IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO5-2213
Lower Tribunal: 16-2004-CF-4525-AXXX

THOMAS BEVEL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JEFFERSON W. MORROW
Florida Bar No. 369136
1301 Riverplace Blvd., Suite 2600
Jacksonville, FL 32207
P: (904)399-5626
Attorney for Appellant

PRELIMINARY STATEMENT

This is an appeal to the Florida Supreme Court of the two death sentences and a life sentence of Bevel. All three sentences were run consecutively.*[1]

---

[1]*Marshall v. Crosby, 911 So.2d 1129, 1141(Fla. 2005). This Court recognizes that the United States Supreme Court has repeatedly emphasized that the Eight Amendment requires a heighten degree of reliability in capital cases. Allen v. Butterworth, 756 So.2d 52, 59 (Fla. 2000). This Court demands of itself "*a responsibility to ensure that society's ultimate penalty is not imposed except in appropriate cases and that the sentence is not arbitrary or the result of a mistake. This second responsibility does not end when an inmate's appeals are completed; it continues until the moment that the death sentence is imposed*." Dorocher v. Singletary, 623 So.2d 422, 486 (Fla. 1993) Barkett, Chief Justice, specially concurring).

RECORD CITATIONS

Citations shall be as follows:

Reference to Bevel's trial will be "TR." for the transcript pages and "R" for the records page.

All references will be followed by the appropriate page number and parenthesized. Other references will be self-explanatory or otherwise explained. And note that all *emphasis* is added unless otherwise indicated.

TABLE OF CONTENTS

Page

Preliminary Statement.. i

Record Citations.. ii

Table of Contents.. iii

Table of Authorities.. vi

Statement of the Case and Facts.. 1

Summary of the Arguments... 12

ARGUMENT I

THE TRIAL JUDGE COMMITTED REVERSIBLE
ERROR BY FAILING TO STRIKE FOR CAUSE A
JUROR WHO FAVORED LAW ENFORCEMENT..15

ARGUMENT II

THE TRIAL COURT ERRED IN FINDING THAT THE
AGGRAVATING FACTORS OUTWEIGHED THE MITIGATING
CIRCUMSTANCES.. 18

ARGUMENT III

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE,
EXCESSIVE, AND INAPPROPRIATE AND IS CRUEL AND UNUSUAL
PUNISHMENT IN VIOLATION OF ARTICLE I,
SECTION 17 OF THE FLORIDA CONSTITUTION
AND THE EIGHTH AND FOURTEENTH AMENDMENTS
OF THE UNITED STATES CONSTITUTION.. 21

ARGUMENT IV

TRIAL COURT COMMITTED ERROR WHEN IT DENIED
THE APPELLANT'S MOTION TO DECLARE 921.141
FLORIDA STATUTES UNCONSTITUTIONAL BECAUSE
A JURY, NOT A JUDGE, MUST MAKE A UNANIMOUS BEYOND
A REASONABLE DOUBT DETERMINATION AS TO
DEATH PENALTY AGGRAVATORS.. 26

ARGUMENT V

TRIAL COURT ERRED IN ITS WEIGHING OF THE
AGGRAVATING FACTOR AND THE MITIGATING
CIRCUMSTANCES FOUND IN APPELLANT'S CASE.............................. 29

ARGUMENT VI

TRIAL COURT ABUSED ITS DISCRETION IN
ALLOWING PHOTOGRAPHIC EVIDENCE WHICH
WAS GRUESOME AND UNDULY PREJUDICIAL.................................... 32

ARGUMENT VII

TRIAL COURT ERRED IN ALLOWING THE
CONFESSION OF THE APPELLANT... 34

ARGUMENT VIII

WHETHER OR NOT THE COURT ERRED IN ADOPTING
VIRTUALLY VERBATIM THE PROPOSED FINDINGS
OF FACTS AND CONCLUSIONS OF LAW SUBMITTED
BY THE STATE.. 36

ARGUMENT IX

APPELLANT'S MENTAL AGE WAS UNDER THAT
OF AN EIGHTEEN YEAR OLD ADOLESCENT AND
THEREFORE THE DEATH PENALTY WAS INAPPROPRIATE............... 38

CONCLUSION.. 42

CERTIFICATE OF FONT SIZE AND SERVICE... 43

TABLE OF AUTHORITIES

Page

Alan v. State, 363 So.2d 494 (Fla. 1994).. 39
Allen v. Butterworth, 756 So.2d 52, 59 (Fla. 2000)....................................... i
Apprendi v. New Jersey, 530 U.S. 466 (2000)... 26
Arbelaez v.State, 898 So.2d 25 (Fla. 2005).. 32
Atkins v. Virginia, 536 U. S. 304 (2002).. 39
Blakely v. State, 561 So.2d 560 (Fla. 1990)... 25
Blakely v. Washington, 121 S.Ct. 2531 (2004).. 27
Candle v.State, 571 So.2d 415 (Fla. l990).. 29
Carlton v. Carlton, 888 So.2d 121 (Fla. 4th DCA 2004)................................. 36
Castro v. State, 644 So.2d 97 (Fla. 1994).. 15
Crane v. Kentucky, 476 U.S. 683 (1986)... 34
Davis v. State, 785 So.2d 359 (Fla. 2004)... 32
Davis v. United States, 512 U.S. 452 (1994)... 34
Dorocher v. Singletary, 623 So.2d 422, 486 (Fla. 1993)............................... I
Eddings v. Oklahoma, 455 U.S. 104 (1982).. 41
Fitzpatrick v. State, 527 So.2d 809 (Fla. l988)... 22
Furman v. Georgia, 408 U.S. 238 (1972).. 22
Hamilton v. State, 547 So.2d 63 (Fla. 1989).. 17
Harris v. United States, 536 U.S. 545 (2002)... 26
Hawk v. State, 718 So.2d 159 (Fla. 1998)... 24
Knowles v. State, 632 So.2d 62 (Fla. 1993)... 23
Larkins v. State, 739 So.2d 90 (Fla. l999).. 23
Livingston v. State, 565 So.2d 1288 (Fla. 1988).. 23
Lusk v. State, 446 So.2d 1038 (Fla. 1984).. 16
Marshall v. Crosby, 911 So.2d 1129, 1141 (Fla. 2005).................................. i
Miller v. State, 373 So.2d 882 (Fla. 1979).. 24
Miranda v. United States, 384 U.S. 436 (1966).. 34
Nibert v. State, 574 So.2d 1059.. 24
North Florida Women's Health and Counseling Services, Inc. vs. State,
866 So.2d 612 (Fla. 2003)... 26
Overton v. State, 801 So.2d 877 (Fla. 2001)... 17
Patton v. State, 784 So.2d 380 (Fla. 2000).. 36
Perlow v. Berg-Perlow, 875 So.2d 383 (Fla. 2004).. 36

Porter v. State, 564 So.2d 1060 (Fla. 1990).. 21
Ring v. Arizona, 536 U.S. 584 (2002).. 27
Robertson v. State, 699 So.2d 1343 (Fla. 1997)... 25
Rodas v. State, 821 So.2d 1150 (Fla. 2002).. 16
Roper v. Simmons, 125 S.Ct. 1183 (2005).. 38
Smalley v. State, 546 So.2d 720 (Fla. l989).. 25
State v. Dixon, 283 So.2d 1 (Fla. 1973)... 22
The Florida Bar vs. Feinberg, 760 So.2cd 933, 939 (Fla. 2000).................... 42
Tillman v. State, 591 So.2d 167 (Fla. 1991).. 21
Trop v. Dulles, 356 U. S. 86 (1958)... 40
Trotter v. State, 476 So.2d 691 (Fla. 1991).. 17
Urbin v. State, 715 So.2d 411 (Fla. 1988)... 24
Valle v. State, 778 So.2d 960 (Fla. 2001)... 36
Walker v. State, 707 So.2d 300 (Fla. 1997).. 34
Weems v. United States, 217 U.S. 349 (1910)... 40
Williams v. State, 638 So.2d 976 (Fla. 4th DCA 1994), Review Denied,
654 So. 2d 920 (Fla. 1995).. 16
Woodson v. North Carolina, 428 U.S. 280 (1976).. 40

STATEMENT OF THE CASE

On Saturday, March 27th, 2004 at 21:45, Mr. Bevel was arrested for two (2) counts of First Degree Murder for two (2) victims, and Attempted First Degree Murder of a third victim. The indictment for Murder in the First Degree, (two (2) counts), Attempted First Degree Murder, and Possession of a Firearm by a Convicted Felon was filed against Mr. Bevel in late 2004. The State then filed a Notice of Intent to Seek Death Penalty and a Request for Statement of Particulars of Mental Mitigation on April 15th, 2004. Bevel filed several death motions on May 19th, 2005. Bevel also filed a Motion for Continuance on August 8th, 2005, which was denied. On August 19th, 2005, Bevel filed a motion to declare that death is not a possible penalty due to the Defendant's mental retardation. Bevel's I.Q. was 65. (R.329). Bevel also filed a Motion to Suppress statements which was denied, (R.395).

Bevel's trial began on August 25th, 2005. On August 26, 2005 the jury found Bevel guilty of First Degree Murder, (2 counts, 2 separate victims), and guilty of Attempted Murder of a third victim (TR. 1243). The jury unanimously (12 to 0) recommended that the Court impose the death penalty for the First Degree Murder of Phillip Sims, (13 year-old victim), the jury recommended the

Court impose the death penalty in the First Degree Murder of Garrick Stringfield by vote of 8 to 4, (TR. 1691).

The penalty phase was conducted following the guilt phase.

The trial court filed a written sentencing order which sentenced Bevel to the death penalty for the First Degree Murder of Garrick Stringfield, and consecutive to death sentence, the trial court sentenced Bevel to the death penalty for the First Degree Murder of Phillip Sims, and consecutive to the second death sentence the trial court sentenced Bevel to life imprisonment for the Attempted First Degree Murder in the shooting of Feletta Smith. All three (3) sentences were run consecutive to each other. Bevel was awarded credit for time served which was one (1) year, 209 days, (R.627).

At the trial level following jury selection, the State produced evidence that Bevel was responsible for shooting two (2) victims to death and wounding a third victim. After his conviction on all three (3) counts, the Defense at the penalty phase proved that Bevel's I.Q. was 65, and that he was abused as a child physically and mentally. His mother died in an accident when he was 12 years old, and his father died of AIDS when Bevel was 18. The jury recommended death penalty by a vote of 8-4 for the shooting death of Garrick Stringfield, and a vote of 12-0 for the shooting death of Phillip Sims.

The State began it's proof during the guilt phase with the witness of Sojourner Parker, who testified she was the mother of Phillip Sims, one of the victims in the shooting, (TR.466). The father of Phillip Sims was Garrick Stringfield. Ms. Parker testified that Mr. Stringfield was living with a roommate named TomTom and identified Bevel in the courtroom as Mr. Stringfield's nephew, TomTom, (TR.467). She further testified that she dropped her son off to go to Stringfield's house on February 28th, 2004, and she saw TomTom (Bevel), at the residence (TR.470). The State also called Feletta Smith who testified that on the evening in question she was in the bedroom with Garrick Stringfield and she heard Bevel's voice saying, "Unc, Open the door!" (TR.525). She testified that Garrick Stringfield opened the door and Bevel began shooting. The bullets hit Mr. Stringfield and Feletta Smith (TR.526). She heard Bevel say during the shooting say "Bitch, shut-up!" (TR.527). She then played dead until he left the residence. After he left the residence her body felt numb, burning and hot. She tried to use the house phone but it had no dial tone, (TR.528). She used Stringfield's cell phone and called 911. Police and Fire Rescue came to the residence (TR.530). She testified she was in the hospital for almost a month. She testified that her left hip was broken, her right femur was broken, and she was shot in the back twice (TR.531). She testified that when she first talked to police she told them it was two (2) males with masks (TR.532). She testified that she first stated that because

she was scared and did not want to get involved and that her family lives on the East side. When cross-examined, she was asked if she ever told other people that she did not remember who had shot her. Her answer was that she did not remember telling anybody that she did not know who shot her (TR.538). She also testified that she did not see Phillip Sims get shot (TR.551).

The State also called Dr. Crumbie who testified that he treated Feletta Smith for her gunshot wounds (TR.560), and Officer Fillingham testified that he arrived at the scene and had to break in through burglar bars to find Feletta Smith (TR.578). Dr. Giles was also called to testify about the autopsy of Phillip Sims. He testified that, in his opinion, the manner of death was homicide (TR.596). The State also called Dr. Nicolaescu who testified that he performed the autopsy on Garrick Stringfield and in his opinion the manner of death was homicide (TR.638).

The State then called Rohnika Dumas who testified that she was Bevel's girlfriend (TR.653). She testified that on the night in question, she was in a bedroom near to the bedroom where Mr. Stringfield and his girlfriend, Feletta Smith, were located. She heard gunshots and then saw Bevel come in with a rifle, (TR.667). She testified that she heard a young lady hollering and screaming during the shooting. (TR.668). Bevel then got her to leave the bedroom and went out the front door and into a car. She testified that Bevel had a rifle or a big gun with him (TR.669). She testified that as they were driving away Bevel tried to kill himself

(TR.669). He asked her to hold the steering wheel and pointed the gun over his neck and stated that he was sorry and didn't mean to do it (TR.670). She testified that he said he did not mean to kill the boy (TR.671). She further stated that he said that he killed the little boy because he was going to be a witness (TR.672). The State then introduced letters from Bevel to Dumas (TR.689). On cross-examination Ms. Dumas admitted she had a pending marijuana charge and another charge of battery on a law enforcement officer (TR.693). She also testified on cross that she told police that she didn't know Bevel was even a suspect in the murders until she saw his picture on television (TR.697).

The State also called Officer Doyle, an evidence technician (TR.726). The State admitted, over the Defense's objection, graphic and inflammatory photographs, one of a very large color photograph with a pool of blood (TR.736). Officer Doyle also recovered spent casings in the residence, (TR.752). He testified he recovered eight (8) cartridge casings at the scene (TR.753). He also testified he lifted fingerprints from the automobile of Garrick Stringfield.

Officer Davidson, an evidence technician, was also called to testify. He testified that he lifted several prints from the Garrick Springfield vehicle, (TR.808). Officer Kocik was called to testify that he analyzed the lift card and compared them to Bevel and, in his opinion, they were the same fingerprint (TR.830). Officer Pulley was called to testify that, in terms of ballistics, the

casings found at the scene were consistent with the AK-47 that was recovered, (TR.872).

The State then called Detective David Corsey, who was the lead detective in this case (TR.896). He testified that he and Detective Chizak were involved in questioning Bevel. After reading his constitutional rights, Bevel signed the rights form and voluntarily waived his rights, then gave different accounts to the detectives. In his first statement, Bevel denied being present at the house at the time of the murders and said he was with his girlfriend, Rohnika Dumas, at her home. In a second statement, Bevel stated he came back to the house and was accosted by two (2) masked men with firearms. Bevel stated he was forced into the house and held at gunpoint by one of the men while the other man went to the back of the house and killed Garrick Stringfield. Bevel next claimed that the two (2) men took him outside, let him go, then left in a car. He stated that he was unaware at the time that Phillip Sims had been killed. A video recap of these statements was given to the police. Both detectives were able to locate Rohnika Dumas who admitted she was at the residence when Bevel committed the murders, and stated she did not come forward because she was scared. Bevel was brought back to the Homicide Interview room and was told by the detectives that they had spoken with Ms. Dumas and that she had implicated Bevel in the murders.

Following this discussion, the detectives testified that Bevel confessed to the murders.

After the testimony of Detective Chazik, the State of Florida rested it's case. The Defense moved for judgment on acquittal, which was denied (TR.1075). The Defendant stated that he did not want to take the witness stand on his own behalf, (TR.1077). The Defense then began their case by calling Officer Bowen. He stated that he was in the Canine Unit and came to the scene of the shooting. He heard through the window a woman call out that she had been shot and that she believed her boyfriend was dead in the bedroom with her (TR.1081). He stated that when he got into the residence the female victim stated that the assailants were two (2) black males with ski masks covering their faces (TR.1083). The Defense then called Francis Smith who testified that she was the mother of Feletta Smith (TR.1090). She said she remembered Feletta telling her something about a man with a mask who was responsible for the shooting (TR.1091). The Defense called Kenitra Bronner who testified that Feletta Smith never told her that Tom Bevel had shot her, (TR.1097). Following that witness the Defense rested and closing arguments and jury instructions were given (TR.1112).

The jury found Bevel guilty as charged on Counts I, II, & III, (TR.1243). After the jury was polled, the penalty phase was passed to September 6, 2005. At the penalty phase of the trial the State called Detective Kuczkowski who was in the

Robbery Division (TR.1280). He testified that he arrested Bevel in connection with an armed robbery charge, (TR.1281). The State next called Detective Dingee who testified that he was also involved in the questioning of Bevel with Detectives Coarsey and Chizik. He testified that Bevel said that Phillip Sims needed to be shot because he was a witness (TR.1298). The State also called Priscilla Frink who was the mother of Garrick Stringfield. She testified as to the grief the family felt after his death. The State then called Florence Sims who testified that Phillip Sims was her grandson. She testified that Phillip Sims was a wonderful grandchild. (TR.1323). The State then called Sojourner Parker who testified about her son, Phillip Sims, and also expressed her feelings about his death, (TR.1326).

The Defense called their first witness, Officer Chuck Fisette, who was the custodian of jail records. He testified that Bevel only received two (2) disciplinary referrals since he was incarcerated. The Defense then called Michelle Kalil, an attorney with the Public Defender's office. She testified that she represented Bevel in the prior robbery case and that the State's first offer was ten (10) years and that after the deposition of the victim the offer was reduced to one (1) year. The Defense then called Barbara Fisher. She was Bevel's aunt who used to work in the Post Office. She testified that Bevel's mother had been drinking while she was pregnant with Bevel (TR.1373). She also testified that there was lots of physical and domestic violence in the home when he was a child (TR.1374). She further

testified that Bevel's mother died in a car accident when he was about nine (9) years old. (TR.1375). She testified that he struggled with the death of his mother. She also testified that his father died of AIDS (TR.1379). The Defense called Donna Sapp who testified that Barbara Fisher was her sister and that Bevel used to help with babysitting her grandchildren (TR.1390). The Defense next called Theondra Bevel. She testified that Bevel was her brother and that their father would be at home drunk a lot when they were children and beat both of them with a belt (TR.1409). Her father threw her in the pool at one time knowing that she could not swim and her brother got her out of the pool (TR.1412). The Defense also called Donella McCray who testified that Bevel was her grandson and after their mother passed away she took care of Bevel and his sister and brother (TR.1426). She testified that Bevel grieved about his mother's death constantly (TR.1426). The Defense then called Dr. Harry Krop, a licensed psychologist (TR.1435). He testified about Fetal Alcohol Syndrome which is when a mother drinks or uses drugs during the pregnancy which can cause an individual to have learning disabilities, possible retardation, but in any event deficits in thinking. However, Dr. Krop did not believe Bevel had the physical characteristics of Fetal Alcohol Syndrome, so he could not give an opinion that he was suffering from Fetal Alcohol Syndrome (TR.1447). He did state that based on his testing, it was likely that the drinking and possible drug use his mother did during her pregnancy

had a significant impact on his overall abilities intellectually (TR.1447). He testified that his I.Q. testing on Bevel came out with a full scale I.Q. of 65, which is classified in the mild range of mentally retarded (TR.1449). What this means is that, (as far as an I.Q. of 65), it represents the lowest one percent (1%) of the population. This means that for every 100 individuals who take the test and score 65, there would be 99 individuals with higher scores. Therefore, this I.Q. was low (TR.1450). However, he clarified that he did not diagnose Bevel as being mentally retarded as far as a diagnosis because he had looked at some of his writings and Bevel had a lot of street sense and a higher level of adaptive functioning, although unfortunately his adaptive level was also maladaptive functioning. However, Dr. Krop stated that the functioning level in terms of I.Q., was functioning based on his testing of Bevel which Dr. Krop believed was reliable in the mild range of mentally retarded (TR.1450). Dr. Krop further testified that given his I.Q., Bevel's mental age was somewhere between 14 or 15 years old (TR.1453). Dr. Krop diagnosed Bevel with anti-social personality disorder, mild mentally retarded in terms of his functioning level, that there was diagnostic criteria under the diagnostic and statistical manual; attention deficit hyperactivity by history, and that he had attention deficits and marijuana abuse. Following Dr. Krop, Bevel testified that he did not want to testify in the penalty phase (TR.1505). Following the evidence and closing arguments and jury instructions in the penalty phase, the jury

made a death recommendation by a vote of 8 to 4 as to Count I, victim Garrick Stringfield, and also recommended death by vote of 12-0 on Count II, victim Phillip Sims, (TR.1692).

SUMMARY OF THE ARGUMENTS

The Trial Judge should have allowed Bevel to strike for cause a juror, Ramos, because he favored law enforcement. In fact, the Trial Court stated that juror, Ramos, seemed conflicted because he favored law enforcement. Juror, Ramos, said that he had worked around law enforcement and that he would favor them. Clearly, he should have been excused for cause.

The Trial Court erred in finding the aggravating factors outweighed the mitigating circumstances. Only one aggravating factor was found on one victim and thirteen mitigating circumstances were proven. The Trial Court also erred in denying the Motion to Dismiss death sentence and to declare the statute unconstitutional.

The Trial Court erred in abusing its discretion allowing inflammatory photographic evidence and in allowing the confession of Bevel.

Thomas Bevel's mental age was under that of an 18 year old adolescent and therefore the death penalty was inappropriate in this particular case. The defense clearly proved that, at the time of the offense, Bevel had the mental capacity of an adolescent between 14 and 15 years of age, which is substantially less than the age of 18. While the 22 years old in actual years, because he had an I.Q. of 65 it was clear that he had frontal lobe dysfunction. The impairments of mentally retarded or mentally challenged offenders make it less defensible to impose a death penalty

as retribution for past crimes and less likely the death penalty will have a real deterrent effect. Almost every state prohibits those under 18 years of age from voting, serving on a jury, or marrying without parental consent. Youth is more than a chronological fact because it is a condition of life when a person may be most susceptible to psychological damage and influence which was clearly proven in this case. Bevel had experienced an abusive childhood. The standards of decency embodied in the Eighth Amendment evolve as public opinion becomes enlightened by humane justice. When the punishment is death that extreme sanction must fit not only the crime but also the offender; a death sentence must be directly related to the personal culpability of the criminal defendant.

The trial court erred in adopting virtually verbatim the proposed findings of facts and conclusions of law submitted my the State. In the trial courts sentencing order, the order itself was copied from the state's memorandum. Additionally, in the record there are handwritten words presumably by the trial court where, in the State's memorandum, the words "State proved" is scratched out, and a handwritten note of "Court finds beyond a reasonable doubt". The problem of a wholesale adoption of a parties proposed order is that it opens to question whether the trier of fact independently considered the issues prior to entering the order, particularly the

weight to be given the aggravating factors and the mitigating circumstances.

ARGUMENT I

THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR BY FAILING TO STRIKE FOR CAUSE A JUROR WHO FAVORED THE LAW ENFORCEMENT

During the voir dire examination of the jury in Bevel's trial, juror Ramos was asked certain questions and gave certain answers. Defense counsel asked the following:

Mr. Eler:	"Mr. Ramos, my understanding is that, for some reason, I had down yesterday when Mr. De La Rionda or the judge may have asked you about law enforcement, that it would influence your verdict, is that true?"
Juror:	"Well, I worked with them for so long that it may tend to- I favor them because I work around law enforcement so long but it wouldn't influence my decision."
Mr. Eler:	"It would not?"
Juror:	"No."
Mr. Eler:	"Okay. Alright. Thank you. Judge." (TR.376)

Following that exchange the Defense counsel renewed his challenge for cause. The trial court even stated that juror Ramos seemed conflicted because he did say he favored law enforcement. (TR.377) However, the Court went on to say that to every objective question, juror Ramos answered in a way that did not show bias. The Court denied the challenge for cause.

The standard for reviewing a challenge for cause is "an abuse discretion". Castro v. State, 644 So.2d 97 (Fla.1994). The trial court abused it's discretion in

denying the challenge for cause of juror Ramos. The court must settle the questions as to "whether the juror can lay aside any bias or prejudice and render his or her verdict solely upon the evidence presented and the instructions on the law given to him or her by the court." Lusk v. State, 446 So.2d 1038 (Fla.1984). When making this determination the court "must acknowledge that a juror's subsequent statements that he or she can be fair should not necessarily control the decision to excuse a juror for cause, when the juror has expressed genuine reservations about his or her preconceived opinions or attitudes." Rodas v. State, 821 So.2d 1150 (Fla.2002), Review Denied, 839 So.2d 700 (Fla.2003). "Because impartiality of the finders of fact is an absolute prerequisite to our system of justice, we adhere to the proposition that close cases involving challenges to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to impartiality." Williams v. State, 638 So.2d 976 (Fla.4th DCA 1994), Review Denied, 654 So.2d 920 (Fla.1995). In the instant case, the responses of prospective juror Ramos reflected doubt as to whether he could set aside his strong connection with law enforcement and how he worked with them and would lean toward their side of a story. The statements by juror Ramos created more than a reasonable doubt about his ability to be fair and impartial. This juror should have been struck for cause and the court erred in

denying the Appellant's challenge for cause.

The Appellant preserved this issue for review pursuant to Trotter v. State, 576 So.2d 691 (Fla.1991). The Appellant requested an additional peremptory challenge and the request was denied, (there was one (1) additional given for a different juror). The Appellant made a timely objection to the process.

This court held that it is reversible error for a trial court to improperly deny cause challenges where a juror expresses the strong belief that an accused should testify as an example, in Overton v. State, 801 So.2d 877 (Fla.2001). In another case, a juror in that jury selection stated in response to questions from the trial judge that she could hear the case with an open mind, but her other responses raised doubt as to whether she could remain unbiased, Hamilton v. State, 547 So.2d 63 (Fla.1989).

Clearly, juror Ramos should have been excused for cause. The fact that he favored law enforcement clearly establishes that there was a reasonable doubt as to whether or not he could remain biased.

ARGUMENT II

THE TRIAL COURT ERRED IN FINDING THAT THE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATING CIRCUMSTANCES

The trial court found one (1) aggravating factor regarding the murder of Garrick Stringfield and two (2) aggravating factors regarding the murder of Phillip Sims. The trial court found the aggravating factor for both victims that the Defendant had previously been convicted of a capital offense or of a felony involving the use of the threat of violence to some person and the trial court found in addition to the victim Phillip Sims, that the crime for which the Defendant is to be sentenced was for the purpose of avoiding or preventing a lawful arrest.

A death sentence would constitute cruel and unusual punishment under the Florida Constitution and the United States Constitution based upon the uncontroverted evidence relating to the Defendant's mental age, (14-15 years old), and his I.Q. of 65, placing him in the functioning range of mental retardation. While the court must give great weight to a jury recommendation of death, if the court finds the aggravating factors have not been proven beyond a reasonable doubt or if at least one (1) aggravating factor is proven and the evidence of mitigation is more compelling then a life sentence would be appropriate. A jury

recommendation of death is not entitled to great weight if it comes after a penalty phase that was not fairly conducted.

As it relates to the murder of Garrick Stringfield, the court found one (1) aggravating circumstance. It is clear that the Defendant proved 13 mitigating circumstances to the testimony of Bevel's grandmother, his aunt, his sister, Officer Fisette, and Dr. Harry Krop. The Defendant established the following mitigating circumstances:

1.) The age of the Defendant at the time of the crime, and more specifically, that he had a mental age between 14-15 years old.
2.) Bevel's religious faith.
3.) The reciprocal love between Bevel and his sisters, brothers, aunts and uncles.
4.) Bevel confessed to his involvement in the crimes charged.
5.) Bevel exhibited good jail conduct.
6.) Bevel exhibited appropriate courtroom behavior.
7.) Bevel could be a good inmate in prison.
8.) Bevel had an I.Q. of 65.
9.) Bevel was abused as a child, (physically and mentally).
10.) Bevel struggled with the death of his mother.
11.) Bevel felt remorse for his actions to the point of being suicidal.
12.) Bevel is young and does well in a structured environment and therefore can be rehabilitated.
13.) Bevel has not been a discipline problem in the detention facility for the 18 months that he has been there.

Dr. Harry Krop testified that Bevel had an I.Q. of 65 and that he functions in the mild range of mental retardation. He also testified that Bevel has a mental age of 14-15 years old. Dr. Krop opined that Bevel was the product of a dysfunctional

family and that he suffered from Attention Deficit Disorder and had a learning disability and cognitive deficits. Despite the fact that Bevel had a low I.Q. and did very poorly in school, he seemingly fell through the cracks in that he was never identified by school officials as a candidate for special education. Bevel did well in structured environments and would continue to do well if placed in the general population of the state prison facility if he received a life sentence. It was clear to Dr. Krop that Bevel was exposed to domestic violence as a young child and lacked any positive male role model while growing up. Bevel's mother consumed alcohol on a regular basis while she was pregnant with the Defendant. Bevel's learning disability is a symptom of Fetal Alcohol Syndrom and could be a result of his mother's drinking during pregnancy. Bevel had poor coping skills and feelings of abandonment resulting partly from the loss of his mother in a car accident.

Therefore, the Trial Court erred in finding that the aggravating factors outweighed the mitigating circumstances.

ARGUMENT III

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE, AND INAPPROPRIATE AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE 1, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS IN THE UNITED STATES CONSTITUTION

This court has described that the proportionality review performed in every capital case as follows:

Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case and to compare it with other capital cases. It is not a comparison between a number of aggravating and mitigating circumstances. Porter v. State, 564 So.2d 1060 (Fla.1990). The requirement that death be administered proportionally has a variety of sources in Florida law. It is clearly unusual to impose death based on facts similar to those cases in which death previously was deemed improper. Tillman v. State, 591 So.2d 167 (Fla.1991). Moreover, proportionality review in death cases rests, at least in part, on the recognition that death is a uniquely irrevocable penalty requiring a more intensive level of judicial scrutiny process than with lesser penalties.

Proportionality review also arises in part by necessary implication from the exclusive jurisdiction this court has over death appeals. This is to insure the uniformity of the death penalty law.

Imposing the death penalty in this case, Judge Haddock found that the State proved one aggravating factor as to Victim Stringfield and two aggravating factors as to Victim Sims.

The death penalty is so different from other punishments "in it's absolute renunciation of all that is embodied in our concept of humanity" Furman v. Georgia, 408 U.S. 238 (1972), that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated serious crimes, State v. Dixon, 283 So.2d 1 (Fla.1973). The Appellant's case is neither the "most aggravated" nor "unmitigated". In fact, the mitigation showing his I.Q. clearly illustrates by itself that this is not an unmitigated case. There were thirteen mitigating circumstances.

In Fitzpatrick v. State, 527 So.2d 809 (Fla.1988), this court noted that any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different. Despite the presence of five (5) statutory aggravating factors and three (3) mitigating factors, Fitzpatrick death sentence was reversed and the case remanded for imposition of life sentence on the premise that

"the Legislature has chosen to reserve its application to only the most aggravated and unmitigated most serious crimes." Fitzpatrick, 527 So.2d 811.

In Larkins v. State, 739 So.2d 90 (Fla.1999), there was no statutory mitigation and only some non-statutory mitigation that included mental problems. Additionally there were two (2) aggravating circumstances - prior violent felony, (actually two (2) of them manslaughter and assault with intent to kill), which had occurred 20 years prior to the murder. Florida Supreme Court reversed the death sentence. The same should apply here where the mitigating circumstances outweigh the statutory factors.

Similarly, in Livingston v. State, 565 So.2d 1288 (Fla.1988), the Court found the death sentence to be disproportionate where the aggravators, (1) prior violent felony and (2) murder committed during a robbery, were offset by severe childhood abuse, youth and immaturity and diminished intellectual functioning. The Florida Supreme Court explained:

> Livingston's childhood was marked by severe beatings by his mother's boyfriend who took great pleasure in abusing him while his mother neglected him. Livingston's youth, inexperience and immaturity also significantly mitigate his defense. Furthermore, there is evidence that after the severe beatings Livingston's intellectual functioning can best be described as marginal. These circumstances, together with the evidence of Livingston's extensive use of cocaine and marijuana, counter balance the effect of the factors found in aggravation. Accordingly, we find that this case does not warrant the death penalty. Livingston v. State, 568 So.2d 1292.

In Knowles v. State, 632 So.2d 62 (Fla.1993), the death sentence was found

to be disproportionate despite the contemporaneous murder aggravator where substantial mitigation included brain damage and impaired capacity; Miller v. State, 373 So.2d 882 (Fla.1979), (death disproportionate despite substantial aggravation, including heinous atrocious and cruel aggravator where mental mitigation was substantial and related to the crime. Also in Hawk v. State, 718 So.2d 159 (Fla.1998), this court held that the death was disproportionate despite substantial aggravation, including contemporaneous attempted murder of a second victim, where mental mitigation was substantial. Also, in Urbin v. State, 714 So.2d 411 (Fla.1988), the death sentence was disproportionate despite multiple aggravators, including prior violent felony, where mitigation included impaired capacity, deprived childhood and youth. In the case at bar, the heinous atrocious or cruel aggravator and the cold calculated premeditated aggravator were not present nor proved nor considered in this particular case. Therefore in comparison with the cases above, together with the substantial mitigation including an abusive childhood, youthful age and mental mitigation, the death penalty is inappropriate and disproportionate when compared with cases where the aggravating factors of HAC and/or CCP have been proven. Moreover, in Nibert v. State, 574 So.2d 1059, death was found to be disproportionate not withstanding the fact that the HAC aggravator was established by the cruel nature of stabbing the victim 17

times. This however was offset by the Defendant's abused childhood, remorse, potential for rehabilitation in a structured prison environment, extreme mental and emotional disturbance and impaired capacity due to alcohol abuse. Likewise, in Smalley v. State, 546 So.2d 720 (Fla.1989), the court held that there was substantial mitigation made which made the death penalty disproportionate despite proof of HAC in the murder of a 28 month old girl who died after the Defendant struck the child repeatedly, dunked her head in water, and banged her head on the floor. More significantly, in Robertson v. State, 699 So.2d 1343 (Fla.1997), this court held that the death penalty was disproportionate where HAC and other aggravation was offset by age, impaired capacity, childhood abuse and mental mitigation. See also Blakely v. State, 561 So.2d 560 (Fla.1990),where the death sentence was found to be disproportionate in domestic dispute despite finding two (2) aggravating circumstances HAC and CCP.

ARGUMENT IV

TRIAL COURT COMMITTED ERROR WHEN IT DENIED THE APPELLANT'S MOTION TO DECLARE 921.141 FLORIDA STATUTES UNCONSTITUTIONAL BECAUSE A JURY, NOT A JUDGE, MUST MAKE A UNANIMOUS BEYOND A REASONABLE DOUBT DETERMINATION AS TO DEATH PENALTY AGGRAVATORS

The standard of review of the denial of the Appellant's motion is a de novo standard of review. North Florida Women's Health and Counseling Services, Inc., v. State, 866 So.2d 612 (Fla.2003).

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. The Sixth Amendment has been strictly interpreted to honor a defendant's right to a jury trial. The Supreme Court in Apprendi v. New Jersey, 530 U.S. 466 (2000), dealt with the Sixth Amendment and hate-crime enhancement where the judge and not a jury decided the applicability of the enhancement. In honoring the right to a jury trial, the Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. In Harris v. United States, 536 U.S. 545 (2002), the United States Supreme Court held that under

Apprendi, "those facts setting those outer limits of a sentence and of the judicial power to oppose it, are the elements of the crime for the purposes of the constitutional analysis.". The court applied Apprendi's rule to death penalty cases and found that aggravating factors "operate as the functional equivalent of an element of a greater offense the Sixth Amendment requires that they be found by a jury," Ring v. Arizona, 536 U.S. 584 (2002).

In Florida the maximum penalty for capital first degree murder is life without parole. A separate finding of at least one aggravating element must be made to sentence a person past this statutory maximum. In Florida that finding is done only by the trial judge and not a unanimous decision by the jury. The jury's role is merely advisory and only requires a majority of the jury to make a recommendation of death. It is true that there was a 12-0 recommendation of death on one of the victims. There was no unanimous finding of the death penalty aggravators since the other victim the jury held recommended death on a vote of 8-4.

The right to a jury trial to establish an element which increases the statutory maximum of a crime continues to be affirmed by the United States Supreme Court. See Blakely v. Washington, 121 S.Ct. 2531 (2004). All states except for Florida follow the rule of Apprendi and Ring.

Therefore, the Trial Court erred when it denied Bevel's Motion to Declare 921.141 Florida Statutes unconstitutional.

ARGUMENT V

TRIAL COURT ERRED IN ITS WEIGHING OF THE AGGRAVATING FACTOR AND THE MITIGATING CIRCUMSTANCES FOUND IN APPELLANT'S CASE

Whether or not a factor or circumstance is mitigating is a question of law and subject to the de novo standard of review. If a mitigator is established or not is a question fact subject to review for substantial competent evidence. Determination of the weight of the evidence assigned to each aggravating factor or mitigating circumstance is subject to the abuse of discretion standard of review. Candle v. State, 571 So.2d 415 (Fla.1990). The Court found one (1) aggravating circumstance regarding Count I (victim-Garrick Stringfield) that the "Defendant was previously convicted of a capital offense or of a felony involving the use or threat of violence to some person". The court found two (2) aggravating circumstances as to Count II (victim-Phillip Sims) in that (1) The defendant had been previously convicted of a capital offense or of a felony involving the use or threat of violence to some person, and (2) The court found that the crime for which the Defendant was to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest.

The Appellant urges this Court to find that the trial decision was error.

Appellant requests the aggravating elements be vacated and that his death sentence be vacated. In the alternative, he urges this court to assign greater weight to mitigating factors and finding that the mitigating factors were proven. Moreover, Appellant requests that this court find that the mitigating factors outweigh the aggravating factors and vacate his death sentence.

One of the more striking mitigating circumstances was the fact that Bevel's I.Q. was 65. In Atkins vs. Virginia, 536 U.S. 304 (2002), Atkins had an I.Q. of 59. In that case, the Virginia Supreme Court, which heard Atkins' case at the state level, noted that it could find no reported case of anyone with an I.Q. as low as Atkins' I.Q. of 59 ever being executed. Regardless of whether one supports the death penalty, the execution of persons like Bevel should be troubling. While a person like Bevel with this condition, may be competent to stand trial (in that he can assist in his defense and understand) he will also unlikely be unable to assert an insanity defense. With an I.Q. score ranging from 59 to 70, a mildly retarded person has the cognitive style and coping abilities of a 9 to 12 year old. When a reasonable person thinks of the difference in impulse control of a 9 year old as compared to an adult, one gets a sense of the dramatic difference. Since we don't execute children, why should we execute a child-like Defendant.

According to the D.S.M.-IV, the essential feature of mental retardation is

sub-average general intellectual functioning (measured with an I.Q. score of 70 or less), but it must be accompanied by significant limitations in adaptive functioning in at least two of several domains, including communication, work, academic skills, health, and independent living. In the <u>Atkins</u> case, at the sentencing re-trial, Atkins presented expert testimony that he was mildly mentally retarded and the prosecution rebutted with an expert who opined that Atkins was of "at least" average intelligence.

The Supreme Court finds a serious question whether the two permissible justifications for capital punishment - retribution and deterrence - apply to mentally retarded defendants. When considering retribution the Court's opinion that if the culpability of the average murderer is insufficient to justify the most extreme sanctions available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. In considering deterrence, the cognitive and behavioral impairments of the mentally retarded make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

ARGUMENT VI

TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING PHOTOGRAPHIC EVIDENCE WHICH WAS GRUESOME AND UNDULY PREJUDICIAL

The admission of photographic evidence is within the trial court's discretion. This will not be disturbed on appeal unless there is a clear showing of abuse. Davis v. State, 875 So.2d 359 (Fla.2004).

The trial court erred in admitting the State's exhibits because they were not relevant and they were extremely prejudicial and gruesome. Relevant evidence is evidence tending to prove or disprove the material fact. This court has consistently upheld the admission of allegedly gruesome photographs where they were independently relevant or corroborative of other evidence. Arbelaez v. State, 898 So.2d 25 (Fla.2005). However in the incident case the photographs should have been excluded because any possible probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. See Section 90.403 Florida Statutes.

Appellant objected to exhibits which were photographs of the dead body of the victim and bloodstains and argued that it was irrelevant. The evidentiary value in these gruesome photographs had no value because the witnesses had already testified seeing the bodies.

Therefore, the Trial Court abused its discretion in allowing inflammatory photographic evidence which was gruesome and unduly prejudicial.

ARGUMENT VII

TRIAL COURT ERRED IN ALLOWING THE CONFESSION OF THE APPELLANT

When a defendant invokes his right to counsel that request must be unequivocal. Davis v. United States, 512 U.S. 452 (1994) and Walker v. State, 707 So.2d 300 (Fla.1997). If a defendant chooses to waive his right to be silent and speak to law enforcement without counsel, that defendant must knowingly and intelligently waive his right to counsel, Miranda v. United States, 384 U.S. 436 (1966). If that waiver is challenged, it is up to the state to prove by a preponderance of evidence that this waiver was knowing and voluntary. When determining the voluntariness of a confession where the defendant has, for instance, an I.Q. of 65, or was under the influence of some other intoxicating agent, the totality of the circumstances must be examined. Crane v. Kentucky, 476 U.S. 683 (1986).

This court held that during the motion to suppress hearing that, after hearing from the detectives and the State's expert Dr. William Riebsam, determined that Appellant's statements were made knowingly and voluntarily. The Appellant gave different accounts of these crimes to the detectives.

Therefore, the Defendant's I.Q. of 65 shows that his Waiver of Right to

Counsel was not knowingly and intelligently completed and therefore the confession should have been suppressed.

ARGUMENT VIII

WHETHER OR NOT THE COURT ERRED IN ADOPTING VIRTUALLY VERBATIM THE PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW SUBMITTED BY THE STATE

Florida courts have disapproved of the practice of adopting a party's proposed judgment or order verbatim, Perlow v. Berg-Perlow, 875 So.2d 383 (Fla.2004), Carlton v. Carlton, 888 So.2d 121 (Fla.4th DCA 2004). The systemic problem with wholesale adoption of a party's proposed order is that it opens to question whether the trier of fact independently considered the issues prior to entering the order. If the case involves a death case as in the case at bar, the accused is denied due process in violation of his rights, both Florida and United States Constitution.

This Court has denied relief where trial courts adopted wholesale submissions of one party so long as the findings were supported by the record. Patton v. State, 784 So.2d 380 (Fla.2000). However, in those instances there was some indication in the record that the trial judge had, in fact, independently considered all of the testimony, records, and files in the case and it could be determined from the order entered that the trial reviewed both proposed orders and did not simply rubber stamp the State's order. Valle v. State, 778 So.2d 960

(Fla.2001).

On page 10 of the State's memorandum in support of the imposition of the death penalty, a hand written note appears that states "inset 2" and then the words "State proved" is scratched out and a handwritten note of "Court finds beyond a reasonable doubt". Additionally at the end of that paragraph the last sentence that states "the State submits that this Court should give this aggravating circumstance great weight" is crossed out. (TR.597). That same area of the State's memorandum, when compared to the judge's sentencing order, is identical on page 9 of the trial judge's sentencing order (R.613).

Therefore, the Trial Court erred in adopting virtually verbatim the proposed findings of facts submitted by the State.

ARGUMENT IX

APPELLANT'S MENTAL AGE WAS UNDER THAT OF AN EIGHTEEN YEAR OLD ADOLESCENT AND THEREFORE THE DEATH PENALTY WAS INAPPROPRIATE

The United States Supreme Court recently held in Roper v. Simmons, 125 S. Ct. 1183 (2005), that execution of individuals who are under eighteen (18) years of age at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments. This court in Urbin v. State, 714 So.2d 411 (Fla.1998), held that the closer that the defendant is to the age that is constitutionally barred, the weightier the statutory mitigator becomes. The defense proved that, at the time of the offense, that the Appellant had the mental capacity of an adolescent between 14-15 years of age which is substantially less than the age of 18. While the Appellant was 22 years of age in actual years, a study entitled "Dynamic Mapping of Human Cortical Development During Childhood Though Early Adulthood" led by NIH's Institute of Mental Health and UCLA's Laboratory of NeuroImaging, found that the maturation of the temporal lobe of the brain (the area which controls judgment and impulse) is not fully formed until age 25. Nitin gogtay et al, Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood, 101 Proceedings of the National Academy of Sciences 21 (2004).

The age of a defendant that has been sentenced to be executed by the State is clearly a subject of considerable change. In Alan v. State, 363 So.2d 494 (Fla.1994), this court held that the death penalty was "cruel or unusual if imposed upon one who is under the age of 16 when committing the crime; and death thus is prohibited by Article 1, Section 17 of the Florida Constitution." In Urbin v. State, 714 So.2d 411 (Fla.1998), this court held that the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes. Urbin was 17 years old at the time of his offense, and yet he was afforded relief from his death sentence based upon statutory and non statutory mitigation related to age and maturity issues even though he was above the age of maturity, at which the execution was constitutionally barred. It is clear the evidence showed that Bevel had an I.Q. of 65. While there was no diagnosis of mental retardation, it is clear that mental retardation diminished personal culpability even if the offender can distinguish between right from wrong. The impairments of mentally retarded offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely the death penalty will have a real deterrent effect. Atkins v. Virginia, 536 U.S. 304 (2002). In recognition of the comparative immaturity and irresponsibility of juveniles, almost

every state prohibits those under 18 years of age from voting, serving on a jury, or marrying without parental consent. Youth is clearly more than a chronological fact; it is a condition of life when a person may be most susceptible to psychological damage and influence which was shown by the Appellant's abusive childhood. More significantly, and from a moral standpoint, it would be misguided to equate the feelings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be later on reformed as an adult. The Eighth Amendment's prohibition on cruel and unusual punishments is not static and rather it must draw its meaning from evolving standards of decency that mark the progress in a maturing society. Trop v. Dulles, 356 U.S. 86 (1958).

The standards of decency embodied in the Eighth Amendment evolve as public opinion becomes enlightened by humane justice. Weems v. United States, 217 U.S. 349 (1910). When the punishment is death that extreme sanction must fit not only the crime but also the offender; a death sentence must be directly related to the personal culpability of the criminal defendant. Woodson v. North Carolina, 428 U.S. 280 (1976).

Arguing from a common sense line of logic and from experience, adolescents when compared to adults have a significantly diminished capacity for

reasoned judgment, for understanding and appreciating the consequences of their choices, and for managing their emotions and controlling their behavior. Minors often lack the experience, perspective and judgment expected in adults. Eddings v. Oklahoma, 455 U.S. 104 (1982). Magnetic resonance imaging (MRI) technology can show the development of the brain over time. It can be shown that the frontal lobes of the brain which govern the high order cognitive functions are not yet fully developed in adolescence. The frontal lobes are the most uniquely human of all the components of the human brain and the frontal lobes, particularly the area of the frontal lobes known as the prefrontal cortex are often referred to as the CEO of the brain in charge of the brain's executive functions. The frontal lobe is the part of the brain that is not yet fully developed in late adolescence.

Therefore, since Bevel's mental age was that of a fourteen to fifteen year old, the death penalty was inappropriate in this particular case.

CONCLUSION

As Judge Wyzanski has written: "*While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators*."

Therefore, since truth is critical to the operation of the judicial system, (The Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla.2000)), this Court should exercise its power to reconsider and correct the trial court's rulings and vacate Bevel's sentences of death sentence to prevent an injustice in a capital case.

CERTIFICATE OF FONT SIZE AND SERVICE

I hereby certify that a true copy of the foregoing Initial Brief was generated in Times New Roman 14-point font, and has been furnished by U.S. Mail to Charmaine Milsaps, Esq., Office of the Attorney General, The Capitol, Tallahassee, Florida 32399, on this 2nd day of November, 2006.

____

JEFFERSON W. MORROW, ESQ.
Florida Bar No. 369136
1301 Riverplace Blvd., Suite 2600
Jacksonville, Florida 32207
Phone: (904)399-5626
Fax: (904)399-5980
Counsel for Appellant