insane. That 26 states had statutes that explicitly said that the insane would be spared executions provided strong evidence that the United States had evolved to the point where no state should permit that. Concerning the mentally retarded, similar facts exist, clearly pointing to the inescapable conclusion that we no longer, if we ever did, want to execute the mentally defective.

Regarding putting the mentally retarded to death, the trend has become as clear that we as a nation have, as a practical matter, rejected executing the retarded. Said another way, it is unusual that we do so. The evolving standards of decency, even under the very narrow Penry measure, have become much clearer in the last twelve years, and they inexorably lead to the conclusion that America no longer wants to, and in fact does not, execute the mentally retarded.

This Court should, therefore, find that executing the mentally retarded in Florida violates the Eighth Amendment to the United States Constitution.

2. **Florida's measures of the evolving standards of decency**.

This Court, like the United States Supreme Court, considered the problems of executing children before it focussed on

imposing a capital sentence on the mentally retarded. Its state constitutional analysis, as it had to, sharply differed from that used by the nation's high court because it had to examine how Florida had treated its youth. In LeCroy v. State, 533 So. 2d 750 (Fla. 1988), this Court, rather than taking a "snapshot" of the current status of the issue in the states, followed more faithfully the method implied by Trop, and it examined the legislative history of Florida's treatment of juveniles to detect our evolving sense of decency in this area.[22] Limiting that historical inquiry to an examination of how the State had dealt with minors charged with crimes, it concluded that "legislative action through approximately thirty-five years has consistently evolved toward treating juveniles charged with serious offenses as if they were adult criminal defendants."[23] Hence, if we have charged them as adults we will punish them as adults.

Significantly, Justice Barkett, dissenting from that conclusion, had a broader historical analysis. In concluding that the Florida legislature was more concerned with and benign towards its youth, she considered legislation regulating the age they could marry, begin drinking alcohol, have an abortion,

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[22] 533 So. 2d 750 (Fla. 1988).

[23] LeCroy, supra, p. 757.

vote, and other rights and privileges adults enjoy. "In my view, that line should be drawn where the law otherwise distinguishes 'minors' from adults." Id., at 759. Without explicitly saying so, she had followed Justice O'Connor's proportionality approach to the issue of executing juveniles convicted of committing first degree murders. "I cannot agree .... That one whose maturity is deemed legally insufficient in other respects should be considered mature enough to be executed in the electric chair." Id.

This Court subsequently reconsidered the issue in two cases. Allen v. State, 636 So. 2d 494 (Fla. 1994); Brennan v. State, 754 So. 2d 1 (Fla. 1999). In Allen, it declared that executing 15-year-old Allen would violate Article I, Section 17 of the Florida Constitution because "death almost never is imposed on defendant's of Allen's age." Id. at 497. Five years later, with considerably more discussion and dissent, it extended that holding to include 16-year-old defendants. Brennan at pp. 5-10.

In reaching that conclusion, the majority similarly interpreted the State constitution to justify its decision. Using a different analytical method than employed in LeCroy, this Court concluded that "at least since 1972, more than a quarter of a century ago, no individual under the age of seventeen at the time of the crime has been executed in

Florida." Id. at p. 7. Moreover, of those sentenced to death who were 16 years old, everyone had his death sentence reduced by this Court -- although not always because of the defendant's youth. In short, it was unusual to execute a child, and hence violative of Article I, Section 17's prohibition against "cruel or unusual" punishments.

Justice Anstead, concurring, emphasized two points. First, imposing a death sentence on a teenage defendant was unusual. Second, he echoed the analysis that Justice Barkett had made in LeCroy, that found relevance in other legislative acts that prescribed the rights and responsibilities of children. Id. at p. 12.

3. **Executing the mentally retarded in Florida**.

The analytical stage thus was set for this Court to consider whether the Florida Constitution prohibited executing the mentally retarded. Although it resolved that issue in Thompson v State, 648 So. 2d 690 (Fla. 1994), that case was not, of course, the first one this Court had considered involving a mentally retarded defendant. Until presented with the issue, however, it had refused to rule on the constitutionality of executing the retarded, though at least three members of this Court in dissenting opinions would have found a constitutional impediment to executing the mentally retarded. Woods v. State,

531 So. 2d 79 (Fla. 1988). Instead, it recognized that disability as mitigation, and more often than not accorded it significant consideration in justifying reducing a sentence of death. Cochran v. State, 547 So. 2d 928 (Fla. 1989)(Trial court should have followed jury's life recommendation because the defendant had an IQ of 70, a long standing mental deficiency, and was likely to become emotionally unstable under stress.); Brown v. State, 526 So. 2d 903 (Fla. 1988)(Judge should have followed jury recommendation of life for murder of police officer who had been killed while trying to arrest Brown for robbery where the latter had an IQ of 70-75, had been in a school for the emotionally handicapped, and had the emotional maturity of a pre-schooler); Livingston v. State, 565 So. 2d 1288 (Fla. 1990)(Death sentence reduced to life in prison despite a jury recommendation of death because the defendant had a childhood marked by severe beatings, parental neglect, and an intelligence that could "best be described as marginal."); Kight v. State, 512 So. 2d 922 (Fla. 1987)(Death sentence affirmed for defendant who, though having an IQ of 69 and who had been abused as a child showed more deliberation and planning than is typical of most mentally retarded persons).

While these cases dealt with mentally defective defendants, none of them specifically challenged the constitutionality of

executing the mentally retarded. That occurred in 1992 and 1993. It dodged the issue in Watts v. State, 593 So. 2d 198 (Fla. 1992), by noting that the defendant there had an IQ of 71, which placed him one or two points above the statutory limit of 70 as defined by Section 393.062(42), Florida Statutes (1990). In Taylor v. State, 630 So. 2d 1038 (Fla. 1993), even though the trial court found the defendant mentally retarded, this Court avoided resolving the constitutional question by noting that only the defendant's mother had said he was retarded. "[N]either the jury, the trial judge, nor this Court has any other empirical data of Taylor's mental condition." Id. at 1041.

Some members of the Court, however, became increasingly disturbed by the retardation attack. In Hall v. State, 614 So. 2d 473 (Fla. 1993), the majority opinion made only scant mention of Hall's mental problems, and none regarding his mental retardation. Justice Barkett, joined by Justice Kogan, however, laid out Freddy Hall's mental condition in their dissent from the affirmance of his death sentence. Then, in the most extensive treatment to date of the constitutional problems in executing the retarded, Justice Barkett noted that the Florida legislature had shown more compassion and leniency for the

retarded. Thus, she found that executing the retarded to be "cruel and unusual."

> First, because a mentally retarded person such as Freddie Lee Hall has a lessened ability to determine from wrong and to appreciate the consequences of his behavior, imposition of the death penalty is excessive in relation to the crime committed....
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> Second, executing a mentally retarded defendant such as Hall is "unusual" because it is disproportionate. Because mentally retarded individuals are not as culpable as other criminal defendants, I would find that the death penalty is always disproportionate when the defendant is proven to be retarded.

Hall, at 481 (Citations omitted).

The Court rejected Justice Barkett's argument, by ignoring it, the next year in Thompson v. State, 648 So. 2d 692 (Fla. 1994). Relying only on Penry and conducting no historical analysis similar to that it had done in LeCroy, this Court simply "elected to follow the approach suggested by the United States Supreme Court and treat low intelligence as a significant mitigating factor with the lower scores indicating the greater mitigating influence." Id. at 697. Adopting the Penry holding meant it also accepted that court's analytical approach, but by doing so, this Court ignored the fundamental difference between the United States Supreme Court and the Florida Supreme Court and its obligation interpret the Florida Constitution's "cruel or unusual" clause found in Article I, Section 17. The former has a national jurisdiction that arguably justified its

"snapshot" analysis of what the states had done with regard to executing children and the mentally retarded. Such an approach has no applicability for this State that must look for evidence of its evolving standards of decency.

Hence, as will be shown in the next two parts, 1) the historical approach used in LeCroy unmistakably shows that when applied to mental retardation we have grown increasingly sensitive to and compassionate towards those members of our society who are developmentally disabled. More specifically, they are accorded special treatment by the law when they are charged with a crime. 2) Moreover, as the Eighth Amendment analysis has shown, nationally we execute the retarded so rarely, and in Florida we have never done so, that it is unusual that we put them to death.

4. **The history of Florida's treatment of the mentally retarded**.

Of course the retarded have always been with us, and in ancient and early modern times they most frequently surfaced as the court "fool" or the village idiot. The first systematic treatment and study of these developmentally disabled in the United States began in the mid to late nineteenth century in Massachusetts. Doctor Gordon Howe convinced that state's legislature to pay for a study to determine how many feeble minded lived in that state, and later to fund a small

experimental residential institution, organized "upon the plan of a family with a kind and mother person in care."[24] His exclusive concern was to train and educate them so they could be returned to their families and communities.[25]

Others, however, viewed the retarded differently. The late nineteenth and early twentieth centuries saw the rise of two developments that would have consequences that reach to this case. In America and Europe, a "social Darwinism" emerged that applied the theory of evolution to the human race.[26] The survival of the fittest of a species exalted individual intellectual capabilities as the defining reason why some people succeeded and others failed. More significantly, those abilities were inherited or passed from one generation to another. Hence, along with this novel view of humanity evolved the eugenics movement. Those who followed its precepts believed they could assist nature in insuring the survival of the best and the brightest by eliminating the weak and deficient. This movement achieved remarkable and widespread popularity, but it

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[24] MR 76: Mental Retardation: Past and Present, President's Commission on Mental Retardation, Washington, D.C. January 1977, p. 3.

[25] Id. 4-5.

[26] Michael P. Maloney and Michael P. Ward, Mental Retardation and Modern Society (New York, Oxford University Press, 1979), pp. 37 et. seq.

had an obvious darker underside, namely the survival of the fittest meant the survival of the white, normal race. African Americans, immigrants, and the mentally retarded were lumped together and seen as those whom the harsh laws of survival had deemed unfit to continue.

As this social Darwinism and the eugenics movement took hold in America, other attitudes began to change, and Dr. Howe's humane view of the village idiot as a poor unfortunate deserving compassion transformed. The feeble minded became one who had an abnormally strong and ungovernable sexual appetite. "[F]eeble minded women are almost invariably immoral, and if at large usually become carriers of venereal disease and give birth to children who are as defective as themselves."[27] More ominously, the retarded accounted for an extraordinary amount of criminal activity. "They cause unutterable sorrow at home and are a menace and danger to the community ... Every feebleminded person, especially the high-grade imbecile, is a potential criminal ... at least 25 percent of the inmates of our penal institutions are mentally defective.... It has been truly said

[27] XVII Journal of Psychoasthenics 70-91 (1912)

that feeble mindedness is the mother of crime, pauperism and degeneracy."[28]

Other large societal movements also aided making the retarded pariahs. Along with the industrial revolution, the nineteenth century saw the rise of publicly supported education. For the vast majority of American children this was an unquestioned boon, but for the retarded, it only signaled their further isolation from mainstream America. Mass, public education, of necessity, focuses on the intellectual abilities of the "normal" child. Those who were either very bright or very dumb typically fared poorly in a system that modeled itself after Henry Ford's assembly line. How did states, therefore, identify the abnormal from the unusual? In 1905, Alfred Binet solved that problem by developing the IQ test to measure the intellectual development of children. For the first time America had an "objective" measure by which the retarded could be identified and separated from normal society. They were not alone, however, because the test achieved a widespread popularity and found applications far beyond those of classifying school children. Soldiers and immigrants were tested, and the results only justified the eugenics position

[28] W.E. Fernald, "The Burden of Feeblemindedness," XVII Journal of Psychoasthenics, 90-98.

that blacks, immigrants, and the feeble minded were major contributors to the weakening of American society.[29]

As the data from these tests accumulated, America discovered that the mentally retarded population was exploding, and the nation began to seriously consider what it should do about this looming "menace of the moron."[30] The essentially benign view of Dr. Howe in which the "poor unfortunate" was treated with a degree of compassion transformed into one in which the feebleminded became the scourge of modern and white America. To combat this flood of low IQs, the states soon realized it had only three options: sterilize the mentally retarded, euthanasia, and/or segregate them from normal, mainstream society. Accordingly, by the mid 1920's, more than a dozen state legislatures had enacted compulsory or forced sterilization laws designed to prevent the retarded from reproducing their kind. Interestingly, many state supreme courts struck them down as unconstitutional denials of the due process rights of the retarded, but in the famous, or infamous, case of Buck v. Bell, 274 U.S. 200 (1927), Justice Oliver Wendall Holmes, speaking for a court that had only a single dissenter, found a rational purpose in Virginia's law that

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[29] Mental Retardation and Modern Society, p. 51.

[30] Mental Retardation and Modern Society, p. 45.

authorized the forced sterilization of the retarded Carrie Buck. “It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes .... Three generations of imbeciles are enough.” Id. at 207 (citations omitted.)

Such language, however outrageous it now sounds, reflected the opinion of most Americans. In 1937, 66% of the public favored the involuntary sterilization of the mentally retarded, and 63% approved the forced sterilization of habitual criminals.[31] Within ten years of that decision, another twenty states had enacted compulsory sterilization laws, and many passed laws prohibiting the mentally retarded from marrying.[32] Accordingly, it is estimated that 60,000 Americans were forcibly sterilized during the 1930's.[33] America, however, stopped short

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[31] Lori B. Andrews, “Past as Prologue: Sobering Thought on Genetic Enthusiasm,” 27 Seton Hall L. Rev. 893, 895-96 (1997).

[32] Deborah Hardin Ross, “Sterilization of the Developmentally Disabled: Shedding some Myth Conceptions,” 9 Florida State University Law Review 599, 606 (1981).

[33] Maxwell J. Mehlman, “The Law of Above Averages: Leveling the New Genetic Enhancement Playing Field,” 85 Iowa Law Review. 517, 593 (January, 2000).

of taking the next logical step, euthanasia. Nazi Germany did not, and during Adolph Hitler's reign between 50,000 and 300,000 mentally retarded were exterminated.[34]

Segregation of the mentally retarded from the mainstream of society became an alternative the states also used. It is also the method Florida adopted although evidence indicates we also employed sterilization at times.[35] Segregation meant institutions, or "farm colonies" as we called them, and those were far different in kind and philosophy from the benign and beneficent, homelike institution Dr. Howe had envisioned. They degenerated into prison-like warehouses, unsafe, unsanitary, and ignored, where custody replaced care as the model on which they were run.

In many ways, Florida's approach to dealing with the mentally retarded reflected the national panic. In 1915,

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[34] Eric Shwartz: "Penry v. Lynaugh: 'Idiocy' and the Framer's Intent Doctrine," 16 New England J. on Crime and Civil Confinement 315, 332 (Summer 1990). Echoing the eugenics philosophy, Hitler said "Such mating is contrary to the will of Nature for a higher breeding of all life. . . .The stronger must dominate and not blend with the weaker. . . . Only the born weakling can view this as cruel, but he after all is only a weak and limited man. . . ." Adolf Hitler, Mein Kampf, 285 (Ralph Manheim trans. Houghton Mifflin 1999) (1938)

[35] As late as 1975, Florida was sterilizing mentally retarded wards of the state. Powell v. Radkins, 506 F.2d 763 (5th Cir 1975).

Governor Park Trammell appointed a committee to "investigate the needs of a State Institution for the care of Epileptic and Feeble-Minded." Four years later, it had completed its task and the results shocked the legislature.

> The said Report indicates that the survey made by the said Committee has been searching and exhaustive and shows an alarming state of facts which should be submitted to the consideration of this Legislature; and .... There can be no doubt but that there should be established and created in this State an Institution for the care of Epileptic and Feeble-Minded, where they can be segregated and more economically cared for than through the numerous charitable institutions now burdened with this unfortunates.

Chapter 7887, Laws of Florida (1919). Reflecting the hysteria of the nation, the legislature created the farm colony

> to the end that these unfortunates may be prevented from reproducing their kind, and the various communities and the State at large relieved from the heavy economic and moral loses arising by reason of their existence.

Section 8, Chapter 7887, Laws of Florida (1919).[36]

So, in 1919, Florida created its farm colonies for the epileptic and feeble minded, converting old tuberculosis hospitals into institutions that in time became euphemistically known as "Sunlands." As befitting the legislative attitude,

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[36] Section 7 of the act allowed the parole of children kept at the farm colony if it was determined "that the child will be in good care, that he or she will be protected and the community protected against him or her. . ."

they were always underfunded. There were, of course, no black Sunlands. Indeed, African-Americans were denied admittance, which in hindsight must certainly qualify as a blessing.[37] By the early 1970s, these institutions had become undeniable snakepits of human misery, models of administrative incompetence of criminal proportions, and open sores on the conscious of this state.[38]

Following the Second World War, attitudes towards the mentally retarded began to soften. Social Darwinism and the foundations on which eugenics developed came under much closer, critical scrutiny, and were eventually discredited. Also, the atrocities committed in the name of eugenics in Nazi Germany emerged. Finally, organizations such as the Association for Retarded Children (later renamed the Association for Retarded Citizens) were organized and began pressing for legislative and judicial recognition of the rights of their retarded children, brothers and sisters, and friends.

Progress, however, was slow and spotty. The United States Supreme Court effectively rejected Buck v. Bell in Skinner v.

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[37] Stephen Noll, Feeble-Minded in Our Midst: Institutions for the Mentally Retarded in the South, 1900-1940 (Chapel Hill, NC, University of North Carolina Press: 1995), pp. 94-95.

[38] Indeed, as early as 1945, the governor "excoriated the Farm Colony for its appalling conditions.. . ." Id. at p. 93.

Oklahoma, 316 U.S. 535 (1942). In 1961, President John Kennedy convened the first President's Panel on Mental Retardation which produced the highly influential report titled "National Action to Combat Mental Retardation."[39] Reflecting a more humane and compassionate understanding of mental retardation, it recommended 1) that services for the retarded be developed at the community level, 2) that all retarded children be educated, and 3) that the welfare, health and general social conditions of the disadvantaged be improved.[40] Accordingly, over the next two decades Congress passed several pieces of legislation specifically aimed at protecting the mentally retarded.

1. Rehabilitation Act of 1973. 29 U.S.C. Sec 794- unlawful to discriminate against the mentally retarded in federally funded programs.

2. Developmental Disabilities Assistance and Bill of Rights – 42 U.S.C. Secs 6010(1),(2) – Mentally retarded have the right to receive 'appropriate treatment, services, and habilitation' in a less restrictive setting of their personal liberty.

3. Education of the Handicapped Act , 20 U.S.C. Sec 1412(5)(B). Federal educational funds conditioned on States' assurances that mentally retarded children will have an education that "to the maximum extent appropriate," is integrated with that of nonmentally retarded children.[41]

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[39] Mental Retardation and Modern Society, at p. 67.

[40] Id.

[41] Though not the result of legislative action, the mentally retarded are exempt from taking competitive exam for

Florida had no similar executive call to action, and our path to recognizing the rights of the mentally retarded and showing them greater compassion required the threat of judicial action before the legislature ameliorated the abominable conditions in which we had imprisoned the retarded.

In the early 1970s, several press exposes of the conditions at the Sunlands and dozens of lawsuits around the nation, and particularly one in Alabama brought the plight of the retarded kept in state care to the attention of the legislature. In Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), Judge Frank Johnson virtually shut down Alabama's institutions that purportedly cared for the mentally retarded. In its place, he ordered the state to implement new guidelines to protect the constitutional rights of the retarded and insure they were trained and cared for. Two years later in Florida, and in response to the Alabama opinion, the Secretary of the Department of Health and Rehabilitative Services, and the House of Representatives, created committees to study Florida's treatment of the mentally retarded. The members of these commissions spent several days visiting and inspecting the various Sunlands, and each issued reports that year or the next that painted a

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federal civil service. 5 CFR Sec 213.3102(t) (1984).

picture of extensive criminal neglect and gross incompetence.[42] Briefly, and in summary form, they concluded:

1. Sunland Training Centers

a. Between 40 and 60 percent overcrowded. "In general, the Sunland environments are drab, dirty, restrictive and archaic .... As one approaches a Sunland Center, the first thing noticed is the fence and the guard station, sometimes referred to as 'the information center.'" (Select Committee No. 1, p. 5).

b. Buildings are in a poor state of repair and maintenance. In many of the Sunlands, drains in the middle of floors collected filth "resulting in odor emanations." They were also very noisy. (Select Committee No. 1, p. 5) Privacy was almost non-existent. "In one case, teenage girls and boys were using the same, relatively open, toilet facility." (Select Committee No. 1, p. 7) Sunlands are "huge, rambling institutions," but the residents are cramped for space." (House Report, p. 33)

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[42] The House Committee on Health and Rehabilitation Services' Report was titled "Report of the Subcommittee on Retardation" and will be referred to as "House Report." The report of the Secretary of the Department of Health and Rehabilitative Services was titled "Report of the Select Committee on Retardation." It consists of three sub-reports and will be referred to as "Select Committee Report No.--."

2. Standards. No one saw a single program that would meet accreditation standards.

a. Grossly insufficient numbers of trained direct care staff, including psychologists, physical, occupation, recreational therapists, educators, and social workers. Deficiencies have existed for years.

b. What trained personnel existed often had to do clerical or housekeeping work. (Select committee No. 1, p. 6)

c. Fire and safety standards were so critically absent that “the physical plants ... were obviously dangerous and should be phased out immediately.” (Select Committee No. 1, p. 7)

d. “Physical needs such as adequate diet, environment and amelioration of physical maladies and disease must be addressed.” (House Report, p. 29)

e. “Many times residents of the Sunlands were in physical danger. (Select Committee No. 3, p. 9) There were “lawless situations with a high prevalence of injury and accident reports.” (Select Committee No. 3, p. 9) “[T]here are few, if any, permanent well-planned or executed programs in the institutions for dealing with these aggressive clients.” (House Report, p. 27)

f. Patients were subjected to dehumanizing treatment that led to deterioration. “Some residents are misplaced”

g. No or very few habilitation programs existed. Staff merely watched residents. (Select Committee No. 3, p. 10) “Residents suffer from a lack of activities -- for the most part many remain with time on their hands .... [A]ny learned behaviors are more likely to be extinguished than nurtured by the environmental atmosphere and physical plant deficiencies .... [A]ny prolonged stay ... can only be detrimental to the resident ... [T]he longer a person stays in a Sunland, the worse off they are ...” (House Report, pp. 32-33)

h. Residents were “dumped” out of institutions, creating “serious post institutionalization problems.” Considerable pressure to leave the institution has apparently been placed on parents and clients, described by one informant as ‘harassment.’” (Select Committee No. 3, p. 11.)

3. Personnel.

a. Low, essentially noncompetitive and “embarrassing,” salaries.

b. Insufficient pre-service and in-service training

c. “The direct care staff ... still look upon their roles as primarily custodial.” (Select Committee No. 1, p. 8) Severe shortage of direct care staff, and those hired were

generally very poor quality. (Select Committee No. 3, p. 7) Staffing ratios are so inadequate at most institutions so as to effectively preclude the possibility of any meaningful intervention with retardation." (House Report, p. 32) "Serious inter-staff conflicts and improper sexual conduct occurring openly between staff were reported by several informants." (Select Committee No. 3, p. 7)

d. Morale was very low. High levels of internal tension existed. Some staff members were described as "deadwood," protected from being fired by the Career Service Program (Select Committee No. 2, p. 7) "There is an alarmingly high staff turnover." (Select Committee No. 3, p. 8) Absenteeism was very high (Select Committee No. 3, p. 10)

e. Staff positions had been unfilled for years. The central office created "roadblock after roadblock to hiring new staff."

4. Health care

a. Generally very poor. "Minimal medical care cannot be delivered." (Select Committee No. 1, p. 9)

b. Mortality rates "on the surface, [appears] to be unusually high." (Select Committee No. 1, p. 10)

5. Progress of the Division of Retardation over the past three years.

a. “The Division has changed from a custodial philosophy to one which emphasizes the humanistic and basic needs as well as legal rights of the retarded.” (Select Committee No. 2, p. 2) Yet, there is a “vast discrepancy between the Division’s policies and stated philosophy and actuality.” (Select Committee No. 3, p. 3) “[I]n reality practice sometimes obscures any rhyme or reason found on paper and the average ... consumer has serious problems dealing with the division.” (House Report, p. 18)

b. “Good management practices appear to be virtually absent in the central office.” (Select Committee No. 2, p. 2) “Changes in policy and procedure were ... common and without explanation or apparent understanding.” (Select Committee No. 3, p. 4)

c. Staff meetings are crisis oriented.

d. Staff does not have necessary administrative skills to manage the Division.

e. Total system is uncoordinated.

f. Budgeting is ineffective

g. “Personnel practices are open to serious question.”

h. “It is difficult to assess the Division’s use of resources”

i. “There is a great deal of confusion related to the administration and responsibility for on-going programs.”

j. “Communications appear to be confused or non-existent.

k. “One must seriously question whether or not a Division can be operated on the basis of a philosophy without addressing the pragmatic problems.”

l. “There is no evidence that the Division had developed any specific plans for addressing previous recommendations.” (Select Committee No. 2, p. 6)

m. The legislature had appropriated no money to implement any of the recommended changes (Select committee No. 2, p. 7)

The legislature, thus, had good reason to be alarmed at the possibility of litigation, particularly when the House Committee’s report noted that the court in Wyatt v. Stickney had identified three “fundamental conditions,” none of which any Florida Sunland met, necessary for adequate and effective treatment:

1. A humane psychological and physical environment.

2. Qualified staff in sufficient numbers to properly conduct their disciplines; and

3. Individualize treatment plans.

Thus, when the United States Supreme Court examined the history of the treatment of the mentally retarded, its conclusions had deep resonance with Florida's history of treating the mentally defective

> Even so, the Court of Appeal correctly observed that through ignorance and prejudice the mentally retarded 'have been subjected to a history of unfair and often grotesque mistreatment.

City of Clerburne, Texas v. Cleburne Livings Center, 473 U.S. 432, 454 (Stevens, Burger concurring)

> [T]he mentally retard have been subject to a 'lengthy and tragic history, of segregation and discrimination that can only be called grotesque.... A regime of state-mandated segregation and degradation ... emerged that in its virulence and bigotry revealed, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and 'nearly extinguish their race.' Retarded children were categorically excluded from public schools, based on the false stereotype that they were ineducable and on the purported need to protec nonretarded children from them. State laws deemed the retarded 'unfit for citizenship.

Id. at 461-62 (Marshall, dissenting).

> Persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility.

Olmstead v. L.C. ex. rel Zimring, 527 U.S. 581, 605 (1999)(Kennedy concurring).

With these reports in hand, and costly litigation looming, the legislators convened in 1975 to make major changes in the

way Florida treated its mentally retarded citizens.[43] Initially, some thought that enacting a "Bill of Rights for the mentally retarded" would avoid litigation similar to that in Alabama. Indeed, the Staff analysis to a 1975 House Bill creating such a bill of rights expressed that hope.

A "Bill of Rights" and all other similar state legislation is to provide an indication of good intent on the part of a state to bring treatment and habilitation standards as well as protection of human rights of retarded individuals under the state's care up to appropriate normalization standards. This is done in anticipation of litigation suites such as Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972).

This bill approaches the most urgent problems in the Wyatt v. Stickney case by attempting to implement the massive reforms as urgently needed by our mentally retarded citizens.

By an indication of the state's good intent as indicated in the bill it is felt that costly suits against the state will be averted.

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[43] During the previous two years a variety of select and ad hoc subcommittees had studied Florida's system of care for the retarded. (House Committee Report, p. 13) In 1974 the legislature enacted Chapter 74-227, Laws of Florida, which provided for a three year phase-in program of instructional programs for all severely and profoundly retarded children. (House Committee report, p. 49)

The novel Bill of Rights the legislature enacted that year recognized the grievous, criminal conditions that had grown and festered, and it addressed the gross, inhuman and inhumane conditions that it had allowed to exist since the eugenics heyday of 1920's and 30's. That it saw a need to provide a bill of rights to protect freedoms "normal" society considered as unquestioned, inalienable rights provided a damning admission of how much abuse had gone on in the name of the State. This "Bill of Rights of Retarded Persons"[44] provided 13 rights, which were

1. The right to dignity, privacy and humane care;

2. The right to religious freedom;

3. The right to unrestricted communication;

4. The right to possession and use of personal property;

5. The right to education and training;

6. The right to medical treatment

7. The right to opportunities for leisure time activities;

8. The right to appropriate physical exercise;

9. The right to humane discipline;

10. The right to freedom from noxious or painful stimuli;

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[44] That title was later changed to "The Bill of Rights of Persons who are Developmentally Disabled."

11. The right to fair and just compensation for labor;

12. The right to freedom from physical restrain; and

13. The right to a confidential central record.

Significantly, violators of those rights could be "liable for damages," and those involuntarily committed had the right to petition for a writ of habeas corpus.

Indeed, the legislative intent found in Section 393.13(2), Florida Statutes (1975), acknowledged the abominable conditions the State had allowed to exist:

> Further, the current system of care for retarded persons is in need of substantial improvement in order to prove truly meaningful treatment and habilitation.

More than a confession of sins, the legislative intent showed that Florida had firmly rejected the eugenics/social Darwinism segregation of the early twentieth century in favor of the more humane, compassionate "normalization" first advocated by Dr. Howe. To realize that benign goal, the 1975 legislature declared that it intended to:

> 1. Reduce the use of large institutions, and rely on them only as a last resort. Even if needed, "it should be in the least restrictive setting."
>
> 2. Increase the development of community based services that realize settings that are the least restrictive to the client.
>
> 3. Provide training and education to the retarded to help them fully realize their potential.

4. Acknowledge and protect the rights of the retarded.

5. Provide individual treatment programs.

6. Fund the plans developed.

7. Provide adequate medical, social, habilitative and rehabilitative, and educational services to the retarded.

8. Finally, "it is the clear, unequivocal intent of this act to guarantee individual dignity, liberty, pursuit of happiness, and protection of the civil and legal rights of mentally retarded persons."

As matters turned out, the legislature provided more than mere lip service, and the 1975 law became only a down payment to fulfilling what it had declared that year. Since then it has strengthened the rights of the retarded and departed from the custodial, incarceration model that had historically characterized its institutions and attitudes to the mentally defective. It has done this by 1) seeking to have patients live as normal a life as possible, while 2) providing special protections to them in light of their intellectual deficiencies. In virtually every aspect of the law and legislation, and particularly in the criminal law, Florida since 1975 has sought to treat the mentally retarded with more humanity and understanding. Such special treatment clearly indicates that it also does not want to execute those mentally deficient people who have committed first degree murders.

1. Normalization. Several laws and judicial opinions promote treating the retarded as normal as possible:

a. Unless they have been declared incompetent, the retarded can vote. Article VI, Section 4, Florida Constitution. Merely being so disabled, even if institutionalized, does not render one "incompetent." Op. Att'y Gen. Fla. 074-15 (1974).

b. Similarly, for health care purposes, incompetency is not inferred from the hospitalization, involuntary or not, of the retarded. Section 765.204, Florida Statutes (2000 Supp.).

c. The retarded can buy and sell land. Section 689.03, Florida Statutes (2000 Supp.). Hassey v. Williams, 174 So. 9 (1937) (Deed of a feeble-minded person is voidable only, depending on the circumstances of the sale.); Foster v. Martin, 436 So. 2d 143 (Fla. 2d DCA 1983).

d. They can make wills. Section 732.501, Florida Statutes (2000 Supp.).

e. Retarded children have the same or similar amount of time in school as normal children. Section 402.22, Fla. Stat. (2000 Supp.).

f. For purposes of vocational rehabilitation, the retarded is considered as a "person who has a severe disability." Section 413.20, Florida Statutes (2000 Supp.).

g. Employers can be reimbursed for worker's compensation losses incurred by a retarded employee from a "Special Disability Trust Fund. Section 440.49(6), Florida Statutes (2000 Supp.). The legislature created this fund recognizing that "it is often difficult for workers with disabilities to achieve employment or to become re-employed following an injury, and it is the desire of the legislature to facilitate the return of these workers to the workplace." Section 440.49(1), Florida Statutes (2000 Supp.).

h. The retarded who escaped from prison, jail, or a hospital can be extradited. Section 941.38, Florida Statutes (2000 Supp.).

i. The mentally retarded can be competent to testify. Simmons v. State, 683 So. 2d 1101 (Fla. 1st DCA 1996)

2. Special protections for the retarded. While legislation has consistently sought to provide "normalization" for the retarded, Floridians have more strongly recognized that they are different and deserve special protections because of their intellectual deficiencies. Hence, far more legislation and judicial activity has reflected the desire to protect the mentally deficient.

a. Mentally retarded qualify for Medicaid benefits. Section 393.063, Florida Statutes (2000 Supp.).

b. If they are covered by a group insurance policy as a child, it can continue after they reach the limiting age. Section 627.6615, Florida Statutes (2000 Supp.).

c. The same is true if they belong to a health maintenance organization. Section 641.31, Florida Statutes (2000 Supp.)

d. Several statutes that initially were designed to protect children when called to testify were expanded in 1994 to include the mentally retarded.

1. Section 92.53, Florida Statutes (2000 Supp.). Videotaping of testimony of victim or witness under age 16 or person with mental retardation

2. Section 92.54, Florida Statutes (2000 Supp.). Use of closed circuit television in proceedings involving victims or witnesses under the age of 16 or persons with mental retardation.

3. Section 92.55, Florida Statutes (2000 Supp.). Judicial or other proceedings involving victim or witness under the age of 16 or person with mental retardation; special protections.

4. Section 914.16, Florida Statutes (2000 Supp.). Child abuse and sexual abuse of victims under age 16 or persons with mental retardation; limits on interviews.

5. Section 914.17, Florida Statutes (2000 Supp.). Appointment of advocate for victims or witnesses who are minors or persons with mental retardation

6. Section 918.16, Florida Statutes (2000 Supp.). Sex offenses; testimony of person under age 16 or person with mental retardation; testimony of victim; courtroom cleared; exceptions. Clements v. State, 742 So. 2d 338 (Fla. 5th DCA 1999) (compelling state interest in protecting younger children or any person with mental retardation while testifying concerning sexual offense)

e. Mentally retarded children are considered “special needs” children for purposes of adoption, and adoptive parents can qualify for financial aid. Section 409.166, Florida Statutes (2000 Supp.).

f. Mentally retarded adults are similarly considered as “disabled persons” deserving of “adult protective services” to protect them from abuse, neglect, and exploitation. Sections 415.101 and 415.102, Florida Statutes (2000 Supp.).

Most significantly, the Sunlands began to “depopulate.” Instead of huge institutional warehouses, the State created a graded level of homes designed to protect the dignity of the

individual and to educate them and train them as far as they were capable of doing.[45]

If this movement to more humane treatment has characterized the general trend of the law and society nationwide and in Florida, the criminal law in Florida has also reflected this revolution. Before 1988, the latter recognized no distinction between the mentally ill and the mentally retarded for competency purposes. Since most lawyers and mental health professionals were more familiar with and recognized mental illness quicker than mental retardation[46] the mentally retarded frequently were overlooked or misdiagnosed when they were lumped with the mentally ill. In that year, the legislature rewrote Chapter 916 to provide a major advantage for the retarded. First, it created a separate and distinct mechanism for evaluating the retarded that was different from that used for the mentally ill. Lawyers, judges, and mental health professionals, thus had notice that mental retardation was

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[45] The continuum is :1. Own home/family, 2. Foster home (child); 3. Foster home (adult), 4. Group home, 5. Residential Habilitation Facility, 6. Community Intermediate Care Facility, 7. Cluster Facility, 8. Nursing Home, 9. Sunland Centers, 10. Retarded Offender/Defendant Program. Source: Developmental Services Comprehensive Plan for Services FY 1981-85, Department of Health and Rehabilitative Services, September 1, 1980.

[46] Ellis and Luckason, "Mentally Retarded Criminal Defendants," pp. 485-86.

different from mental illness, and had its own distinct and different measures to be considered in evaluating a defendant's competence to stand trial. Although the general inquiry for the mentally ill was the same as for the retarded, the legislature clearly signaled the latter was so much different from the mentally ill that it wanted to make sure they were protected from ignorance, incompetence, and misdiagnosis.

As a result, Sections 916.115-916.17 deal with the problems of the mentally ill while Sections 916.301-916.303 focus on mentally retarded defendants, as the chart below demonstrates

MENTAL ILLNESS			MENTAL RETARDATION
916.115	--	Appointment of experts	-- 916.301
916.12	--	Involuntary commitment	-- 916.302
916.14	Statute of limitations, double jeopardy not applicable if the defendant is incompetent to stand trial because of mental illness		No similar restrictions for the retarded
916. 145		if the defendant remains incompetent to stand trial for	
	five years if mentally ill		two years if mentally retarded
		after being committed, the charges against him or her are dismissed.	
916.15-not guilty by reason of insanity			no similar verdict

			possible for the retarded
916.16	court retains jurisdiction if defendant is not guilty reason of insanity	no similar provision for the mentally retarded	
916.17	Conditional release	916.304	

Once in the control of the Department of Corrections, the mentally retarded defendants still have some protections. They are, first, to be identified as such, and wherever possible housed away from repeat or dangerous offenders. Section 945.025, Florida Statutes (2000 Supp.). Moreover, upon release, the department must notify the Department of Children and Family Services, so it can offer its services to the defendant. Section 947.175, Florida Statutes (2000 Supp.).

Thus, the mentally retarded have at least two significant advantages over the mentally ill: 1) the statute of limitations and double jeopardy protections can apply and 2) if they are incompetent for more than two years, the charges against them are dismissed, whereas for the mentally ill, they have to remain so for more than five years. When those protections are coupled with the other, beneficial changes in the criminal law specifically and the law generally, the inescapable conclusion emerges that we view the mentally retarded with a large amount of compassion and sympathy. Such regard is the best evidence of

our evolving standard of decency, a decency that should now exclude the mentally retarded from receiving a sentence of death.

5. **Florida has not executed a mentally retarded defendant since it re-enacted its death penalty statute.**

During the past quarter century only Florida and five other states have executed more than one person, on average, each year. Of the 49 defendants this State has put to death, none have been mentally retarded.[47] That it has not done so during this long period, strongly indicates that it is "unusual" in the constitutional sense meant by this Court's decisions in Allen and Brennan. Hence, as with 16- and 17-year-old juveniles, this Court must conclude that it is cruel or unusual punishment for this State to execute the mentally retarded.

Conclusion

Thus, this Court should declare that Florida will not execute the mentally retarded. It is cruel to do so because we are punishing those whose intellect makes them among the very least deserving of being put to death. It is unusual because nationally and in Florida the retarded are executed, either extraordinarily infrequently or not at all. Our evolving

[47] The Death Penalty Information Center's web site claims Florida has executed four mentally retarded defendants: Arthur Goode, James Dupree Henry, Nollie Martin, and John Earl Bush. Http://www.deathpenaltyinfo.org/dpicmr.html. Henry had an IQ greater than the cutoff of 70, and was not retarded as Florida defines it. See, Watts v. State, 593 So. 2d 198 (Fla. 1992). As to the other three, there is no indication in any of the opinions of this Court in their cases that they were mentally retarded, or even had particularly low IQs.

standards of decency, as evidenced by Florida's history of treating the mentally retarded with increasing compassion, or the state and federal legislation banning executions totally or only for the retarded, show that as a nation and a State we no longer, if we ever did, want to end the life of a mentally defective defendant.

This Court should declare that executing the mentally retarded a violation of the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution, and remand with instructions that the trial court resentence Thomas to life in prison without the possibility of parole.

ISSUE IV

THE COURT ERRED IN DENYING THOMAS' MOTION TO SUPPRESS HIS CONFESSION BECAUSE HIS MENTAL DEFECTS ARE SO SEVERE THAT HE COULD NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS MIRANDA[48] RIGHTS, A VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

By September 24, 1997, 10 days after the murder of Brandy Howard, the police, including Major Jerome Worley of the Crestview Police Department, had developed enough probable cause to believe that Thomas had committed that crime. They applied for and obtained a warrant to search the house where the

[48] Miranda v. Arizona, 384 U.S. 436 (1966).

defendant lived, and executed it at 1:30 in the morning (6 R 1123). After waking him, Worley and two other officers took him to a room away from his relatives (6 R 1125,1177,1178-79). They read him his Miranda rights, which they claimed he said he understood (6 R 1088). Major Worley also said Thomas waived his both his right to remain silent and his right to counsel (6 R 1096 1177). He was given the form with the rights and he "appear[ed] to look at the document for a period of time." (6 R 1098). The police officer knew that Thomas was "slow," but the latter gave no indication he could not read, nor that he did not understand "the nature of the statements [that were made] to him." (6 R 1099).

After signing this form, he was taken to the Okaloosa County jail (6 R 1180). He was readvised of his rights "line by line," and he again agreed to talk with the police (6 R 1181). He initially denied any knowledge of the murder (6 R 1099), even though on the way to the station, he had admitted knowing Brandy and had had sexual intercourse with her the night before her death (6 R 1180). When pressed, he said that a month earlier, Brandy had been riding with two men who had beaten him and stolen his car (6 R 1101-1102). On further interrogation, he said that on the night of the murder, he and Brandy left the

Thom Thumb Store, had had sexual intercourse, had later gotten into an argument, and he had killed her (6 R 1103-1104).[49]

Counsel for Thomas subsequently filed a motion to suppress the statements the defendant had given to the police. Specifically, he alleged:

> That Defendant's I.Q. is so low he lacks the mental ability to comprehend his Miranda Rights. This was known or should have been apparent to Major Worley, Serving the search warrant in the middle of the night thereby waking Defendant, is a circumstance further adding to the diminished ability of Defendant to understand his rights.

(3 R 584)

At the hearing on the motion, Dr. James Larson, a psychologist, testified for Thomas. He said the defendant had an IQ of 61, along with other deficiencies, and that meant he was mentally retarded (6 R 1142). Besides determining that the defendant had general intellectual and vocabulary deficits (6 R 1145), this expert tested him "specifically concerning his understanding and appreciation of the constitutional rights as enumerated in Miranda." (6 R 1146). Interestingly, experts in

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[49] Five days later, and after he had counsel appointed, he asked to talk with the police (6 R 1184). Before the questioning began, an Assistant Public Defender told Worley not to talk with his client, and the attorney left to make a telephone call (6 R 1112-15). The police officer ignored him, and questioned Thomas who gave a different version of how the murder had occurred (6 R 1115). The State never used that statement at trial, so it is not part of this issue.

Dr. Larson's field have developed such tests, "Instruments for Assessing, Understanding and Appreciation of Miranda Rights," to do just that (6 R 1147). In particular, Dr. Larson asked Thomas to define several key words found in the Miranda rights. "Consult" was used four times in the warning, but the defendant had no idea what that word meant. He knew what an "attorney" was, but could not explain "interrogation." He had an adequate understanding of "appoint," but had no clue about "entitled" or what a "right" was (6 R 1152). More than simply being ignorant of what those crucial words meant, Thomas lacked

> the intellectual horsepower, so to speak, to tie [the meaning of right] to such concepts as the Fifth Amendment or for it to be something that's not altered if the situation changes. I don't think he has a strong sense of entitlement about it, and I don't think that he sees it as almost inflexible.

(6 R 1152-53)

Dr. Larson also noted that Major Worley's presence only compounded Thomas' fundamental failure to understand the key words and concepts embodied in Miranda. As with most retarded persons, Thomas sought to please those who were in positions of authority over him.[50] This had particular significance in this case because he viewed Major Worley "as very powerful and

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[50] James W. Ellis and Ruth Luckason, "Mentally Retarded Criminal Defendants," 53 George Washington Law Review 414, 431.

potentially helpful" person. Specifically, he believed this officer had "helped" him avoid a prison sentence for a 1993 robbery he had committed (6 R 1153-54,1165). Thus, the defendant's limited understanding of his rights became even more impaired with Major Worley's participation in the questioning (6 R 1156). In short, as this expert testified, merely because Thomas signed the rights waiver form, he probably did not understand what he was giving up (6 R 1155). At best, he comprehended them "At a very elementary level." (6 R 1168)[51]

> I don't think it was a full understanding. I think he probably had some kind of understanding that was subject to situational factors, and his conceptual ability is very limited, and so when he forms concepts, he can have them for one moment but not maintain them in very sharp focus for an extended period of time, and those concepts he has that might be absolute to someone of normal intelligence are really an effect of situational factors that don't remain firmly in place.

(6 R 1155)

The court rejected Thomas motion, finding that while the defendant might have had some problems in understanding the technical nature of Miranda warnings, that he comprehended the basic principles.

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[51] Dr. Larson also rejected the possibility that Thomas may have "faked" his answers, concluding that he was not only highly motivated to assist as much as he could but also he had a poor understanding of how his answers would be used in a hearing. (6 R 1169)

> The court finds that in considering the totality of the evidence in this case, the Court is confident that the defendant was properly advised of his Miranda rights prior to making the statements which were the subject of this motion, and he freely and voluntarily and with sufficient understanding of his Miranda rights, gave these statements to the investigating officers. The court further finds that there is no evidence before the Court of any misleading behavior or intimidating behavior on behalf of the police officers. The Court finds that the only obstacle to admission of these statements, the only possible obstacle, is strictly the defendant's IQ.

(6 R 1212-13)

The court erred in denying Thomas' motion to suppress, and this Court should find that it misapplied the correct rule of law and abused the discretion normally given to trial courts in matters of this sort because it had no evidentiary base on which to set its findings. Rolling v. State, 695 So. 2d 278 (Fla. 1997).

When examining confessions of the mentally retarded some routine legal concepts blend with special considerations that must be afforded them. First, as the trial court correctly noted, IQ, by itself, does not predict the outcome. Fairchild v. Lockhart, 744 F. Supp. 1429, 1453 (E.D. Ark. 1989). Instead, it had to look at the totality of the circumstances, of which IQ is only one factor used in determining whether Thomas waived the constitutional rights accorded by Miranda in an intelligent and knowing manner. Jennings v. State, 718 So. 2d 144, 150 (Fla.

1998). Though only one aspect of the case, IQ is so important that courts have often required little else beyond proof of a defendant's retardation to justify finding he or she never waived those rights. T.S.D. v. State, 741 So. 2d 1142 (Fla. 3d DCA 1999)(12-year-old boy with and IQ of 62 and a history of psychological problems and who read at a 3rd grade level.); Tennell v. State, 348 So. 2d 937 (Fla. 2d DCA.1977)(14-year-old defendant had below average intelligence, had a first-grade reading level, and had difficulty understanding normal speech); Henry v. Dees, 658 F. 2d 406 (5th Cir. 1981)(IQ between 65 and 69; sixth grade level of education); Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972)(defendants with IQs between 61 and 67; low functioning); State v. Flower, 539 A.2d 1284 (N.J. Super. Ct. Law Div. 1987)(IQ less than 70; mental age equivalency of seven to twelve-year-old child). Thus, the court correctly focussed on the defendant's IQ as the dominant factor in this case, but it erred in looking no further. In short, rather than applying the correct rule of law by examining the totality of the circumstances it simply focussed on the defendant's IQ as determinative of Thomas' motion and denied it. Had it done that inquiry, the defendant's extraordinary intellectual deficit would have stood out even more sharply when placed amid the

abundant other evidence that he could not and did not understand his rights.

As discussed in the previous issue, the mentally retarded, by virtue of their extremely low intellectual capacity, present unique problems to the criminal justice system. The difficulties become especially acute when the judicial inquiry focusses on whether a defendant has validly waived the rights guaranteed under the United States and Florida Constitutions and given meaning by the so-called Miranda rights. That is, the fundamental inquiry required focusses on whether a defendant has "knowingly and intelligently" waived his rights after being informed of them. T.S.D., cited above. These particular requirements, of a knowing and intelligent waiver, specifically implicate the defendant's intelligence. Hence, if the defendant has any mental defects, such as mental retardation, drunkenness, or ignorance of the English language, courts must closely scrutinize the circumstances under which he allegedly waived those rights. People v. Williams, 465 N.E. 2d 327, 329-30 (N.Y. 1984). For example, giving the Miranda warnings in English to a native Russian who had just gotten off the boat from the mother land would certainly be unintelligible and unfair to him or her. Similarly, giving the warnings to a mentally retarded person using the sophisticated terms found in

the typical warning such as the one Major Worley read to Thomas would be as incomprehensible as if he had spoken in Russian. Id. Thus, knowing and intelligent means, on a practical level, the defendant understood not only the words that were spoken but the concepts those words conveyed. "[T]o waive rights intelligently and knowingly, one must at least understand basically what those rights encompass and minimally what their waiver will entail." People v. Bernasco, 562 N.E. 2d 958, 964 (Ill. 1990).

Now, Thomas is not saying the mentally retarded, by virtue of that intellectual deficiency alone, cannot invariably waive their rights, because they can. Richardson v. State, 604 So. 2d 1107 (Fla. 1992). But, also with that impairment firmly in mind and with the special problems it presents to the police and the law, courts need to closely examine the circumstances under which the defendant waived his rights. Factors, which might be of slight significance with a defendant of average intelligence, such as a lack of sleep at the time of questioning, have heightened significance when the defendant has a very low intelligence. See, Commonwealth v. Jones, 328 A. 2d 828 (Pa. 1974).

From the totality of the circumstances in this cases Thomas' ignorance of what several crucial words in the Miranda warning

meant must stand out as the key, dominant fact. He had no idea what "consult," "interrogation," "entitled," and "right" meant, words that were repeated throughout the warning, and which were integral to understanding its meaning (6 R 1152). As significant, if not more fundamental, he had a "limited conceptual ability," or as Dr. Larson said, he lacked the "intellectual horsepower" to understand that the Fifth Amendment rights were his, which he, and not the police or the court, controlled (6 R 1152-53). Thus, the court had absolutely no evidentiary basis to conclude that he "comprehended the basic principles" of Miranda (6 R 1212-13).[52] Thomas simply never understood the words detective Worley read to him, as the totality of the other evidence clearly showed.[53]

Other aspects of the totality of these circumstances support that conclusion. Specifically, the police knew that he was "slow" and he had a poor understanding of English (6 R 1192),

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[52] Months after confessing and after having had numerous meetings with his lawyers, Thomas had becomes more educated about the Miranda issue, but he still had only a "very elementary level" of understanding the concepts involved. "But when the situation changes, he doesn't really maintain it very well in place under the heat of pressure or passion." (6 R 1168)

[53] The State, of course, could have sought to have experts of its choosing examine the defendant, but for whatever reasons it never did so. Cf, Dilbeck v. State, 643 So. 2d 1027 (Fla. 1994).

but they never took any special precautions to compensate for those deficits. To the contrary, Worley went too fast and Thomas "didn't really understand it." (6 R 1163).[54] Dr. Larson himself confirmed he had go slow with the defendant when he examined him. "[I]ndeed, I did find I had to go very slowly with him to elicit these things." (6 R 1163)

The State presented no evidence that when the police read him the rights, they read them slowly, paused after each right to ask if he understood them, used simpler words, or gave more careful explanations. See, People v. King, 234 A. 2d 923, 924 (N.Y. 4th Dept. 1996). Of course, Major Worley went over the rights "line by line" at the police station, but the record remains silent about whether he proceeded slowly and worked through each right, making sure the defendant understood them. State v. Thomas, 461 So. 2d 1253 (La. Ct. App. 1984)(6 R 1181). Even giving Thomas the rights form and asking him to read it was deceptive. He is functionally illiterate, reading on a second or third grade level (17 R 1049, 1061), and to understand the Miranda rights he had to have at least a six-grade reading ability. T.S.D., cited above. For all this record shows, the police treated this defendant, whom they knew

[54] He also said the he was still high from the marijuana he had smoked that evening (6 R 1164).

was slow, the same as any normal person and zipped through Miranda so they could get onto more important matters (6 R 1163).

The police also knew Thomas had been asleep when they entered his house, and adding to the disorientation that normally arises when someone is woken up early in the morning, they immediately separated him from his family before reading him his rights(6 R 1088). State v. Carpenter, 633 A. 2d 1005, 1009 (N.J. Sup. Ct. App. Div. 1993). Instead of the reassuring presence of relatives, three officers were in the bedroom with him as Major Worley informed him of the requirements of Miranda.

Of course, Thomas had apparently been arrested on a robbery charge about 4 years earlier, and significantly Major Worley had, from the defendant's perspective, played a significant role in keeping him from going to prison (6 R 1165). Normally, prior experience with law enforcement works in favor of finding a knowing and intelligent waiver of rights, but for the retarded generally, and for Thomas specifically, it had a different, more complicated effect (6 R 1159). That is, he was very scared and frightened by the early morning arrest and allegations against him (6 R 1164). At once he had a crisis more acute and subtle because of his retardation. More so than persons of normal intellect, the mentally retarded expect the world to be a safer

and more honest place. People v. Higgins, 607 N.E. 2d 337, 342 (Ill. App. 5th 1993). It was now decidedly not so except for Major Worley in whom he believed he had a refuge and an ally (6 R 1165). More than simply seeing him as a friend, Thomas, because of his mental retardation, had an innate desire to please this authority figure (6 R 1164).[55]

> He perceived him [Worley] as very powerful.... His experience had been before when he cooperated, Mr. Worley had assisted him, and he didn't end up going to prison like he had anticipated he could. So he perceive that it was in his best interest to cooperate with him again.

(6 R 1165)

Thus, whether he understood the rights Major Worley read to him or not, and the uncontroverted evidence shows he never did, Thomas said he did to remain in the good graces of this police officer.

The totality of the circumstances in this case, therefore, forces the inevitable conclusion that the trial court simply had no evidentiary basis on which to rest its amazing finding that Thomas "comprehended the basic principles" of Miranda, and had "sufficient understanding" of them to knowingly and intelligently waive those rights. More subtly, it shifted the burden of proof from the State to the defense. That is, it

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[55] Ellis and Luckason, "Mentally Retarded Defendants," p. 431.

faulted Dr. Larson and the defense for never saying "that the defendant lacked the mental capacity to knowingly and intelligently understand his Miranda rights." (6 R 1213). Blackstock v. Tennessee, 19 S.W. 3d 200, 209 (Tenn. 2000) ("[T]his effectively reversed the proper standard, which requires a showing that Blackstock had a meaningful awareness of his Miranda rights, as well as the consequences of waiving his rights.").

This Court should do the same, and find the trial court abused the discretion normally afforded courts in matters of this sort and reverse the judgment and sentence entered against Thomas and remand for a new trial. It should also find that the trial court abused the discretion given them in matters of this type because there simply was no evidence to support its conclusion that Thomas knowingly and intelligently waived his Miranda rights.

ISSUE V

THE COURT ERRED IN REFUSING TO GIVE ANY WEIGHT TO THE LEGITIMATE AND UNCONTROVERTED MITIGATION THOMAS PRESENTED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In its sentencing order, the court noted that Thomas had "requested the Court to consider the following mitigating

factors." (11 R 2170). Of the 12 factors presented, it found two as mitigating, but gave them no weight:

> 4. The Defendant, despite being mentally retarded and in special education classes, obtained a special certificate or diploma of graduation.[56] Defendant's school records also confirm that he had good attendance with no disciplinary problems. The Court finds that these allegations have been proven by the evidence but are entitled to no weight as a mitigating factor.
>
> 5. The Defendant was a good worker and employed as an automobile detailer. The Court finds this fact to be established by the evidence but of no weight as an mitigating factor.

Thomas' argument on this point is simple: While under this Court's recent ruling in Trease v. State, 25 Fla. L. Weekly S622 (Fla. October 11, 2000), the court could give this mitigation no weight, before it could do so, it had to explain why it did so. Specifically, trial courts and this Court have recognized the mitigating value of the two factors Thomas offered and the trial court accepted. Beasley v. State, 25 Fla. L. Weekly S915 (Fla. Oct. 26, 2000); Lowe v. State, 650 So. 2d 969, 971 (Fla. 1995); Turner v. Dugger, 614 So. 2d 1075, 1078 (Fla. 1993). Thus, the trial court should have explained why this acknowledged and weighty mitigation had no value in this case.

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[56] Actually it was a certificate of attendance (17 R 1052).

In Campbell v. State, 571 So. 2d 415 (Fla. 1990), this Court held that a trial court could not find a mitigating factor but give it no weight. "[A] mitigating factor once found cannot be dismissed as having no weight." Id. At 420. In Trease, this Court made a limited retreat from that holding, deciding that the sentencer may determine in the particular case at hand that it [the mitigation] is entitled to no weight for additional reasons or circumstances unique to that case."

Thus, while the trial court can give no weight to a particular mitigator, it must explain why it has done so. It cannot simply declare by fiat that it gets no weight. Instead, it should as this Court did in Trease when it explained why drug addiction, normally a mitigating factor of some weight, might get none. "For example, while being a drug addict may be considered a mitigating circumstance, ... that the defendant was a drug addict twenty years before the crime for which he or she was convicted may be sufficient reason to entitle the factor to no weight." Id. Trease, in short, does not make the sentencer's job easier by allowing it to arbitrarily discard mitigating factors. It recognizes, instead, the common experience notion that occasionally some mitigation may have such an attenuated value as to merit no consideration in mitigating a death sentence. This Court's prior rulings in

cases such as Mann v. State, 420 So. 2d 578, 581 (Fla. 1982), and the Eighth Amendment's particular concern that death sentences be imposed only on the most deserving of defendants requires this explanation. Cf., Zant v. Stephens, 456 U.S. 410 (1982). In Mann, this Court said, "The trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found."

In this case, the evidence of Thomas' school attendance and work record had genuine mitigating value and should have been given some weight as the cases cited above acknowledge. In spite of his severe intellectual capabilities, he was a valued employee, and he had persevered long enough at school to get a "certificate of attendance." (17 R 1052)

Such evidence tended to lesson the significance of the aggravators. He committed a robbery in 1994, which the lower court used to justify imposing a death sentence. That aggravator had relevance because a person's history of violent crime indicates "the defendant is likely to prove dangerous to life on some future occasion." Section 201.6, American Law Institute, Model Penal Code,1980. Law v. State, 639 So. 2d 1102, 1103-1104 (Fla. 5th DCA 1994)(A defendant's past record "establish clearly" his future dangerousness). That Thomas

regularly and peaceably attended school and had a good work record mitigated the significance or weight the sentencer gave that aggravator. It described a person who lacked a deep, fundamental criminal nature (17 R 1063). Thomas, in short, was neither a sociopath, nor did he have an antisocial personality disorder (17 R 1064), which is typical of those on death row.

This acknowledged mitigation did not occur 20 years ago, and the State presented no evidence that the significance of this evidence somehow had attenuated to the point of having no, rather than little, mitigating value. Thus, while the court under Trease could arguably have given the mitigation no weight, there was no evidence why it should have done so in this particular case. To the contrary, several reasons exist for the trial court to have considered Thomas' school and work records as significant indicators of a basically peaceable nature.

The trial court simply erred in providing no reason for why it gave no weight to the legitimate mitigation the defendant offered and it found. This Court should reverse the defendant's sentence of life and remand for resentencing.

ISSUE VI

THE COURT ERRED IN REFUSING TO FIND THAT THOMAS' CAPACITY TO APPRECIATE THE CRIMINALITY OF HS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED, A VIOLATION OF THE

EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNTIED STATES CONSTITUTION.

The court's sentencing order considered, but rejected, the statutory mitigating factor, that at the time of the murder Thomas's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

> The Court finds that the overall testimony offered by the defense consisted of the testimony of Dr. James Larson and the recitation of Dr. Oas's opinion that the Defendant suffered from mild retardation and was tested as having an IQ score of 61. Dr. Larson testified that this IQ rating, combined with the Defendant's alcohol consumption the night of the murder, as described by the Defendant, would have interfered with the Defendant's capacity to conform his behavior to the requirements of the law. However, on cross examination, Dr. Larson also testified that the Defendant, on the night in question, was able to appreciate the criminality of his conduct and that his ability to conform his conduct to the requirement of law was not substantially impaired. The Court finds that the Defendant's borderline retardation does not rise to the level to be considered by this Court as a statutory mitigator as the testimony of Dr. Larson, when considered with the entire facts and evidence in this case tend to demonstrate there was no substantial impairment of the Defendant's ability to appreciate the criminality of his conduct. This statutory mitigator has not been established and will not be considered by the Court. However, the Defendant's intellectual capacity shall be considered as a non-statutory mitigator and shall be discussed below.

(11 R 2169) The court abused its discretion when it rejected this statutory mitigator. It simply failed to consider or overlooked Dr. Larson's testimony on re-direct examination in

which he clearly said it applied (17 R 1096). Brown v. State, 721 So. 2d 274 (Fla. 1998); said differently, no competent, substantial evidence existed to support rejecting this mitigating factor. Arbelaez v. State, 626 So. 2d 169 (Fla. 1993).

As to the "substantial impairment" mental mitigator, Dr. Larson, on direct examination said.

> Q. Another statutory mitigating circumstance is the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to requirements of law was substantially impaired. Did you make a determination based on all your observations?
> A. I did.
> Q And what was that determination?
> A I think it was impaired.
> Q And explain to the members of the jury why.
> A I think he had the ability to understand the criminality of his conduct, but at the time I think his ability to conform his behavior was impaired to some degree.
> Q And for what reasons did you make that finding?
> A A number of factors, actually. One, again, the disorganized crime scene. Another is the low intellectual functioning and he's in the mild range of retardation, and also if we assume substance abuse which would be consistent with his history, which was consistent with his report, I think that would further impair him at the time. People who are on substances are frequently much more impulsive and are more inclined to be aggressive.

(17 R 1068). On cross-examination, the prosecutor tried to get him to qualify his response, but he ultimately reaffirmed his conclusion that this statutory mitigator applied.

Q. Concerning his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law and whether that was substantially impaired, that's the statutory mitigator, Dr. Larson, it's your opinion that Demetris Thomas has no problem in appreciating the criminality of his conduct, correct?
A. That's correct.
Q That appreciation of the criminality of his conduct is not substantially impaired either today or at the time he committed these crimes, correct?
A That's my opinion.
Q Okay. And so when you gave the opinion that you believe -- and I believe your words when Mr. Wells asked you if he fit that statutory mitigator, you said I think it was impaired. When you said I think it was impaired, you were talking about it being his ability to conform his conduct to the requirements of law?
A That's correct.
Q And your answer was, I think it was impaired, but the statutory mitigator requires substantial impairment. Was it substantially impaired in your opinion?
A I think it was.
Q And that was the result of his lack of intellect and substance abuse?
A Yes.

(17 R 1086) On re-direct examination, Dr. Larson reiterated his conclusion that Thomas' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

Q And in your opinion does Demetris Thomas fit under those two statutory criteria that we discussed, first that he suffered from an extreme emotional disturbance on the night of September 13, 1997, or the early morning hours?
A Yes.
Q And secondly, that his capacity to conform his behavior to the requisite of law would have been substantially impaired?
A Yes.

Q And that is based upon his lack of any prior violent history that you could find through your observations?
A That's one of the factors.
Q And also because of his substance abuse problems?
A Yes.

(17 R 1096)

Thus, Dr. Larson repeatedly said that statutory mental mitigator applied, and the trial court simply was wrong in concluding he had testified otherwise. Of course, had the State presented evidence conflicting with this expert's conclusion, Thomas would have no legal reason to argue the trial court abused its discretion in rejecting his witness' opinion. Walker v. State, 707 So. 2d 300 (Fla. 1998). It never did so, however, and the court had no basis on which to rest it finding that the substantial impairment mitigator did not apply in this case.

Of course, the trial court also said that the "facts and evidence in this case tend to demonstrate that there was no substantial impairment," but it never said what those facts and evidence were. So, this Court cannot say beyond all reasonable doubts that the trial court would have inevitably had rejected finding this mitigator even if it considered Dr. Larson's testimony was contrary to what it said it was. State v. DiGuillio, 491 So. 2d 1129 (Fla. 1986). This Court should,

therefore, reverse the trial court's sentencing order and remand for resentencing.

ISSUE VII

A DEATH SENTENCE IS PROPORTIONALLY UNWARRANTED IN THIS CASE.

Under this Court's proportionality review obligation, Thomas does not deserve a death sentence. Although the trial court found four aggravating factors none of them have a particularly compelling quality. On the other hand, he found several mitigators, including the statutory mental mitigation that at the time of murder he was under the influence of an extreme emotional disturbance. He also found that the defendant suffered from mental retardation, and the homicide was "a situation heat of the moment type murder." (11 R 2171). He gave those mitigators great, significant or substantial weight (11 R 2169-71). Thus, considering the poor quality of the aggravators and the strong nature of the mitigation, this Court can only conclude that this case is not one of the most aggravated and least mitigated, so a death sentence is unwarranted.

This Court, to fulfill its constitutional obligations under Florida's "Cruel or Unusual" provision found in Article I, Section 17 of the state constitution, conducts a proportionality

review of the capital punishment cases that come before it. See Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991); State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973); Terry v. State, 668 So. 2d 954, 965 (Fla. 1996). Proportionality review looks at the quality of the aggravating factors, not the quantity, and compares the case at hand with others that have similar facts. It does this type of analysis to "foster a uniformity in death-penalty law." Urbin v. State, 714 So. 2d 411, 415 (Fla. 1998); Williams v. State, 707 So. 2d 683, 687 (Fla. 1998).

In Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999), this Court laid out the two pronged analytical framework. "We compare the case under review to others to determine if the crime falls within the category of both (1)the most aggravated, and (2) the least mitigated." (Emphasis in opinion.) Significantly, as the Almeida opinion indicates, the aggravation must be among the most severe this Court has seen, and the mitigation must rank among the most trivial. If the case has poor quality aggravation and strong mitigation then the defendant's death sentence cannot stand. That is the easy case. Likewise, however, if it has several strong aggravating factors but the mitigation is likewise very strong, or at least not weak, then this Court, under the strict Almeida criteria, must reverse the

death sentence. Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988).

A. **The quality of the aggravating factors.**

Although the court found four aggravating factors (under sentence of imprisonment, prior conviction for robbery, murder committed during the course of a kidnaping, and especially heinous, atrocious, or cruel), none of them have any particularly compelling quality. Curiously, the court never assigned any weight to the aggravators although it did so with the mitigators. With such a critical detail missing, this Court can either give them whatever weight it believes they deserve, Clemons v. Mississippi, 494 U.S. 738 (1990), or it can remand the case to clarify the matter. Mann v. State, 420 So. 2d 758 (Fla. 1982). In either event, they have such poor quality and the mitigation is so strong as to rank this case among the least aggravated and most mitigated.

a. Under sentence of imprisonment. At the time of the murder, Thomas was on probation for a 1993 robbery (17 R 1029). He was not in prison, nor was he on parole or community control, all more significant forms of restraint than probation. Moreover, he was doing well, and his probation officer said the only problem the defendant had "was paying monies on a monthly basis, but most everybody has that problem." (17 R 1033).

Significantly, the framers of the American Law Institute's Model Penal Code, from which Florida patterned its death penalty statute, justified the under sentence of imprisonment aggravating factor because it served the limited function of deterring persons in prison from killing other inmates or guards.

> Paragraph (a) recognizes the need for a special deterrent to homicide by convicts under sentence of imprisonment. Especially where the prisoner has no immediate prosect of release in any event, the threat of further imprisonment as the penalty for murder may well seem inconsequential.

Section 210.6, Model Penal Code. Significantly, neither the framers of the model code nor the legislature that adopted it included probation within the "under sentence of imprisonment" aggravator, and this Court refused to find it in the language of the statute. Trotter v. State, 576 So. 2d 691 (Fla. 1990); Petit v. State, 591 So. 2d 618 (Fla. 1992). In 1996, the legislature specifically overruled Trotter, and included felony probation within this aggravator although doing so conflicts with the underlying rationale for the aggravator.

Hence, while this aggravator technically applies it has much less compelling quality. Thomas had successfully stayed on the streets for years under the mildest form of restraint recognized by the law. The threat of imprisonment had proved a more significant deterrent than the possibility of death.

b. The prior robbery conviction. Thomas was on probation for a 1993 robbery of a convenience store. As related by the clerk he had robbed

> I was in the back stocking the cooler and an individual came into the back section and called me out, and when I got out there he poked me in the chest and said, this is a robbery, you're being robbed, don't come out front. If you come out front I'm going to kill you."

(17 R 1035-36).

That was it. The clerk "just stood where I was standing." There was no abduction or beating. Thomas merely rummaged through the cash register, took some money, and fled. Eventually he was caught and the money recovered (17 R 1042). This was such a mild forced theft that it is understandable why the court punished the defendant with only probation. Normally, one would have expected that because Thomas had committed a second degree felony (17 R 1030-31), the court would have required he serve at least time in prison or on community control. That it "sentenced" him to probation, and he had done well on it (17 R 1032), attests to the mild nature of this aggravator.

c. Committed during the course of a kidnaping. As argued in Issue II, the State presented insufficient evidence that Thomas forcefully abducted Brandy Howard. The store clerk who witnessed her get into the car never thought Thomas

kidnapped her, and that Ms. Howard smiled at her as they left only further allayed any concern she might have had. Like the robbery he had committed in 1993, this kidnaping, if such it was, was only barely so.

d. Undoubtedly, this was a heinous beating death. Yet, this Court has recognized that the especially heinous, atrocious, or cruel aggravator has a diminished quality when the defendants' mental or emotional problems prevent them from "enjoying" what they are doing. Mann v. State, 420 So. 2d 578, 581 (Fla. 1982) ("There is frequently a significant connection between the grossness of a homicide and the perpetrator's mental condition.")

In Huckaby v. State, 343 So. 2d 29, 33-34 (Fla. 1977), Huckaby was sentenced to death for sexually battering his children. This Court agreed that his crimes were especially heinous, atrocious, or cruel, but that aggravator had little significance in light of the two statutory mitigators present, and "causal relationship between the mitigating and aggravating circumstances. The heinous and atrocious manner in which this crime was perpetrated, and the harm to which the members of Huckaby's family were exposed, were the direct consequence of his mental illness, so far as the record reveals." Id. at 34. Accord, Porter v. State, 544 So. 2d 1060 (Fla. 1990).

In this case, when Thomas murdered Howard, he was mentally retarded and extremely emotionally disturbed. As discussed in Issue III, this meant his normally low impulse control (because of his retardation) was even less in check. Hence, the murder, as the court found, was the product of an easily frenzied mind that had quickly become frazzled (11 R 2171). Nothing exhibited any desire by Thomas to intentionally torture Howard. No evidence showed he enjoyed her suffering. If this murder was especially heinous, atrocious, or cruel, its quality, like the other aggravators, is muted.

B. **The quality of the mitigation.**

On the other hand, Thomas' mitigation, particularly his mental retardation, defines not only this defendant, but it permeated everything he did. The trial court correctly gave it "significant weight." Moreover, when it also found that "the murder was a situational heat of the moment type murder," (11 R 2171) it signaled that this was not one of those most aggravated/least mitigated homicides.

> The law reduces the killing of a person in the heat of passion from murder to manslaughter out of recognition of the frailty of human nature, of the temporary suspension or overthrow of the reason or judgment of the defendant by the sudden access of passion and because in such case there is an absence of malice.

Paz v. State, 25 Fla. L. Weekly D 824 (Fla. 3d DCA March 29, 2000). In this case, the extreme emotional disturbance Thomas suffered, the "situation heat of passion," and his mental retardation become powerful mitigation that defined, far better than the aggravation, Thomas and this murder. Hence, this is one of the least aggravated and most mitigated homicides this Court has considered.

C. **Compared to other cases.**

This court has affirmed cases involving defendants with low intelligence, and even those who have been mentally retarded. Watts v. State, 593 So. 2d 198 (Fla. 1992); Kight v. State, 512 So. 2d 922 (Fla. 1987). It has, on the other hand, reversed death sentences of mentally retarded defendants who have committed frenzied murders, such as the one in this case. The distinguishing characteristic seems to be the fortuity or lack of planning involved.

In Kight, the defendant and another person kidnapped and killed a cab driver. Kight, though retarded, was the "brains" of the operation, showing more cunning than would normally be associated with a mentally defective person. For that reason, his low IQ posed no barrier to execution. Similarly, in Hayes v. State, 581 So. 2d 121 (Fla. 1991), Hayes and two other robbed and killed a cab driver for money so they could buy more drugs.

This Court affirmed his death sentence despite his low intelligence because the murder was cold blooded and he was the more culpable of the trio.

On the other hand, this court has reversed death sentences of the mentally retarded where the murderers have also been young as well as dumb. Curtis v. State, 685 So. 2d 1234 (Fla. 1996) (vacating death sentence for shooting death of store clerk where multiple aggravators -- including attempted murder of second store clerk – were weighed against substantial mitigation including remorse and youth); Morgan v. State, 639 So. 2d 6 (Fla. 1994) (vacating death sentence for bludgeoning death of homeowner where multiple aggravators were weighed against copious mitigation including brain damage and youth); Livingston v. State, 565 So. 2d 1288 (Fla. 1988)(vacating death sentence for shooting death of store clerk where multiple aggravators were weighed against substantial mitigation including abusive childhood, diminished intellectual functioning, and youth). See also Knowles v. State, 632 So. 2d 62 (Fla. 1993)(vacating death sentence for shooting deaths of defendant's father and neighborhood child where one aggravator was weighed against substantial mitigation including brain damage and impaired capacity).

Thomas was 25 years old at the time he killed Brandy Howard, which is not much older than the teenage defendants in some of the cases just cited. As is typical of youthful defendants, Thomas committed his crimes impulsively. By sheer bad luck, he happened to drive by a convenience store at 3 a.m. after spending the night with friends drinking and smoking marijuana and playing cards (14 R 442,447; 15 R 726,732; 17 R 1087). He saw Brandy Howard talking on the telephone. He later killed her in the heat of passion as the court found, using a clumsy, fortuitously found murder weapon. He had no sophisticated or simple plan to kill. It simply happened, and this homicide exhibits the naivete characteristic of the retarded generally and Thomas specifically.

Thus, Thomas' age has little significance. As discussed in Issue III, the mentally retarded take an extraordinarily long time to learn, and in some matters, they will forever remain ignorant. They may have the body of an adult, but their minds forever remain in childhood or worse. They simply never mature intellectually. Thus, the cases Thomas cited are similar to his, and they uniformly declare that a death sentence is proportionately unwarranted in this case. This Court should, therefore, reverse the trial court's sentence of death and

remand with instructions that it sentence Demetris O'Marr Thomas to life in prison without the possibility of ever being paroled.

CONCLUSION

Based on the arguments presented here, the Appellant, Demetris O'Marr Thomas, respectfully asks this honorable Court for the following relief: (1) Reverse the trial court's judgment and sentence and remand for a new trial; (2) Reverse the trial court's sentence of death and remand for imposition of a life sentence without the possibility of parole; or (3) Reverse the trial court's sentence of death and remand for a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to **CAROLYN SNURKOWSKI**, Assistant Attorney General, The Capitol, PL01, Tallahassee, FL 32399-1050, and by U.S. Mail to appellant, **DEMETRIS OMARR THOMAS**, #221834, Florida State Prison, Post Office Box 181, Starke, FL 32091-0181, on this date, February 26, 2001.

_____

DAVID A. DAVIS
Assistant Public Defender

CERTIFICATE OF FONT SIZE

Pursuant to Florida Rules of Appellate Procedure 9.100(1), I hereby certify that this brief was typed in Courier New 12 point.

_____

DAVID A. DAVIS
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

DEMETRIS OMARR THOMAS,

Appellant,

v. Case No. **SC00-1092**

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX TO INITIAL BRIEF OF APPELLANT

APPENDIX	DOCUMENT
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