IN THE SUPREME COURT OF FLORIDA

FREDERICK NOWITZKE,

Appellant,

vs. Case No. 71,729

STATE OF FLORIDA,

Appellee.

Originally filed
2-5-90

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MANATEE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

Corrected

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STATEMENT OF THE CASE

Frederick Nowitzke was charged with first degree murder of his mother (Frances Carroll) and step-brother (Bret Carroll), and with attempted first degree murder of his stepfather (Clay Carroll). (R3792, 4201-02) He was found incompetent to stand trial, and was hospitalized at the North Florida Evaluation and Treatment Center for six months. (R3815-17, 3536) At the end of that period, the trial court found that he was competent. (R3542)

The case proceeded to trial on October 26 - November 12, 1987 before Acting Circuit Judge Walter R. Talley and a jury. The defense was insanity. Appellant was found guilty as charged on all three counts. (R4207-08, 4168, 3234) After the penalty phase, the jury recommended life imprisonment for the murder of Frances Carroll, and death (by a 7-5 vote) for the murder of Bret Carroll. (R4209-10, 3483-84) At sentencing on December 18, 1987, the trial court followed both recommendations, and also imposed a consecutive seventeen year sentence on the attempted murder count. (R4211-15, 4178-80, 3784-90) The trial court orally announced his findings in support of the death penalty. (R3786-89) While he stated that he would reduce his notes to writing and file them (R3787), it does not appear that he ever did so. (see R4280)

STATEMENT OF THE FACTS

A. BACKGROUND

Appellant, Frederick Nowitzke, known as Rick, is the youngest of three children of Frederick and Frances Nowitzke. Appellant had a grandmother who, in the 1930s, was diagnosed with "dementia praecox" (now referred to as schizophrenia), and died in a New Jersey state hospital. One of appellant's great-grandfathers spent the last ten years of his life in a mental institution in Italy, in a catatonic schizophrenic state. (R2196, 2216, 2225)

Appellant was born in 1959. Two years later, his father was diagnosed as having a cancerous tumor of the spine; it was estimated that he had only two or three years to live. On recommendation of the doctors, the family (including

Rick's older siblings Joyce and Jim) moved to Florida. As Frederick, Sr.'s disability worsened, the family received V.A. benefits and disability checks, and Frances worked as a secretary. Rick attended the Bradenton schools, where he was an average student and was considered quiet and rather shy. In high school, he dated a girl named Susan Parish. They broke up after graduation, but continued to be friends.

Meanwhile, to everyone's surprise, Frederick, Sr. survived as an invalid for approximately twenty years. After his death, Frances began dating Clay Carroll. The Carroll family had lived across the street from the Nowitzkes for about seventeen years. Clay, a former major league baseball pitcher, was divorced from his first wife, Judy, in 1981. They had three children, Connie, Lori and Bret. On April 1, 1983, Frances Nowitzke and Clay Carroll were married, and Clay, Lori, and Bret moved into the Nowitzke home.

Joyce and Jim Nowitzke had each married by that time and moved out on their own, but appellant was still living at home, and working as a landscaper. In 1985 appellant's friends began noticing an abrupt change in his personality and behavior.

B. APPELLANT'S BEHAVIOR IN THE MONTHS PRECEDING THE SHOOTINGS

Susan Parish, appellant's former girlfriend, testified that they had continued to see each other as friends after their relationship ended. During 1985, appellant began acting strangely. In the spring of that year, he began talking about a black raven-type bird which was following him everywhere: in his car, on his motorcycle. He was always looking up for the bird. He would also look around and talk, as if speaking to someone, when there was nobody there. Susan knew that he was "losing it." Asked what she meant by that, she replied:

> Losing his mind. I -- I've known him for ten years and I had never -- he was always real quiet and soft spoken; and he was a very good person, in my book, and I've never seen him hurt anyone. ... And I just couldn't understand why he was always just so nervous and just high-strung and paranoid and talking about birds and stuff. I knew that he wasn't the same person.

(R2486-91)

Mark Lavallee had known appellant for nine years as a friend and as an employee. Lavallee was appellant's supervisor at Neal and Neal, where appellant worked in new site development and landscaping. They became friends, and were roommates for several years. Beginning in 1984, Lavallee observed that appellant was behaving oddly. He would be paranoid that people were watching him or birds were following him. The birds would be sitting in a tree or flying around the dumpsters; appellant would point them out and say "See, they are right there." When Lavallee would question him about such remarks, appellant never could give a good explanation; he just felt like it was a curse, that they were following him. Lavallee thought appellant was suicidal, because he had gotten very morose and felt like everything was going wrong. Appellant's odd behavior and his comments about birds continued through the summer and early fall of 1985. He made a number of remarks to Lavallee to the effect that the bottom of the lake was calling to him[1]. Lavallee testified:

> He really couldn't explain himself. He always had said "That lake, I know it's calling me. I'm going to have to go down and see on the bottom of the lake." He really felt like that lake had a lot to do with his problems.

Appellant said he was going to get some scuba gear and see what was really calling him to the bottom of the lake. He told Lavallee that he "felt these vibes" that there was a message down there for him. According to Lavallee, appellant would bring up the lake "all the time." In Lavallee's opinion, appellant's comments about the lake and about the birds following him were serious and not joking.

Lavallee testified that during most of the nine years he knew him, appellant was "pretty outgoing -- he was a quiet, but peaceful person. He really liked the outdoors. He liked animals. He had horses, dogs. He liked to swim. Within the last year there, there was a complete change." (R2502-15)

Mark McMahon, a rebuttal witness called by the prosecution[2], testified on

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[1] There was a small lake or pond behind the Nowitzke home.

[2] McMahon testified on direct that he saw appellant at about 8:00 p.m. on November 15, 1985, the evening before the shootings, at a mutual friend's house, (continued...)

cross-examination that he and appellant have been friends since childhood. They grew up in the same neighborhood, and attended the same schools. After high school, they continued to see each other often, and on several occasions they worked together. During the months prior to November 15, 1985, McMahon noticed a change in appellant's behavior and personality. It came on slowly at first, but McMahon said "There was no question in my mind that there was an obvious change." Appellant began to make remarks which were "off the wall", unrelated to the topic of conversation; he would "just kind of break away from the situation at hand and kind of go into his own little world." The content of his statements made no sense, and were inappropriate to what was happening at the time; they were "weird and bizarre." At times, appellant would bring up the lake; "[t]here was just an obvious obsession with the lake." McMahon elaborated:

> Strange as it may sound, there being a door -- he mentioned something about a door, a passageway, through the lake. Into what, I really didn't know; and I didn't feel like going into it any further, you know.

The change in appellant's personality and behavior was obvious to others, and the question of "What's the matter with Rick" was discussed among family and friends. Even though he was aware at the time that appellant used drugs, McMahon did not attribute appellant's strange behavior and remarks to drug use; he felt it was something deeper than that. (R2723-35)

James Moon was a neighbor of the Nowitzkes; the lake or pond is common to both of their back yards. Moon had known appellant for about 12-13 years, and described him as a quiet, reserved person. During the second week of November 1985, Moon was doing yard work when he saw appellant swimming around the lake. Appellant had on a wet suit, a pair of fins, a mask, and a snorkel, and he was swimming in a kind of zigzag pattern in one particular spot, looking down into the lake. Moon thought to himself that it was "something that I probably wouldn't have been doing for fun at that time of the year." He testified:

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[2](...continued)
and that appellant took a drug which McMahon described as "assumably, cocaine." (R2721-23)

> ... [T]he lake is not a real clear lake and its got a real muddy bottom, and you can't see the bottom. And as I remember, it was chilly.

Moon said he saw appellant with his head under water, breathing through the snorkel. Moon (a scuba instructor himself) testified that he had never seen that lake where you could see the bottom from the surface. "You went down and you said 'I know its there somewheres', and pretty soon you were down around swimming in the mud. So its not a fun place to do anything but swim on the surface.'' Moon offered appellant the use of a weight belt, so he could get something other than his head below the surface, but appellant declined.

In years past, Moon had often seen appellant swimming in the lake with is whole family, but he had never seen him snorkeling like that. (R2440-47)

Robert Brown had been a close friend of appellant's for fifteen years, from the neighborhood and school. On November 15, 1985, Brown was driving by appellant's house and saw appellant outside in the garage area. He stopped to say hello. Appellant's appearance and dress were no different than usual, but, according to Brown, "He was really quiet and I -- I didn't really understand where he was coming from. He didn't really respond to anything I was saying in a viable manner. I didn't -- I didn't really understand him. I felt uneasy being with him. It was very strange." Appellant kept saying things that didn't mean anything, and Brown wondered what was the matter with him. "I didn't know what to think." Appellant was "just kind of mumbling about different things," and his response to Brown's questions or comments were not normal or appropriate. Brown felt strange and uncomfortable being there with him, and was anxious to get away.

Brown testified that he had felt strongly that for the last six months to a year or even longer, appellant was losing his ability to function and lead a normal life, at work and socially with friends. Brown felt badly for him, and was concerned. "But that night in particular, he seemed worse to me, and

detached almost. He wasn't the same Rick that I knew." (R2451-57)[3]

Harold Parish, the brother of Susan Parish, saw appellant at Susan's house on Friday evening, November 15, 1985 (the night before the shootings took place). Appellant seemed confused; he was making comments about joining the military service, and kept looking at his watch, saying he had to meet a recruiter at 10:00 p.m. When Harold asked him why it was necessary for him to meet a military recruiter at ten in the evening, he "did not get any answer with the exception he wanted to join a Service to better his life. He was very confused, he had a lot of problems." Harold asked appellant if he'd like to go fishing with him, and they decided to set up a fishing trip for the following afternoon. Appellant left at about twenty minutes to ten, and returned about half an hour later.

That night was the first time in two years that Harold had seen appellant for any length of time. Harold was trying to talk to appellant, but could not understand what he was getting at. When he had seen him in the past, in contrast, "I could sit down and talk to him and we could exchange words and understand each other." Harold testified:

> But two years prior to that [November 15, 1985], Rick seemed to be himself. There was -- you know, he was just a happy person; shy, didn't really talk a lot, and would always offer, you know, comments if you have a discussion with him. But the night before, which was the night that I seen him, it just wasn't Rick.

(R2474-81)

C. THE EVENTS OF NOVEMBER 16, 1985

Deborah Wiggins, a topless dancer at the Peek-a-Boo Lounge in Bradenton, noticed appellant in that establishment at about 5:00 p.m. on November 16. Appellant paid her for a dance. As Ms. Wiggins danced for him, she observed that his entire body was trembling, to such an extent that she described him as a "human vibrator." Appellant would not look at her, but instead kept staring at the mirrored ball which was hanging from the ceiling. His eyes were "like

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[3] Observations by appellant's friends to the effect that "He was a different person" and "It just wasn't Rick" were a recurrent theme. See R2457 (Robert Brown); 2467-69 (Arthur Brown); 2478 (Harold Parish); 2491 (Susan Parish).

dysfunctional, almost"; the pupils were "like dilated ... They were huge-like.'' She thought he had a glass eye at first. According to Ms. Wiggins, he looked scared and pitiful. She believed that he was under the influence of cocaine.

Ms. Wiggins kept asking appellant if he was all right, maybe half a dozen times. Two or three times appellant said "I have to go. There's something I have to do." Ms. Wiggins went on to other customers; she did not see appellant leave. (R2053-69)

Clay Carroll, appellant's stepfather, testified that in the early evening of November 16 he and Bret were watching television, while Frances and Lori were preparing supper. Appellant came inside the house and asked Clay, "You going out on the boat?" Clay replied, "No, we never go out on Saturday night." Appellant went to the bathroom, then came back out and went outside through the patio and back door. When supper was ready, Frances went outside and hollered for appellant, but he never came back in. After the meal, Frances and Lori did the dishes, and Clay and Bret watched some more TV. When the dishes were finished, Lori left to go baby-sit. After a while, appellant came back in through the patio and went to his room. Frances went in there with him. They were in there "a good 20 minutes or more." Clay did not know what they were talking about.

Appellant and Frances came out of the bedroom and went through the kitchen area toward a closet by the front door. Clay asked "what's up?" or "Where's he going?" and Frances said "He's going to a belated Halloween party." At that point, Clay noticed that appellant was standing there with a shotgun in his hand, and another gun either in a holster or strapped to his side. Clay said "Something's up", and appellant said "That's right." Clay got up from his chair and walked through the kitchen. Frances was standing right behind appellant. Appellant pointed the shotgun at Clay. Clay told Bret (who was still sitting down, and did not know what was going on) to get out of the house. Clay got behind a wall, and when appellant came through again, Clay grabbed him and knocked him up against the wall. He took the shotgun away from appellant and threw it on the floor. When Clay turned to go after appellant again,

because he remembered the other gun, he was shot in the head and fell to the floor. He kept hearing gunshots, and Frances fell on top of him. Clay was down for a minute or more, but he never lost consciousness. When he got to his feet, he shook Frances, but got no response. As he was going to the telephone, he saw Bret lying on the floor with his legs shaking. Clay called 911, and put a rag under Bret's head, and waited for the paramedics to arrive. (R2122-34)

The first paramedic unit arrived at the residence at about 7:45 p.m. Clay Carroll met them at the front door. Bobby Weldon, an E.M.T., asked him if the person who did it was still there, and Clay said no. The police arrived a few minutes later. Frances Carroll was lying face down on the floor in the front hallway with a gunshot wound to the back of the head. She had no pulse, or virtually no pulse; the paramedics determined that the injury was fatal and that life support measures would be in vain. Bret Carroll was lying face down in the dining room area, with the shotgun next to him. He had a gunshot wound to the right temple and another to the left flank, and appeared to be unconscious. When paramedic Weldon rolled him over, he opened his eyes momentarily and said "He's coming back to get us." (R1740-48, 1750, 1753-54, 1765-66, 1771-767) [Both Frances and Bret died from their head injuries. Clay was hospitalized for several weeks and underwent surgery for a fractured jaw. (R1867-72, 2013-16, 2025-26, 2031-33, 2136)]

Clay Carroll told the police officers that his stepson Rick had done the shootings, and described appellant's motorcycle. In the garage, the paramedics and police found a dog lying motionless on the floor; it had been fatally injured by a shotgun blast. The other dog in the residence was unharmed. Outside the garage, in the driveway, one tire on Clay Carroll's automobile was flattened, and one tire on Clay's boat trailer was also flattened. (R1748, 1768-70, 1835, 1886)

Cynthia Coey, a neighbor from across the street, told police she had heard a couple of pops, which she thought was a car backfiring, and a few minutes later heard a dog yelping. After she heard the dog, she saw someone about to get on appellant's motorcycle. (R1848-49, 1890)

Susan Parish, appellant's former girlfriend, heard a motorcycle pull up in her driveway at about 8:00 p.m. There was a knock on her door but she did not answer it. She then heard the motorcycle drive away. (R2498-99)

Joseph Hampton, a neighbor, arrived home from dinner at about 10:00 p.m., when he saw a lot of cars and noticed the crime scene tape. Another neighbor told him there had been a shooting. As Hampton walked across the street to talk to a police officer, a motorcycle drove by him at a very slow rate of speed. The motorcyclist went down to where the street reached a dead end, got off the motorcycle, and walked into the woods, in the direction of the lake. Hampton went over and began talking with a policewoman, who told him "We think that Rick did the shooting and left on his motorcycle." Upon hearing that, Hampton said "He's right down the street." (R1853-55)

The police officers parked their vehicles at the dead end, and turned up the P.A. system. Appellant's sister, Joyce Seelbach, a civilian police employee, tried to talk him into coming out. When there was no response, a tracking dog was brought in. The dog, Thor, picked up the scent from the motorcycle. State troopers Costanzo and Betts and Lieutenant Hackle of the Sheriff's Department followed Thor into the brush. After they had gone about one hundred yards, Thor alerted and lurched at the suspect; Betts hollered "Don't move." Appellant was lying in a swale or ditch, covered by thickets. At the officers' direction, appellant came out of the brush on his belly, spread eagle. Appellant told them he was not armed. Hackle advised him of his Miranda rights, and then asked him what he had done with the gun. Appellant said he had buried it at another location. According to Hackle, appellant was visibly shaken and crying.

Appellant got in a patrol car with Lt. Hackle and Sgt. Benjamin, and directed them to the area where he had buried the gun. Costanzo and the dog followed in another vehicle. They drove a couple of miles to an area off Cortez Road, parked near a building under construction, and walked along a dirt path to another lake. At first they were unable to find the exact location where the gun was buried. The dog, Thor, was again enlisted to do an "article search",

and he discovered the weapon buried and covered with a palm frond, about three feet away from the lake. Buried along with the .22 revolver were two unspent shells, three knives, two knife sheaths, a belt, and a paper bag. (R1899-1916, 1922-23, 1937-48, 1958, 1994-96)

D. APPELLANT'S VIDEOTAPED STATEMENT

That same night at 12:57 a.m. appellant was interviewed at the Manatee County Jail by Detectives Nipper and Keough. The interview was videotaped through a one-way mirror. (R2433-39, State Exh. 18, Def. Exh. 1)

When Detective Nipper asked appellant if there had been an argument at his house that evening, appellant replied that there had been one little argument, about wearing shoes in the house. Nipper asked what happened next. Appellant said:

> Ah --- it's kinda hard to remember. Ah, I was getting [these] strange feelings and I had to get rid of em. They were opposing me from accelerating or getting out and ah, crazy. Ahm, you all know (laughter).
>
> Q. [by Det. Nipper]. Yeah, but I wanta hear your side of it, okay?
>
> A. Ah --- I was trying to --- I had ah a boss tell me about her. Dream about it you know, just dream about, you know, just dream about it. So I did, I got you know, ah ... and then I kind of, ah ... ohhhh..
>
> Q. I know it's hard. But we got to do this.
>
> A. Ahm ... Okay, we'll get back on the fights.
>
> Q. Okay.
>
> A. Ah ... been wanting to go out and do something and ah --- I just ah --- I get right at the last minute and it's like something just grabs me back.
>
> Q. Just can't [quite] go through with.
>
> A. I guess. I mean, I guess it was a club, some type of, ah, club to join, ah, and ah, there's I guess different steps you [gotta] do em in to kinda get em accomplished. Ah, they were kinda handed to me backwards. Which is I guess, if I would of realized it at the time and didn't shied away like I did, ah, (laughter) then would be a lot different. Ah --- They were just tri-- treating me too much like a baby. Ah, I guess I am.

When Det. Nipper asked "Okay, so what happened then tonight", appellant answered:

> Ah -- I don't know, I got dressed up, I put on some guns. Some knives, some ah, my dad's shotgun and ah, (inaudible) you know. Loaded up with two shells and ah .. my mom or whoever it was, come up and was kinda saying ah -- put that down, put that down or something. And then we got in a little struggle, then you know, I went for my gun, shot em both a couple of times or something. It [just] .. it .. it didn't seem real.

In response to Nipper's questioning, appellant told him that he got the shotgun out of the front hallway closet. Clay was watching TV. "I asked my mom where -- where my one gun was. And ah --- she found it for me." That was the .22, which appellant had gotten in a trade with a friend a long time ago. It was under appellant's mattress, and was already loaded with six shots. Appellant told his mother he was going to a Halloween party. Asked what happened next, appellant said:

> Ah ... kept on walking around. Ah --- trying to ah figure out ah, why I can t ah, what .. something was just holding me back from what I've been trying to do. And ah, I was kinda going through, like ah.

At this point, Det. Nipper asked:

> Q. Have you been doing any drugs tonight?
>
> A. (no audible answer)
>
> Q. Did that effect what you was thinking about?
>
> A. Ah, probably.
>
> Q. Okay, what were you --- what kind of drugs were you using tonight?
>
> A. It was white, that's all I know.

Appellant said he took maybe half a gram of the powder during the daytime. He had gone out to the race track and did a little out there; and later pulled off the highway by a tomato farm and did some more:

> ... walked around there for a little while trying to ... it just seems kinda hard to believe. The ... I guess what you [gotta] go through ah, whatever ah, whatever that different ah, life is.
>
> . . . . . .
>
> Q. This is earlier during the day you was doing this?
>
> A. Ah, no, it was ah, its been happening, I guess the last three or four months.
>
> Q. You've been feeling these feelings [you're] talking about?
>
> A. Yeah --

Q. Okay. Well, I'm talking about tonight. When was the last time you was doing any drugs? ...

In response to Det. Nipper's interrogation, appellant stated that neither his mother nor stepfather was armed with a weapon. Nipper asked:

What [led] up to it? Why did you have to shoot?

A. Ah -- to get initiated into a club.

Q. Okay, what's this club?

A. Ah --- (long pause)

Q. Does it have a name?

A. Yeah.

Q. Okay, what name does it go by?

A. You tell me.

Q. I don't know the club. Only you do, Rick. Okay. So you had to shoot your mom?

A. Yeah, and anyone else that stood in my way to do what I had to do.

Q. What did you feel you had to do?

A. Ah ... I've been being held back from ah, on I'd tried to get different jobs, ahm, there's something better in life than working.

Q. Okay, how was your parents, your step-father and your mother holding you back? Why ...

A. Ah ...

Q. ... do you have to do that to achieve what you want?

A. Ah, I couldn't tell you on that one.

Q. Okay. Let's go just a little ---

A. (inaudible) a computer.

Q. ... bit. Let's go on.

A. ... a little game computer at a bar ah, it brought up on it so and so fuek you, kill em.

Q. Okay.

A. And, I didn't kill em, but that might have been the one person I shoulda probably killed and I could have done what I had to do. I don t know.

Q. Okay.

A. It's a computer land out there and I'm way behind.

Det. Nipper asked appellant which gun he had when he first pulled the trigger. Appellant said it was the 122.

Q. ... And who did you shoot with the .22?

A. I don't remember. It was Clay.

Q. Okay. What happened when you shot him?

A. Ah, kinda fell back, like, I don't know. It didn't seem like he really got shot.

. . . . . .

Q. ... What happened then? After you shot him? How many times did you shoot him?

A. Two or three times.[4]

Q. Okay.

A. I wanted to make sure he wasn't in pain.

Nipper next asked about the shooting of Frances. Appellant said:

Ah yeah she, she said, Put the gun away, put the gun away. I go, Yeah, stupid why do I got it? Yeah I can't do this. And then Clay come running, I guess when I was getting ready to put it down. And ah -- I just felt the threat.

Q. Okay.

A. I've been threatened a lot.

Q. So you shot your mother?

A. Ah --

Q. At that time?

A. Ah, I don't think it was my mom actually.

Q. Okay and then what happened?

A. Ah, I guess little Bret come up and yelled at something and I shot him.

Q. What did Bret yell, do you remember?

A. I don't remember. Oh, my God maybe or --

Q. Okay, how many times did you [shoot] at him, do you know?

A. Two, three, probably.

Asked about the dog, appellant told Nipper that he'd shot the little dog,

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[4] In fact, Clay Carroll was shot only once. (R2131, 1867-71)

Daisy, first with the shotgun and then with the .22, because he was yipping. "I'm taking a half his side off [with the shotgun], it just didn't seem like there was no blood around. They were robots."

Appellant threw the shotgun on the floor, reloaded the pistol, flattened two tires (on the car and boat trailer) with his knife, and took off on his motorcycle. He went by his old girlfriend's house, but nobody answered the door. In response to Nipper's questioning, appellant said that he buried the pistol and knives at the spot by the lake where he had later taken the officers. After hanging out around there for a while, he drove back toward his house, to the end of the dirt road. He sat on his motorcycle trying to figure out what he was doing; then walked into the woods by the other lake. Eventually the police officers and police dog came back there and found him. Det. Nipper asked:

> ... [D]id you know you was [gonna] shoot somebody when you got your gun out?
>
> A. I had it kinda of, ah -- kinda I guess had it in, like a mission I had to.
>
> Q. It was in your head and you knew you was [gonna] do something.
>
> A. Yeah.
>
> Q. Okay, did you know you was [gonna) kill your mom?
>
> A. Ah -- a lot of peoples been asking me how, -- how's my mom, how's Clay. Ah ah, they don't feel like they were my mom. You know, it -- I'm just not into ah, right dimension of life.
>
> Q. Okay, was your intention to [shoot] Fran? Was that your intention?
>
> A. Ah, yeah, I guess so.
>
> Q. Okay, was it your intention to shoot Clay?
>
> A. Yeah.
>
> Q. Okay, and how about Bret?
>
> A. Ah, well yeah, he was inside the house.
>
> Q. Okay. Okay, is there anything else I have not asked you that you want to tell me at this time?
>
> A. Ah --- yeah.
> Q. Okay.

A. Ahm --- Something is funny going on. They can't say its not.

Q. Okay.

A. Ahm -- cause ah, seems like peoples just been popping up here and there around me. Ah, like the shadow knows or, ah.

Q. Have you been seeing any kind of psychiatrist or anybody for having any problems? Emotional problems?

A. No. I just talk to a psychiatrist -- well not a psychiatrist, but a palm reader.

Q. Okay, have you ever had any mental problems where you have been confined for observation?

In response to that question, appellant told Nipper that in 1978 he was in Manatee Memorial Hospital for doing drugs.

Q. Okay. Since then have you had any other problems reoccurring that would cause you to have any mental problems? Do you feel that you have a mental problem?

A. No, I'm just having a hard time accepting.

Q. [You're] under stress and having a hard time accepting

A. Ah --- just there's a computer land there. And everybody's ..

Q. Everybody's in that and you're behind?

A. Yeah and I'm not there.

Q. I'm not either. Okay. Have I promised you anything for talking with me tonight?

At the conclusion of the interview, appellant interjected:

Ahm ... I've been ah what? How can I say this? Guess I'm saying it as I'm saying it. And -- part of life that you get, I guess you [gotta] just go down in the water, for whatever and --- you mature.

Q. Is that why you was at the lake tonight?

A. I guess so, yeah.

During the next few days, two of appellant's friends, Mark Lavallee and Arthur Brown, saw him at the jail. Lavallee came on the Monday after the shooting, and continued to visit appellant on a regular basis thereafter. On his second visit, appellant made the comment that we were all robots: when Lavallee asked what he meant by that, appellant said that we have a transistor on the top of our head. Appellant had let his fingernails grow really long, and

referred to the brillo pad which he used in his job at the jail as if it were a friend of his. Several visits later, appellant told Lavallee that the birds outside the jail were watching him. Lavallee believed that appellant's mental condition during this time was very unstable.

Arthur Brown was the brother of Robert Brown (who had testified earlier about appellant's behavior the day before the shootings), and the two of them had grown up in the neighborhood with appellant. Arthur, however, unlike Robert, had not had much contact with appellant for a few years prior to the incident. When Arthur saw appellant at the jail "he wasn't the person I knew at all." "[T]he change was so dramatic, it's hard to describe. Just a shell of a person. You know, it's hard to explain --- I just can't find words to explain." Arthur tried, without much success, to carry on a conversation with appellant. On cross-examination, asked by the prosecutor whether appellant seemed upset or depressed, Arthur replied that he "didn't sense as much depression as I did incoherence." (R2466-71, 2515-18, 2524-25)

E. THE EXPERT TESTIMONY ON THE QUESTION OF SANITY

In support of the defense of insanity, the defense offered the testimony of psychiatrists Emanuel Tanay and Rufus Vaughn, and psychologist Robert Berland. The state countered with psychiatrist Arturo Gonzalez, clinical psychologist Sidney Merin, and neurosurgeon Stephen Prdar.

Dr. Tanay testified that in his opinion appellant was legally insane, under the M'Naghten standard, on November 16, 1985 when the shootings occurred. Tanay evaluated appellant in January, 1986, and described him as "one of the most severe psychotics that I have seen while in jail."

Regarding the diagnosis of schizophrenia, Tanay testified that "the first principle in medicine, generally, and in psychiatry, particularly, is: Take a history." In order to determine whether a person is schizophrenic, it is necessary not only to observe and interview him, but also to get a history from family members and other sources:

> Obviously, lay people don't call it schizophrenia, but they also make a diagnosis. They call it something else. They might call it, "He's weird. He's crazy", whatever. But many times, lay people make observations that are very valid even though not put in

scientific terms.

The history is also important to determine whether somebody is malingering a psychotic condition. Dr. Tanay explained that, while it is possible for a knowledgeable individual to feign psychosis in an interview, "[Y]ou [the psychiatrist] never rely only on the examination. You have a longstanding history. I mean, nobody malingers for a long time, malingers ahead of time."

When Dr. Tanay first saw appellant at the jail in January, 1986, he was uncommunicative, suicidal, and appeared to be in a psychotic state. Tanay concluded that he was incompetent to stand trial at that time, but that he would become competent in a relatively short time if treated with medication. The trial court ruled accordingly, and appellant was hospitalized.

Among the factors which Dr. Tanay found psychiatrically significant was appellant's family history of mental illness, including a grandmother who was admitted to a New Jersey state hospital in the 1930s with a diagnosis of "dementia praecox" (an old term for schizophrenia), and a great grandfather in Italy who spent the last ten years of his life in a mental institution in a catatonic schizophrenic state. Heredity, while not necessarily the direct cause of Schizophrenia, does predispose a person to it; which Dr. Tanay described as a family or genetic "loading."

The onset of schizophrenia, according to Dr. Tanay, typically occurs in late adolescence or early adulthood; which is why it was originally called the praecox (premature) dementia. Tanay noted that six months or more before the shootings, appellant's family and friends began observing that he was behaving and thinking strangely. "He felt that something was happening at the bottom of the lake, there was a door at the bottom of the lake; and birds were following him. Both [his] brother and sister described to me that bumper stickers had special meaning for him."

Another important factor in the formation of Dr. Tanay's opinion was appellant's statement to Detective Nipper on the night of the shootings:

> The videotape itself, which was done immediately after, in my opinion, shows clearly immediately after this tragic event that he's a bizarre psychotic individual -- the transcript. But I think more than the transcript, the videotape shows -- even though the police officers go about their business to just get facts, they don't do

a psychiatric examination -- but I think a viewing of this shows that he is just a perplexed, inappropriate -- it clearly shows the picture, in my judgment, of a schizophrenic individual.

When Dr. Tanay interviewed appellant, he asked him "Why did you kill your family?" Appellant would answer that they made fun of him; "They called me monkey and chicken." Another time, he said that a girl at the topless bar had made a comment which indicated that he should kill his family.

> And how that connects, you know, it's an irrational statement. It's something that makes us all uncomfortable, but that's how a schizophrenic thinks. And he tries to make it rational, too, by saying that he wanted to kill Clay because he was no good. At another time, however, he said that Clay was helpful to him, that they -- he told Doctor Merin, for example, that he was happy when his mother married Clay. Be was happy for his mother, happy for Clay.

(R2196-97, 2205-06, 2210-11, 2216-27, 2235-36, 2241-42, 2367)

Dr. Rufus Vaughn (a psychiatrist who was initially retained by the prosecution to examine appellant on the issue of sanity, also testified that appellant was insane, as defined under Florida law, on November 16, 1985 when he shot his mother, stepbrother and stepfather.

From 1982 until January 30, 1987, Dr. Vaughn served as a psychiatrist at the North Florida Evaluation and Treatment Center (IFETC). When appellant was committed to NFETC as incompetent to stand trial, Dr. Vaughn was his treating physician. Appellant was hospitalieedthere for six months. At the end of that time, he was returned to Court, with the recommendation of Dr. Vaughn that he was now competent to stand trial. During that period of time, Vaughn had not examined appellant on the issue of sanity or insanity at the time of the offense. He explained that there is a state policy which prohibits state hospital personnel from examining patients on the issue of insanity, for two reasons:

> One is, the State feels that's a community problem, not a State problem. And secondly, quite frankly, the State was very, very short of psychiatrists. We had three or two hundred patients up there, and they didn't want us flying around the state testifying at trials because we had so little time to take care of patients. So we were asked not *to* get involved with that issue.
>
> DEFENSE COUNSEL: And you did not get involved with that?
>
> DR. VAUGHN: I did not.

In March, 1987, the State Attorney, Hr. Schaub, came up to Gainesville

and took a statement from Dr. Vaughn on the question of appellant's competency to stand trial.

> The opinion that I gave him at that time was that the young man was competent but there probably was some malingering. We did not discuss *or* raise the issue of insanity at the time of the commission of the crime. ...

The State Attorney, aware that Dr. Vaughn was retiring from the hospital system, requested him to look at appellant from the standpoint of a second question, i.e., his sanity at the time of the offense. Vaughn said he would be pleased to do that. On May 21, 1987, Dr. Vaughn came to Bradenton to interview appellant. Before going to the jail, he reviewed certain materials in the State Attorney's office, including the videotape of appellant's statement to police on the night of his arrest. He found the videotape striking in a number of respects; appellant's flat affect, his inappropriate emotional responses, his weird and erratic thought processes, his peculiarities of association; all of which were indicative of schizophrenia.

Dr. Vaughn attempted to interview appellant that day, but appellant refused to talk to him. Vaughn returned six days later and saw appellant at the jail:

> It was an extremely difficult interview. He began attacking me as a traitor -- I've forgotten what he said: that I had no business being there, that I was not his friend. And he really was very, very unpleasant. And that was how the interview began; my attempting to -- I was actually sitting there kind of sweating, "How am I going to get out of this bind."
> But eventually, he calmed down and began to talk. But he came out with a tirade at first. That's how it began.

When he had first arrived at the hospital, appellant refused to eat, so he was tube fed. The next day he began eating. In the May 27 jail interview, Dr. Vaughn asked him why he had started eating again, and appellant replied that that was one of the steps he had to go through. He told Vaughn that he had to go through a number of other steps; he had to go through trial, he had to go through sentencing, he had to go through rape, he had to go through the step of getting his eyeballs plucked out, he had to go through the step of getting choked. Dr. Vaughn also noted appellant's flat affect and blocked associations in the interview:

> For example, I said to him on -- we were talking and on one occasion, for example, with no apparent stimulus, out of the clear blue sky, he starts talking about Coke can tabs with the number 8. And later, I said "Well, what's that about?" Be said "Eight wads of toilet tissue." I quite frankly admit I couldn't make any sense of that.

Dr. Vaughn testified that he did not believe appellant was malingering in the interview. He stated that he had never seen a non-psychotic person make up word association deficits; it is almost impossible to do. Based on appellant's bizarre associations, combined with his affect, the nature of the crime, and his past history, it was Dr. Vaughn's opinion that he was psychotic. Specifically, he went on, appellant's disorder "is just classical paranoid schizophrenia."

After viewing the videotape and interviewing appellant, Dr. Vaughn advised the State Attorney that it was his opinion that appellant was insane at the time of the offense. (R2560-61, 2567-84, 2589-95)

In its case in rebuttal, the state called Dr. Arturo Gonzalez, who stated his opinion that appellant was sane, as defined by Florida law, at the time of the shootings. It was Gonzalez' diagnosis that appellant did not have a psychotic illness, but instead had a personality disorder of the antisocial and schizoid types. (R2866-69, 2873)

On cross-examination, Dr. Gonzalez was asked whether he thought appellant had planned the shooting of his family before he went to get the guns that night. He answered:

> Okay. What I said is, I think that this is a combination of factors. Here, we have a man that obviously he has a personality disorder, he's an antisocial personality. As such, he's explosive and could be violent.
>
> And this individual, now compounding that problem, has taken cocaine, has abused cocaine that day, has himself drank ten beers; and the combination of the alcohol, the drugs, the cocaine, plus his personality created a very explosive situation.

In light of these contributing factors, it was Dr. Gonzalez' opinion that what triggered the already volatile situation was Clay Carroll grabbing the shotgun away from appellant. If that had not happened, Gonzalez believed that appellant most likely would not have killed anybody in the house. Possibly he would have killed somebody outside the house "because who knows what would have happened outside?"

> Q [by Mr. Slater): What you're saying is that there was a split-second decision made after the confrontation?
>
> A. After Clay is wrestling the gun from him, he pulls out the gun. At that moment, he's going to shoot Clay. He knows, whether it's ten seconds --
> -- And in the seconds that go on -- I don't know how long, perhaps 15 seconds, 20 seconds in the struggle -- he makes up his mind he s going to shoot him and he's going to do it.

(R2886-87)

Psychologist Sidney Merin also testified that in his opinion appellant was sane, under Florida law, at the time of the shootings. According to Merin, psychological tests (administered by Merin's psychometrist) confirmed his opinion that appellant was not psychotic, but had a personality disorder of the boarderline and schizotypal varieties[5]. (R2931, 2955-79, 2993, 3013-16)

F. PENALTY PHASE

Dr. Rufus Vaughn testified that, in his opinion, appellant was suffering from a severe schizophrenic illness at the time of the offenses, and that both "mental mitigating circumstances" existed. Specifically, Vaughn stated that appellant was under the influence of extreme mental or emotional disturbance on November 16, 1985, and that his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. (R3333-38)

Joyce Seelbach, appellant's sister, testified regarding appellant's early life and the effect of their father's disabling illness, and also concerning appellant's mental state just prior to the shootings. During the summer and fall of 1985, Joyce became alarmed by the strange ideas which her brother was expressing. He thought that birds, cars, and helicopters were following him. He kept on saying "A raven", and the raven was talking to him. Her first reaction was that it might be drugs, but as time went on she concluded otherwise: "There was something wrong and, obviously, it wasn't a drug problem.

---

[5] Psychologist Robert Berland, a defense surrebuttal witness, also reviewed the test results and disagreed with Merin's interpretation. Berland found that the tests showed a psychotic profile. (R3033-42)

Obviously, it was something else wrong." She testified:

> Well, for awhile, he'd come over and talk to me and I got scared. I know one time when he came over, he was talking to me and I got really scared and I didn't know how to react. And the only thing that I could think of was praying. And even then, I was scared to do that. I don't know why, but I was. And I said, "Well, read the Bible."
>
> And I brought him one out and I said, "Here. Do you want this one?" You know, I didn't know. I was scared because he was acting strange. He would talk to me and he'd jump back and forth -- and that's why I'm jumping, because like one conversation didn't go in a normal pattern. One minute, he'd be talking about one thing; and the next minute he'd be talking about going into the Army, into basic training and getting help.

On Friday night, November 15, 1985, the night before the shootings, Joyce called her mother. Joyce had not seen appellant for a couple of weeks, which was unusual:

> MR. COMBS [defense counsel]: So why did you call your mother?
>
> A. Because I was worried. I was concerned where he was because he had talked about going down to the bottom of the lake and I was getting worried that he might go ahead and go to the bottom of the lake.
>
> Q. What did that mean to you?
>
> A. I interpreted it that he was going to try and kill himself; that if someone goes down to the bottom of the lake and stays there -- he mentioned that there was doors there. Well, they aren't going to come up if they wait down there too long.
>
> Q. Drown themselves?
>
> A. Right. I thought it was maybe a way of him covering up. You know, say, "I'll go to the bottom of the lake," but that it was a way of covering up wanting to commit suicide.

When Joyce expressed her concerns to her mother that night on the phone, Frances reacted by accusing Joyce and their other brother Jim of "always coming down on Rick"; always being against him.

> Q. What did you tell your mother in response to that?
>
> A. I said, "Well, there's something wrong." I said, "He's not acting right," that we've got to help Rick.
>
> Q. And what did she say?
>
> A. That's when she said that, that me and my older brother were always against him. And I said, you know, it was the farthest truth because I always -- well, we were on the swim team together. Me and Rick always -- we did things together growing up and everything.
>
> Q. Were you against Rick?

A. No.

Q. What did you want?

A. I wanted to help him. There was something wrong and I got to the point, well, obviously it wasn't drugs, but there was something definitely wrong. And I was scared he was going to try and commit suicide, that he was going to go down to the bottom of the lake.

(R3353-60)

SUMMARY OF THE ARGUMENT

The trial court's responsibility to insure that a defendant is not tried while incompetent is a continuing one; extending through the pre-trial stages to the beginning of trial, and throughout the trial and sentencing proceedings. Drope; Lane; Pridgen. "[A] judge's responsibility to guard against the possibility that an accused person may have become incompetent does not end when the trial begins." Pouncey. This constitutional guarantee is implemented in Florida by Fla.R.Cr.P. 3.210 and 3.211, which require the trial court to order a competency evaluation and hearing if, at any time before or during trial, there is reasonable ground to believe that the defendant may be incompetent to stand trial. Scott. In the instant case, on the Monday morning immediately prior to jury selection, defense counsel requested a competency hearing, after informing the trial court that on the preceding Friday the state had offered a plea for concurrent life sentences. Defense counsel, along with appellant's brother and sister, had visited him at the jail and urged him to accept the offer. Appellant explained that the verdict and punishment made no difference, and he could not be executed, because he was going to be spiritually released - and subsequently physically released - on July 4, 1989 regardless of the court proceedings. He had arrived at that date based on the fact that it was Independence Day, and based on the number of letters in his three names. Appellant further told counsel that this information had come from what a judge had told him in his dreams.

The problem here is not that appellant refused the plea offer. The problem is that his reasons for refusing the plea offer were irrational on their face, and give rise to a reasonable doubt as to whether appellant had a

sufficient present ability to consult with his attorneys with a reasonable degree of rational understanding. Dusky; Lane; Scott. Under these circumstances, a competency hearing was mandatory, and trial court's refusal to provide one requires reversal for a new trial [Issue I].

During jury selection, the prosecutor peremptorily challenged all three of the black jurors who remained on the panel after the challenges for cause were exercised. Appellant does not challenge the excusal of Wrs. Davis. However, the reasons given by the prosecutor for exercising Ms. McDuffie and Mrs. Johnson clearly do not meet the standard established by this Court in the Neil, Slappy, and Kibler decisions. As to both McDuffie and Johnson, the prosecutor misstated answers given by the juror on voir dire, indicating that he was listening for reasons to excuse them, rather than listening to what they said. The laundry list of reasons given by the prosecutor include (1) reasons totally unsupported by the record; (2) reasons unrelated to the facts of the case or to the juror's ability to serve impartially; and (3) reasons equally applicable (or more so) to white jurors who were accepted by the state. Slappy.

The excusal of even one minority juror for impermissible reasons - reasons which are unsupported by the record or which appear to be a pretext for racial discrimination - is reversible error. Tillman; Thompson. It is the trial judge's responsibility to critically evaluate the credibility of the prosecutor's explanation, and not merely accept it at face value. Slappy; Tillman; Roundtree [Issue II].

The State Attorney's cross-examination of the defense expert witnesses on the issue of sanity, and his presentation of evidence in rebuttal on that critical issue, were replete with error. Irrelevant, misleading, and extremely prejudicial testimony was repeatedly elicited by the State Attorney, over repeated and strenuous defense relevancy objections and motions for mistrial. Many of the State Attorney's tactics amounted to deliberate prosecutorial misconduct designed to mislead and prejudice the jury [see Issues III-A (The "Hired Gun" Attack); III-B (Dr. Tanay's Bill); III-D (Dr. Tanay's "Problems with Other Judges); Issue X (violation of the trial court's earlier ruling that the

removal of organs from Bret Carroll for transplantation was irrelevant)]. The State Attorney made it clear to the trial court that part of his strategy in this trial was to attack psychiatry as a profession, and in his cross-examination of Dr. Tanay he launched into at least four different lines of irrelevant questioning designed not to test the credibility of Tanay's conclusions, but rather to question the legitimacy and even the admissibility of psychiatric testimony in general [Issue III-C (The "Rosenhan Study", the Ziskin Book, the Tarasoff Case, and Former Chief Justice Burger)].

In his cross-examination of Dr. Vaughn, the State Attorney brought out before the jury that it is not uncommon for persons found not guilty of homicide by reason of insanity to spend only six to eight months in the state mental hospital. Florida courts, and those of numerous other jurisdictions have recognized that comments or cross-examination designed to draw the jury's attention to the defendant's possible early release in the event of an insanity acquittal are grossly improper and prejudicial, to the point of denying a fair trial. See e.g. **Williams**; Johnson; **Evalt**; **Wall**; **Makal** [Issue IV-A].

In its rebuttal case, the State Attorney was allowed to elicit an opinion on sanity from an expert witness (neurosurgeon Dr. Stephen Padar) who acknowledged that he was not even familiar with the definition of insanity under Florida law. Padar's testimony was also improper rebuttal (since the defense had never claimed that appellant suffered from organic brain damage), but more importantly, the State Attorney held this witness out to the jury as the only "genuine scientist" to offer an opinion on the issue of sanity. The error in allowing this witness to state an opinion on sanity which was not based on the M'Naghten Rule [see Gurganus] was therefore extremely harmful [Issue V].

The trial court also erred in allowing the State Attorney to present irrelevant and inflammatory testimony from two police officers about the criminal behavior patterns of drug addicts [Issue VI], and in allowing the State Attorney to introduce extensive evidence before the jury relating not to appellant's sanity but rather to his competency to stand trial [Issue VII].

In the penalty phase, the jury's 7-5 death recommendation (as to Bret Carroll) was tainted by improper evidence; argument; limitation of defense argument; and jury instructions. Only one valid aggravating circumstance exists in this case: the trial court's weighing of the aggravating and mitigating factors was compromised by his consideration of unproven aggravators, non-statutory aggravators, and lack of remorse; as well as his failure to provide contemporaneous written reasons. Under the totality of the circumstances of the case - including (1) only one valid aggravator (based on a contemporaneous conviction); (2) both mental mitigators found, and extensive evidence of mental illness, as well as cocaine and alcohol use on the day of the shootings; (3) the fact that this was not an organized crime or underworld killing, but one arising out of family difficulties [see Garron]; and (4) appellant's lack of a history of violent behavior - the death penalty is proportionally unwarranted. See Garron; Holsworth; Caruthers; Ross; Wilson.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN REFUSING TO ORDER A COMPETENCY HEARING PRIOR TO SELECTION OF THE JURY ON OCTOBER 26, 1987.

A. THE APPLICABLE LAW

The constitutional right of an accused not to be tried while incompetent contains both a substantive and a procedural element. The substantive principle is that a defendant's right to due process is violated if he is tried while incompetent. See Bishop V. United States, 350 U.S. 961 (1956); Dusky V. United States, 362 U.S. 402 (1956); Lane V. State, 388 So.2d 1022 (Fla. 1980). The corollary, but separate, procedural guarantee is the requirement that the State maintain adequate procedures to ensure the defendant's right to be tried while competent. See Pate V. Robinsog, 383 U.S. 375 (1966); Drope V. Missouri, 420 U.S. 162 (1975): Lane. "[F]ailure to observe procedures to protect a defendant's right not to be tried or convicted while incompetent deprives him of his due process right to a fair trial." Drope V. Missouri, 420 U.S. at 172.

The test for determining competency, under both Florida and federal law, is (1) whether the defendant has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and (2) whether he has a rational as well as factual understanding of the proceedings against him. This constitutional standard has been implemented in Florida by the adoption of Fla.R.Cr.P. 3.210 and 3.211. Rule 3.210(b) states:

> If before or during the trial the court of its own motion, or upon motion of counsel for the defendant or for the State, has reasonable ground to believe that the defendant is not mentally competent to stand trial, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days after the date of the filing of the motion, and shall order the defendant to be examined by no more than three nor fewer than two experts prior to the date of said hearing. Attorneys for the State and the defendant may be present at the examination.

In determining whether to order a hearing pursuant to Rule 3.210(b), the test is "whether there is reasonable ground to believe that the defendant be incompetent, not whether he is incompetent" Scott v. State, 420 So.2d 595, 597 (Fla. 1982); Walker v. State, 384 So.2d 730, 733 (Pla. 4th DCA 1980); Kothm v. State, 442 So.2d 357, 359 (Pla. 1st DCA 1983). The competency rule is mandatory, and states that "upon reasonable ground the court shall fix a time for a hearing." Scott. As explained in Kothman, 442 So.2d at 359:

> Once the judge is presented with reasonable grounds to believe a defendant may not have sufficient present ability to consult with his attorney and aid in the preparation of his defense with a reasonable degree of understanding ... he must order a hearing and examination pursuant to Rule 3.210. ... The issue in this case is not, as [the State] contends, whether there was competent, substantial evidence from which the judge could conclude Kothman was competent to stand trial.

In Lane v. State, at 1025, this Court addressed the question of what constitutes "reasonable ground" to believe that a defendant is not mentally competent to stand trial, so as to activate the trial court's responsibility to order a competency hearing pursuant to Rules 3.210 and 3.211:

> The United States Supreme Court in Dusky restated the historical rule that a person accused of a crime who is incompetent to stand trial shall not be proceeded against while he is incompetent. The law is now clear that the trial court has the res onsibility to conduct a hearing for competency to stand triaf whenever it reasonably appears necessary, whether requested or not, to ensure that a defendant meets the standard of competency set forth in Dusky. The United States Supreme Court reiterated this directive in Drope and said:

> The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated [420 U.S. at 180-181, 95 S.Ct. at 908].

See also Pridaen v. State, 531 So.2d 951, 954 (Fla. 1988).

Other factors which have been recognized as bearing upon whether reasonable grounds existed to order a competency hearing include a defendant's suicidal behavior D[——— o ri,]; his insistence on a course of action clearly not in his best interests [Scott]; and the representations of the defendant's lawyer [Drope; Scott]. While the trial judge is not required to accept at face value the lawyer's representations concerning his client's competency, "an expressed doubt in that regard by the one with 'the closest contact with the defendant' is unquestionably a factor which should be considered." Scott, at 597 (quoting from Drope v. Missouri, 420 U.S. at 177-178, n.13).

The trial court's responsibility to ensure that the defendant is not tried while incompetent is a continuing one; extending through the pre-trial stages to the beginning of trial, and throughout the trial and sentencing proceedings. See e.g. Drope; Lane; Pridgen. A prior determination of competency is by no means conclusive of the defendant's present mental condition, in light of new or additional evidence indicating that he may now be incompetent. Lane; Pridgen; see also State v. Bauer, 245 N.W.2d 848, 852-57 (Minn. 1976); Atwell v. State, 354 So.2d 30, 37 (Ala.Cr. App. 1977). "[A] judge's responsibility to guard against the possibility that an accused person may have become incompetent does not end when the trial begins." Pouncey v. United States, 349 F.2d 699, 700 (D.C. Cir. 1965); State v. Spivey, 319 A.2d 461, 471 (N.J. 1974); State v. Bauer. As stated by the U.S. Supreme Court in Drope (420 U.S. at 181) and by this Court in Lane (388 So.2d at 1025), "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet

the standards of competence to stand trial." See also Holm v. State, 494 So.2d 230, 232 (Fla. 3d DCA 1986).

B. DEFENSE COUNSEL'S PRE-TRIAL REQUEST FOR A COMPETENCY EVALUATION

Prior to jury selection, on Monday, October 26, 1987, defense counsel brought to the trial court's attention a matter which led counsel to believe that appellant was presently irrational and incompetent to stand trial.

> MR. COMBS [defense counsel]: All right. Let me bring the Court current on the situation. Of course, in meeting with Rick, we have advised him of the three charges pending against him; the two Indictments for first-degree murder and the one Information for attempted first-degree murder. Rick, you understand the charges?
>
> THE DEFENDANT: Yeah.
>
> MR. COMBS: All right. He understands. He's been advised that the statute penalty is life on each of these charges, and such penalty and sentence could be imposed in a consecutive nature; and he indicated to us then that he understands that.
>
> He's also been advised that the prosecution intends to seek the death penalty if he's found guilty on these charges. And he has told us that he understands that. Is that correct, Rick?
>
> THE DEPENDANT: Yes.
>
> MR. COMBS: Now, we have reviewed this with him. We've talked about the evidence. We've answered all of his questions.
>
> And then on Friday, October 23rd of this year, an offer from the Prosecution was communicated to us. And the offer was two concurrent life sentences on the charges of first-degree murder, and then a consecutive 22-year sentence on the other charge, with a three-year minimum mandatory.
>
> And we've explained to the Defendant that there would be a minimum required sentence of 28 years with the possibility of release before serving 35 years.
>
> Rick, did we explain that to you?
>
> THE DEFENDANT: Yes.
>
> MR. COMBS: We were able to contact Rick's brother and sister, and we were able to allow a personal visit in the jail where they discussed this situation with him. They discussed the offer with him and all aspects of this trial. Mr. Slater [co-counsel] and I were with them until late Friday afternoon.
>
> And at that time, Rick advised us that he rejected this plea offer and desired to proceed to trial.
>
> And, Your Honor, for the record, we feel that his reason for this decision -- his reasons are evidence of his incompetency, and it's based on irrational thought processes.

Rick ex lained to us and told us that he believes that he will be release8 on July 4th, 1989, regardless of these court proceedings, and that the verdict of this jury and any punishment imposed by this court makes no difference as to his future.

He tells us that if he accepts this plea offer, or what had been offered last week, that he will not be released on July 4th, 1989. And he tells us that the only way that he is going to be released on that date is to proceed with this trial. Is that correct, Rick?

THE DEFENDANT: Sort of.

MR. COMBS: All right. And he stated to us that he did not believe that he would be released on July 4th, 1989, if he would accept this plea offer.

NOW, when we questioned him as to this date, the significance of July 4th, 1989, he explained to us that that is Independence Day, and to him that means that he will gain his independence on that day.

And he also pointed out to us that the number of letters in his three names, when read backwards, are 7, 8, 9, and he interprets those numbers as meaning July of 1989.

He tells us further that this information has come to him from his dreams as to what some judge has told him -- what an inmate had told him.

. . . . . .

He have discussed with Rick the possibility of the death penalty, and I believe that he understands that. And, quite frankly, his response is, he just laughs at it. He says that he cannot be executed, that he's going to be released spiritually on that date, and subsequently he'll be released physically.

(R36-42)

The trial judge stated that he would "deny the motion for the Suggestion of Incompetency." After several other subjects were discussed, the prosecutor indicated that he might join in the defense's request for a continuance. As one of his reasons, the prosecutor said:

In addition, an attack was made upon competency. We are trying to research that to see whether or not it is mandatory upon the Court to hold such a hearing on competency. The rule does say "shall." So we're looking at that. We'd like some time to do that.

Also, of course, they wanted -
THE COURT: You mean, Mr. Schaub, that any time they want one in the course of a trial, they can have one?

MR. SCHAUB: I hope not.

THE COURT: I don't think that's the Rule.

MR. SCHAUB: I don't think so either, but we're trying to find some law. It does say "shall", so that's a problem.

(R78-79)

Shortly thereafter, the prosecutor brought up the competency question again, citing Walker, and Kothman, for the proposition that "Once the judge is presented with reasonable grounds to believe a defendant may not have sufficient present ability to consult with his attorney and aid in preparation of his defense with a reasonable degree of understanding, the judge must order a hearing and examination for the purpose of determining whether the defendant is competent to stand trial." Nevertheless, the trial judge refused to order an evaluation and hearing, relying instead on the prior determination of competency:

> ...[A]s far as the Defense motion for another examination, I find that the record shows the man has been examined and been certified, found competent. There's been no showing certainly by the Defense that there's anything further that has changed that in any way, fashion or form except he gets up and says he doesn't take a deal. The only thing he says is, he didn't take some kind of a negotiated plea. That's a matter of judgment. I don't think it has anything to do with whether or not he's competent.
>
> I have watched him, observed him in hearings and here, and I find that the man acts very competent. At least he acts that way. Now, doctors have said he is, and I have no one else to rely on but the doctors who have examined him. So we will proceed with the trial, gentlemen.

(R95-96)

C. THE TRIAL COURT ERRED IN REFUSING TO ORDER A COMPETENCY HEARING

The state's plea offer for concurrent life sentences was made on the Friday before trial. Defense counsel, along with appellant's brother and sister, visited him at the jail and urged him to accept the offer. Appellant explained that the verdict and punishment made no difference, and he could not be executed, because he was going to be spiritually released on July 4, 1989 regardless of the court proceedings. He had arrived at that date based on the fact that it was Independence Day, and based on the number of letters in his three names. Appellant further told counsel that this information had come from what a judge had told him in his dreams. On Monday before jury selection,

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[6] And subsequently physically released.

defense counsel informed the trial court of this development, and requested a competency evaluation. The information before the court was more than sufficient to give rise to a reasonable doubt as to whether appellant had the present ability to consult with his attorney with a reasonable degree of rational understanding, or whether he had a rational as well as factual understanding of the proceedings against him. See **Dusky**; Lane; Scott; Hill. In Scott V. State, 420 So.2d at 597, this Court said:

> A number of factors, each minor by itself but taken together weighty indeed, combine to persuade this Court that a competency hearing should have been held. The record in this case is replete with numerous instances both before and during trial wherein the trial court should have been alerted to the fact that a hearing was necessary. Prior to the commencement of the trial, counsel for appellant requested such a hearing. He made known to the court that he was having great difficulty in communicating with his client and that appellant was unable to assist him in the preparation of the defense. Later, before sentencing, defense counsel once again requested that appellant be evaluated, but his request was not acted upon by the trial judge. In addition, an agreement had been reached between defense counsel and the state that the prosecutor would waive the death penalty if appellant agreed to have his case tried by a six-person jury instead of twelve. The trial court was prepared to ratify this agreement. Appellant, personally, however, overrode his lawyer's recommendation and rejected this eminently favorable bargain.

The trial court in the present case refused to order a competency hearing, and said "There's been no showing ... by the Defense that there's anything further that has changed that in any way, fashion or form except that he gets up and says he doesn't take a deal. The only thing he says is, he didn't take some kind of a negotiated plea. That's a matter of judgment. I don't think it has anything to do with whether or not he's competent."

The problem, however, is not that appellant didn't take a plea; the problem is **why** he didn't take the plea. If defense counsel had merely told the judge "He won't take the plea offer, and we believe its an irrational decision", then there would not necessarily be a reasonable doubt of appellant's competency, especially in light of the earlier findings. But in the instant case, defense counsel informed the judge of the **reason** appellant gave for rejecting the plea offer, and those reasons are irrational on their face. The test for whether a hearing is necessary is whether there is reasonable ground to believe the defendant **may** be incompetent, not whether he **is** incompetent;

determination of the latter question is what the hearing is for. Scott; Walker; Kothman. Moreover, the trial judge was aware that appellant's mental condition was, at best, unstable. While he was aware of the prior findings of competency by predecessor judges (and in fact placed too much reliance on them, in light of the information casting doubt on appellant's present competency), he was also aware that appellant had at one point been found incompetent to stand trial and was committed to the state hospital. He was also aware that the defense at trial was going to be insanity, and that at least two experts - Dr. Tanay and Dr. Vaughn (the latter of whom was appellant's psychiatrist at the state hospital during the time he was committed as incompetent to stand trial) - were prepared to testify that appellant was insane at the time of the offenses. (see R3617-18) Therefore, it could not be assumed that appellant's mental condition was necessarily the same on October 23rd and 26th, 1987 as it was in June and July of that year. See Lane; Pridgen; Bauer.

Not only did the trial judge err in refusing to order a competency hearing when defense counsel requested it, subsequent testimony at trial and prior to sentencing should also have made it clear to the judge that there was more than a reasonable doubt as to appellant's competency. At trial, Douglas Bonar, who was appellant's counselor at the state hospital for three months in the summer of 1986, testified that appellant had a fixation on a particular date, July 4.

> MR. COMBS [defense counsel]: He told you, on July the 4th, everything would be over?
>
> MR. BONAR: Yes.
>
> Q. That is Independence Day; right?
>
> A. Yes.
>
> Q. And that on that date, on Independence Day, he would meet his master? Is that what he told you?
>
> A. I believe that 's correct.
>
> Q. That's right. And that somehow, he got -- he had the idea that a judge had told him that he would be released on July 4th?
>
> A. That's correct.
>
> Q. That's right? And that something like supernatural was going to happen; right?

A. That's correct.

Q. Now, Mr. Bonar, he also indicated to you that he was going to suffocate; right, that he had to choke or suffocate?

A. Yes.

Q. And that and somehow, he was going to be released; released from his body?

A. That's what he said, yes.

Q. Like in some, what? Incarnate way; that his spirit was going leave his body?

A. I believe that's what he was meaning, yes.

(R2815-16)

Dr. Rufus Vaughn testified that appellant had told him "My life is full of steps."

> He said when he comes back to jail here, he had to go through a number of other steps. He had to go through trial, he had to go through sentencing, he had to go through rape, had to go through the -- there were several things that he said. These were things that had to be done in his life.
>
> And I asked him if he were fatalistic and -- also, he said he had to go through the step of having his eyeballs plucked out and go through the step of getting choked. So the steps relate to some other kinds of feelings that he had.

Dr. Vaughn stated that the psychiatric significance of appellant's thought process involving these "steps" which he must go through in order to achieve some sort of a goal was:

> It's weird and it's peculiar to him. But psychotics do this. They do things that don't make any sense to anybody. And when they begin talking, they still don't make any sense.
>
> But psychotics will sometimes develop a repetitive kind of presentation in order to control the psychosis. They will eat in certain ways. They don clothes in certain ways.
>
> And this one is steps in certain ways. ...

(R2576-77)

Prior to sentencing, defense counsel Larry Combs took the stand and testified regarding the events surrounding appellant's refusal of the plea offer. (R3769-73) See Scott v. State, 420 So.2d at 597 ("Later, before sentencing, defense counsel once again requested that appellant be evaluated, but this request was not acted upon by the trial judge.") When counsel would

try to discuss the possibility of a plea agreement with appellant, he would explain that he did not want this because going to trial was a necessary step which he had to go through in order to be released on July 4, 1989. Appellant "said he had been told this by a number of persons, although he could never identify or give us any names of people that had told him this; and even said at one time a judge had told him that he would be released July of 1989. And again, no judge was ever identified." When asked "Why 1989?", appellant

> ... pointed out to us, and we counted up on our fingers, that "Charles Frederick Nowitzke", the numbers of his name was 9, 8, 7. And we pointed out to him that that was backwards from July 1989, and his response was, at that time, Well this whole case is backwards, so it figures that way."

When, right before trial, the prosecution offered a plea with a minimum mandatory 28 years, counsel arranged a private meeting between appellant and his brother and sister in the jail, after normal visiting hours. Afterwards they all met together with counsel. Joyce and Jim "literally begged [appellant] to take this plea offer of 28 years." Asked what appellant's response was, attorney Combs testified:

> My notes indicated that -- he said that the results of the trial made no difference in the scheme of things, in the plan -- the results of the trial would not affect him being released in July of 1989. And he just again could not accept it. He had to go through the trial in order to be released at that time.
>
> MR. SLATER [defense co-counsel]: Did he ever seem to be concerned about the fact that there was a potential for the imposition of the death penalty?
>
> MR. COMBS: No. I could even say under oath that he would almost laugh about it, that it was not a real threat. It's like the Court had to do this and he had to go through it. But it was not, in his mind, a real threat.

The plea offer was made on October 23, 1987, and defense counsel brought the problem to the trial court's attention on Monday, October 26, before the jury was selected. Even the prosecutor expressed concern (and cited case law) that a competency hearing was mandatory under these circumstances. Clearly there was, at the very least, a reasonable doubt whether appellant had the present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he had a rational as well as factual understanding of the proceedings against him. None of the prior competency evaluations

addressed the question of appellant's delusional belief that he would somehow magically be released on July 4, 1989 provided he went through the "step" of going to trial. The trial court's refusal to order a competency hearing as required by Rules 3.210 and 3.211 was reversible error. Lane; Scott; Pridgen.

ISSUE II

THE TRIAL JUDGE ERRED IN ALLOWING THE PROSECUTOR TO USE PEREMPTORY CHALLENGES TO EXCUSE JURORS McDUFFIE AND JOHNSON, WHERE (1) THE PROSECUTOR FAILED TO ARTICULATE A LEGITIMATE, RACIALLY NEUTRAL EXPLANATION FOR THE STRIKES UNDER THE STANDARDS ESTABLISHED IN THE NEIL AND SLAPPY DECISIONS, AND (2) THE JUDGE ACCEPTED THE REASONS PROFFERED BY THE PROSECUTOR AT FACE VALUE, AND FAILED TO EVALUATE THE CREDIBILITY OF THE EXPLANATION.

A. THE APPLICABLE LAW

In State v. Neil, 457 So.2d 481 (Fla. 1984) and State v. Slappy, 522 So.2d 18 (Fla. 1988), this Court established procedures that were intended to abolish the discriminatory exercise of peremptory challenges.[7] "[U]nder article I, section 16 of the Florida Constitution it is unnecessary that the defendant who objects to peremptory challenges directed to members of a cognizable racial group be of the same race as the jurors who are being challenged." Kibler v. State, 546 So.2d 710, 712 (Fla. 1989); Timmons v. State, 548 So.2d 255 (Fla. 2d DCA 1989); see also Barwick v. State, 547 So.2d 612 (Pla. 1989); Reed v. State, ___ So.2d ___ (Fla. 1989) (case no. 70,069, opinion filed June 15, 1989) (14 FLU 298).

The complaining party must initially make a prima facie showing that there is a strong likelihood that jurors have been challenged because of their race. Neil; Slappy; Roundtree v. State, 546 So.2d 1042 (Fla. 1989); Jennings v. State, 545 So.2d 945 (Fla. 1st DCA 1989); Hill v. State, 547 So.2d 175 (Fla. 4th DCA 1989). "Where there is any doubt as to whether the complaining party has met its initial burden, the doubt should be resolved in that party's favor, and the other party given an opportunity to explain the use of its peremptory

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7 See also Batson v. Kentucky, 476 U.S. 79 (1986) (use of peremptory challenges to exclude jurors solely on the basis of race violates Fourteenth Amendment to the United States Constitution).

challenges." Jennings V. State, 545 So.2d at 946; see Slappy; Roundtree; Hill. As this Court stated in Slappy (522 So.2d at 21-22):

> [W]e affirm that the spirit and intent of Neil was not to obscure the issue in procedural rules governing the shifting burdens of proof, but to provide broad leeway in allowing parties to make a prima facie showing that a "likelihood" of discrimination exists. Only in this way can we have a full airing of the reasons behind a peremptory strike, which is the crucial question. Recognizing, as did Batson, that peremptory challenges permit "those to discriminate who are of a mind to discriminate," 476 U.S. at 96, 106 S.Ct. at 1723, we hold that any doubt as to whether the complaining party has met its initial burden should be resolved in that party s favor. If we are to err at all, it must be in the way least likely to allow discrimination.

When the prima facie showing is made, the burden shifts to the other party to rebut the presumption of discrimination by showing "clear and reasonably specific ... legitimate reasons" related to the particular case to be tried. Slappy; Roundtree; Hill; Floyd v. State, 511 So.2d 762, 764 (Fla. 3d DCA 1987); Parrish v. State, 540 So.2d 870, 871 (Fla. 3d DCA 1989); Williams v. State, 547 So.2d 179, 180 (Fla. 4th DCA 1989).

The law prohibits the removal of any prospective juror because of his or her race. Therefore if even one black juror is excused for illegitimate reasons, it does not "cure" the error that the state may have accepted another black person to serve on the jury. See e.g. Slappy; t t , 522 So.2d 14, 17 (Fla. 1988); Thompson V. State, 548 So.2d 198, 202 (Fla. 1989); Floyd; Jennings; Williams; Stubbs V. State, 540 So.2d 255, 257 (Fla. 2d DCA 1989); Mayes v. State, ___ So.2d ___ (Fla. 4th DCA 1989) (case no. 88-1824, opinion filed October 11, 1989) (14 FLW 2383). The mere fact that one or more members of the minority group have been seated does not establish the absence of racial discrimination [Mayes] - "[T]he issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other." Slappy, 522 So.2d at 21.

Where, however, the state's use of its peremptory challenges results in not a single black member remaining on the panel, the likelihood of racial motivation is even greater. See e.g. Blackshear V. State, 521 So.2d 1083, 1084 (Fla. 1988) (where at the time defense counsel's objection was made, not a single black member remained on the prospective panel, burden of proof to

justify strikes shifted to the state); Floyd v. State, 511 So.2d at 763 (where state used peremptory challenges to remove all black persons from venire "presumption of discriminatory use of peremptory challenges did arise"); Parrish v. State, 540 So.2d at 871 (striking of the only black member "demonstrated a strong likelihood that the juror was rejected on racial grounds", and burden shifted to the state to provide legitimate explanation). See also Kibler v. State, 546 So.2d at 713 (defense counsel requested Neil inquiry after state had challenged all the black people on the jury); Knowles v. State, 543 So.2d 1258, 1259 (Fla. 4th DCA 1989); Timmons v. State, 548 So.2d at 257.

Once the threshold requirement has been met, the burden then shifts to the state to rebut the inference that the use of the peremptory challenges is racially motivated. Slappy; Roundtree. The state "must tender an explanation which is not only reasonable but also shows the absence of subterfuge or pretext." Mitchell v. State, 548 So.2d 823, 824 (Fla. 1989); see Slappy; Roundtree. The trial judge "cannot merely accept the proffered reasons at face value, but must evaluate those reasons as he or she would weigh any disputed fact" Roundtree; see Slappy; Tillman; Parrish; Knowles; Williams; Timmons; Mitchell. The explanation must be based on answers provided on voir dire or otherwise disclosed on the record itself; and it is the trial judge's obligation to determine whether the proffered reasons are indeed supported by the record. Slappy; Tillman; Parrish; Knowles; Williams; Hill.

This Court has recently stated:

> In Slappy, we agreed with the district court that the legitimacy of the state's race-neutral explanations would be questioned if certain factors were present that would tend to show the reasons were not actually supported by the record or were an impermissible pretext. The five factors mentioned in Slappy are: (1) alleged group bias not shown to be shared by the juror in question; (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel questioned the juror; (3) singling the juror out for special questioning designed to evoke a certain response; (4) the prosecutor's reason is unrelated to the facts of the case; and (5) a challenge based on reasons equally applicable to jurors who were not challenged.

Roundtree v. State, 546 So.2d at 1044.

The prosecutor in the instant case peremptorily challenged all three of the black jurors who remained on the panel after the challenges for cause were exercised. (R1293, 1446, 1611) After the first two jurors were challenged, defense counsel noted for the record that they were black. (R1293, 1446) The prosecutor said "If we could do that outside the presence of the jury." (R1446) When the third and last black juror was excused by the state, defense counsel stated:

> ... [T]hat is the third black juror that the State has excused and the last black juror in this venire. I believe the State needs to place on the record the reasons why they have excused every single black juror on this panel. How do you want to do that?
>
> MR. SEYMOUR [prosecutor]: I think we can do that after the jury retires for the afternoon. I'll be more than happy.

(R1611-12)

Since, as defense counsel pointed out in requesting a Neil inquiry, the state's use of its peremptories had resulted in not a single black member remaining on the jury, a presumption of racial discrimination did arise, and the burden of explanation shifted to the state. Blackshear; Kibler; Floyd; Parrish; Knowles; Timmons.[8]

After the jury was selected and sworn, the prosecutor stated his reasons for striking jurors Davis, McDuffie, and Johnson. Appellant concedes that the state's reasons for challenging Georgia Davis were proper. The prosecutor represented that she had two sons in prison, and a daughter who had thrown a knife at her boyfriend in the presence of police officers who had come to quell the disturbance. Many years earlier, the father of Ms. Davis' daughter had fatally stabbed a woman, was charged with second degree murder, and pled to 20 years in prison. Judge Talley had been the defense lawyer in that case. Needless to say, the reasons for the excusal of Ms. Davis were more than sufficient.

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[8] In any event, as in Peed v. State (14 FLW at 298), the prosecutor here voluntarily "accepted the burden by going forward and [doing] everything he would have done had the judge found that the defense had made a prima facie case." In that situation, the legitimacy of the reasons given by the prosecutor must be examined the same as if the judge had ordered him to explain the strikes.

As regards Ms. McDuffie and Mrs. Johnson, on the other hand, an examination of the reasons given by the prosecutor (in light of the questions asked and answers given on voir dire) show that most if not all of those reasons "were not actually supported by the record or were an impermissible pretext." Roundtree; see Slappy. The prosecutor stated:

> The first one we excused was Twanda McDuffie.[9] She was the number 1 Juror called. She was 19 years old. She's single. She's, I believe, a maid, has had that job for some two months, indicating a certain pattern of lack of stability or responsibility.
>
> She said that her recreation, I believe, was going out to the bars dancing at night. It doesn't make her a bad person because I do that myself, but certainly not an appropriate juror in the eyes of the State for this case. She belongs to no clubs. And her answers on the death penalty were very weak.
>
> She said at one point she wasn't against the death penalty, but she said she had never really thought about it much, didn't know much about it. At one point, she said she didn't think anyone should ever take a life, and that includes the State.
>
> She also said mental illness, which is a factor in this case, would be a single most important factor in the question of whether or not the death penalty should be imposed. So obviously, the State had good grounds totally independent of her race for excusing Hiss McDuffie.

(R1699)

Regarding juror Johnson, the prosecutor explained:

> The third black juror was Lovie Johnson. Mrs. Johnson, we did not inquire further on this to embarrass her, but she had a member of her family charged with a crime. She stated that she had no -- at one point, she stated she had no opinion on the question of capital punishment, and did state that the first execution -- I believe she remembered the name of Spinkellink; that the Spinkellink execution bothered her a great deal. And I also think she was a social worker.
>
> For those considerations, we excused her. And again, that had nothing whatsoever to do with her race.

(R1699-1700)

The prosecutor also saw fit to mention that a black person had sat on the jury in the last capital case he tried, six months earlier. (R1700) The

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[9] Actually, Ms. McDuffie, while she was the first juror called (R106, 1131), was not the first black juror peremptorily challenged by the state. (see R1293) In fact, the state left her on the panel after she and her group of twelve were examined on voir dire (R1293), but subsequently excused her with a back strike. (R1446)

defendant in that case, Melvin Trotter, was also black. (R1700) The trial judge said:

> I find it hard to see -- the Defendant in this case is not black -- what brought up the race question at all in this case? I find it hard to see. I've seen no question of racism so far.

(R1700)

The trial judge may have believed, incorrectly, that a white defendant lacked standing to complain [see Kibler; Barwick; Reed; Timmons]; or else he may merely have accepted the state's reasons at face value [see Slappy; Tillman; Roundtree; Parrish; Knowles; Williams; Timmons; Mitchell]. As in Kibler v. State, 546 So.2d at 713-14, the matter ended inconclusively, without a clear ruling on the sufficiency of the reasons asserted by the prosecutor, perhaps because the judge was uncertain whether appellant had standing.

C. PROSPECTIVE JUROR McDUFFIE

If the judge had critically evaluated the explanation, he would have seen that much of what the prosecutor said was irrelevant, unsupported by the record, or a distortion of the jurors' actual responses on voir dire. The prosecutor said of Ms. McDuffie, "She's, I believe, a maid, has had that job for some two months, indicating a certain pattern of lack of stability or responsibility. She said that her recreation, I believe, was going out to the bars dancing at night." He then added, unctuously, that "It doesn't make her a bad person because I do that myself", but that she was certainly not an appropriate juror for the state in this case.

The truth is quite different. Ms. McDuffie was the very first juror questioned, and the prosecutor asked her the open-ended question:

> Will you please tell us something about yourself?
>
> MS. MCDUFFIE: Well, like what? I mean --
>
> Q. Whatever you can think of that might be of interest to us as the lawyers in this case in determining whether or not you should be selected as a juror.
>
> A. Well, I work at the Freedom Village. I'm a housekeeper moving up to a nurse's aide. At home, I do nothing but cook. I like crocheting. I don't know what to -- I just --
>
> Q. Anything you can think of that might be of interest?

A. I like going out, and that's all I can say.

Q. You are single?

A. Ah-hmm.

Q. You have no children?

A. No.

(R1131)

The nineteen year old Ms. McDuffie stated that she had been in her present employment at Freedom Village for two months; before that she was a cashier at Winn-Dixie for 6 or 7 months. (R1132) She was presently taking classes at Freedom Village to become a nurse's aide, and intended to continue working there. (R1220)

The prosecutor's characterieation of Ms. McDuffie's employment as "indicating a certain pattern of lack of stability or responsibility" is unfair, inaccurate, and in all likelihood pretextual. See Tillman v. State, 522 So.2d at 17; Roundtree v. State, 546 So.2d at 1045; Reed v. State, 14 FLW at 299; Floyd v. State, 511 So.2d at 764-65; Mitchell v. State, 548 So.2d at 824-25; Mayes v. State, 14 FLW at 2384. Similarly, his statement that "[s]he said that her recreation, I believe, was going out to the bars at night" strongly suggests that he was looking for reasons to excuse her from the jury; and hearing things she did not say. When asked by the prosecutor to tell him something about herself, she answered "At home, I do nothing but cook. I like crocheting." Asked next if she could thing of anything else that might be of interest, she said "I like going out, and that's all I can say." The prosecutor did not ask her to elaborate on that. [See Mayes v. State, 14 FLW at 2384 ("Moreover, the state did not question [juror] Goffe in an effort to support the belief that she slight be preoccupied with caring for her daughter. Questioning may well have revealed no cause for the state's concern. Furthermore, several of the seated jurors also had small children"); see also Slappy v. State, 522 So.2d at 23 and n.3 (state excused black jurors because of purported traits which record did not support; a few simple questions could have established existence or non-existence of these traits)]. It is a safe bet that some of the white female

jurors in this case liked to cook, crochet, and go out.

It is hard to imagine how the prosecutor came up with "going out to the bars dancing at night", but this clearly was an unsupported - and probably pretextual - basis for excusing Ms. McDuffie fromthe jury. Tillman; Roundtree; Reed; Floyd; Mitchell; Mayes.

The prosecutor's comment that Ms. McDuffie belongs to no clubs likewise does not justify her excusal. Club membership is not a prerequisite for jury service, and bears no reasonable relationship to a juror's ability to fairly decide the case. Compare Tillman v. State, 522 So.2d at 17 ("As there is no requirement that jurors have college degrees to serve on a panel, it is clear that the record does not support the reason, whether it was proffered by the state or by the judge"). In addition, membership in clubs is unrelated to the facts of the case. Slappy; Roundtree; Reed; Floyd; see 'lliams v. State, 547 So.2d at 180 ("Here the state's explanation failed to rise to the level required by Slappy. The state's examination of the juror was perfunctory, and the reasons given by the state were not related to the facts of the case"); Mayes v. State, 14 FLW at 2384 ("[Juror] Goffe's employment as a practical nurse was completely unrelated to the facts of the case. Indeed, the state failed to question Goffe regarding the effect her employment might have upon her ability to fulfill jury duty. Thus the utter failure to question Goffe in those areas asserted as the grounds for the challenge at the very least renders the state's explanation suspect. Slappy, 522 So.2d at 22").

The state never asked Ms. McDuffie whether she belonged to any clubs, so the record does not even indicate whether there is a factual basis for the prosecutor's assertion. In fact, only a handful of prospective jurors, from the very last groups to be questioned, were ever asked about club membership, and that was by defense counsel. The absence of any questioning by the prosecutor in the area asserted as the ground for the challenge, and the lack of any relationship between club membership and ability to serve as an impartial juror, renders his explanation suspect. Slappy; Williams; Mayes.

Even assuming arguendo that Ms. McDuffie may have indicated in her jury questionnaire that she did not belong to any clubs, that would not make the prosecutor's reason any more related to the case, or any less irrelevant to her ability to serve. Nor would it explain his failure to question her on the subject. The state may contend on appeal that not belonging to clubs is indicative of non-involvement in society or the community. But the kinds of social involvement a person engages in depends in large part on his or her age, sex, race, socioeconomic position, and many other factors. A white male retiree in his sixties may well belong to the Elks or the Masons; a nineteen year old black working woman is not likely to.[10] If the prosecutor was truly interested in finding out whether Ms. McDuffie was socially involved, the obvious question would have been whether she had participated in any activities or organizations in school. But the prosecutor never asked her anything at all on the subject. **Slappy**; **Williams**; **Mayes**. Moreover, we have no way of knowing how many of the white jurors who were accepted by the state also did not belong to any clubs. See **Slappy**; Roundtree; Reed; **Floyd**; **Parrish**; **Mitchell**; **Mayes**.

The prosecutor next said that Ms. McDuffie's answers on the death penalty were very weak. "She said at one point she wasn't against the death penalty, but she said she had never really thought about it much, didn't know much about it. At one point, she said she didn't think anyone should ever take a life and that includes the State. She also said that mental illness, which is a factor in this case, would be the single most important factor in the question of whether or not the death penalty should be imposed."

First of all - even apart fromthe **Batson/Neil** issue - it is questionable whether the prosecutor's use of peremptory challenges to excuse jurors who are perceived as "weak" on the death penalty is constitutionally permissible. See Brown v. Rice, 693 F.Supp. 381 (W.D.N.C. 1988) (holding that it violates the U.S. Constitution for the prosecutor to use peremptory challenges consistently

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[10] The fact that many private social clubs maintain discriminatory membership policies is yet another reason why "not belonging to any clubs" cannot be considered a legitimate reason to exclude minority jurors.

to exclude potential jurors who express reservations about capital punishment, but who would not be excludable for cause). But it is not necessary to reach the Brown v. Rice issue, because here juror McDuffie's responses, in context and in their totality, do not support the prosecutor's explanation under the test set forth in Slappy. In questioning by the state, Ms. McDuffie gave the following responses:

Q. Miss McDuffie, do you have any personal beliefs against the death penalty?

A. No, I do not.

Q. What do you think about it?

A. Well I really don't know that much about the death penaity.

Q. Well, I'm talking about where a person who commits a crime may be punished by receiving a sentence providing for death. That's what I'm speaking of when I talk of the death penalty. Now, what are your thoughts about this, the death penalty?

A. If I believe that they are guilty, then I could say yes.

Q. Would this interfere in any way with your judging the guilt or innocence of the Defendant?

A. No.

Q. And you will follow the Judge's instructions at the completion of the trial and the oath you took as a juror; is that correct?

A. Yes.

Q. Can you judge the Defendant guilty or innocent without the possible - would the possible imposition of the death penalty interfere with such determination? What I mean is, would the fact that the death sentence is there as a possible punishment interfere in any way with your judging the guilt or innocence of the defendant?

A. Yes.

Q. Would it or would it not?

A. No, it would not, no.

Q. I don't think I made that question as clear as I should have. Would your reservations about capital punishment prevent you from making an impartial decision?

A. No.

Q. As to the Defendant's guilt or innocence?
A. No.

Q. And you can envision a murder where you as juror could return a verdict providing for the death sentence?

A. Yes.

(R115-16)

In subsequent questioning by defense counsel, Ms. McDuffie made it clear that while she did not think anyone, including the government, should take a life, she also believed that there were some cases where the death penalty was really necessary. (R199-200) She agreed that the death penalty could be a deterrent to crime. (R200)

Q. Do you think locking somebody up for their life, do you think that stops other people? Send somebody to jail and somebody else might not commit a crime?

A. No, not really, because they can get out doing six or seven years and get out in their term. No, not really. But I think the death penalty will do good. But, like I say, I don't think no man should take another man's life.

Q. Well, I've got to ask you. What good do you think the death penalty can do?

A. Like I say, stop them.

Q. Stop that person?

A. Yeah, what killed another person. And since he decide to take a life, he shouldn't deserve to live, either.

Q. Okay. Then when do you think it's necessary to take a life?

A. Hell, like I said, not really necessary to take a life. But the case would depend on taking the life, then the death penalty.

Q. What sort of case do you see?

A. A murder.

Q. So when somebody commits a murder, then in that case -

A. Not, you know -- like in different cases, you know, but not in like all murders.

Q. Not all murders?

A. No.

Q. What murders do you think would reauire the takina of a life?

A. I couldn't say unless I heard it.

Q. Well, would you be willing then to listen to evidence in making up your mind as to whether or not a life should be taken?

A. Yeah. before I do aive it.

Q. Would you consider, let's say, whether or not the person has any prior criminal activity in deciding whether or not the life should be taken?

A. Yeah. I would like to decide first and listen and go over it carefully before I decide something like that.

(R200-02)

Asked whether she would consider the mental condition of a person before decidina whether or not to take his life. Ms. McDuffie answered "I will have to decide on that, I wouldn't know, you know. unless I heard evervthina in the case." (R202)

Q. Well, if the evidence showed you, if the evidence convinced you that a person was mentally sick at the time that he committed a criminal act, would you consider that in deciding whether or not he should be executed?

A. Yeah.

Q. You think that would be important?

A. Yeah. Yeah that would be the most important thing.

(R203)

Defense counsel asked "Do you think we should execute people who are mentally ill, who are sick?" (R203) Ms. McDuffie answered "No", and then began to explain "Unless ..." (R203-04) She was cut off by the prosecutor's objection to the question. (R204, see R205-06)

THE COURT: I think you're getting far afield, Mr. Combs.
MR. COMBS [defense counsel]: Your Honor, this goes to the question of a mitigating circumstance; if the juror felt that a person who was mentally ill, whether *or* not the death penalty would be appropriate.

THE COURT: I will instruct as to that if she's a juror in this case.

You understand there will be two trials, ma'am? First would be to find guilt or innocence. If he's found guilty, there will be another hearing to decide what penalty to give, and that's when you consider mitigating circumstances as given to you by the Judge.

Do you understand that?

PROSPECTIVE JUROR McDUFFIE: Yes.

THE COURT: Would you consider that?

PROSPECTIVE JUROR McDUFFIE: Yes.

THE COURT: The same way as you would consider the other side?

PROSPECTIVE JUROR McDUFFIE: Yes.

THE COURT: And that's -- do you understand what I'm saying?

PROSPECTIVE JUROR McDUFFIE: Yeah, I understand.

THE COURT: All right. Go ahead.

(R204-05)

Ms. McDuffie then stated, in response to counsel's re-phrased question, that if she found that the person was mentally ill, she would consider that in deciding whether or not to impose the death penalty. (R205) Counsel asked:

> If you felt that the death penalty was not appropriate, for whatever reasons, is that how you would vote?
>
> PROSPECTIVE JUROR McDUFFIE: No. I will make my own decision unless it came from the Judge, you know, that I had to make a decision in that way.

(R207)

For someone who, like many prospective jurors, had never thought much about the death penalty before, Ms. McDuffie's answers were quite thoughtful and even-handed. In response to a wide variety of questions, she consistently made it clear that her verdict would depend on the evidence, and on the law as instructed by the court; and that the appropriateness of the death penalty depended on the circumstances of the case. See Roundtree V. State, 546 So.2d at 1045 ("Two more black jurors were challenged by the state because of their views regarding the death penalty although both indicated that they could follow the law and recommend a sentence of death if the circumstances of the case so warranted"); cf. Timmons V. State, 548 So.2d at 256. The prosecutor, in stating his reasons for challenging Ms. McDuffie, said:

> She said at one point she wasn't against the death penalty, but she said she had never really thought about it much, didn't know much about it. At one point, she said she didn't think anyone should ever take a life, and that includes the State.

An important factor in determining whether the state's explanation for striking a black juror is pretextual is whether white jurors who gave comparable answers were accepted by the state. Slappy; Roundtree; Reed; Floyd; Parrish;

Mitchell; Mayes. Mrs. Engel, a white juror who was accepted by the state and who served on the jury (see R3486) said:

> I guess I have mixed feelings about capital punishment. On the one hand, I feel that the punishment should justify the crime. And on the other hand, my Christian upbringing tells me that only God has the right to take life. So I'm kind of mixed about that.
>
> MR. ECONOMOU [prosecutor]: Again, as I've stated before, there is no wrong answer. Don't feel as if you have to give any of us a specific answer, particularly to this question. And this is probably the type of decision or type of question that perhaps most people don't go through their life and have to ever decide or have an opinion on.
>
> Now, do you feel that because of -- apparently, you have some religious feelings or hesitations about accepting capital punishment; am I correct in that?
>
> JUROR ENGEL: Yes, I do.

(R557)

[Not only did Wrs. Engel show considerably more ambivalence about the capital punishment than Ms. McDuffie ever did, it is also interesting that the state on the one hand assured Mrs. Engel that the death penalty is something most people go through their whole life without ever giving much thought to; yet on the other hand gave as a reason for excusing Ms. McDuffie that "She said at one point she wasn't against the death penalty, but she said she had never really thought about it much, didn't know much about it"].

The prosecutor's examination of Mrs. Engel continued as follows:

> If you could just perhaps explain to me -- if you cannot, that's fine, too -- what reservations you may have about capital punishment. Is there anything in particular, any particular incident or just a basic religious feeling about it?
>
> JUROR ENGEL: No, just a basic religious feeling, that I've always been taught that God gives life and God alone can take life.
>
> Q. Yes, ma'am, and I'm not -- this is a difficult situation because the law in the State of Florida also, for lack of a better word, approves or allows, rather, capital punishment in the state. And obviously, you do not feel that your religious beliefs, which are valid, but you do not feel that your religious beliefs would interfere with the legal requirements. That's basically what I'm asking.
>
> A. No, I don't think so because, as I stated earlier, I have mixed feelings about it. I really feel that when the crime merits capital punishment, it should be given. But then again, my religious training tells me not, so I have --I argue with myself in that regard.

Q. So if you're allowed to sit as a juror, particularly at the penalty phase, if you have that problem in the back room with this struggle between the legal issue and your personal or moral or religious feelings, can you deal with that?

A. I think I can, yes.

(R559-60)

The prosecutor's explanation that he struck Ms. McDuffie because "her answers on the death penalty were very weak" is belied by the fact that he did not strike Mrs. Engel (and also belied by the fact that the other reasons he gave for excusing McDuffie - the "pattern of lack of stability or responsibility" and the "dancing at bars at night" - were so transparently bogus). The state also accepted a white juror, Mr. Cline[11], who was extremely confused about the death penalty, saying several times that he would not under any circumstances vote for a death sentence (R769-70), and that he would automatically recommend life imprisonment because "I don't believe in the death penalty, either." (R770) Then he turned around and said he was in favor of the death penalty, and could not consider life imprisonment. (R772-74) Finally, he indicated that would follow the law and the evidence, and consider either life or death as a possible recommendation. (R774) While Ms. McDuffie may not have been as articulate on the subject of the death penalty as Mrs. Engel, she was certainly much more articulate (and made a lot more sense) on the subject than Mr. Cline. Unlike Cline, McDuffie consistently stated that she would base her decision on the law and the evidence.

Another white juror who was accepted to serve, Mr. Rhodes (see R3486), said "I'm not against the death penalty, but I'm not necessarily for it", that he had no strong convictions one way or the other, and that he would not automatically recommend death, nor automatically recommend life. (R705-06) The prosecutor replied that this was "probably the best answer you could have given me." (R706)

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[11] Cline was selected as a juror, but left in the middle of trial to attend an out-of-town funeral. He was replaced by alternate juror Hix. (R2665-69, 3486-87)

In his questioning of the various prospective jurors, the prosecutor repeatedly made comments similar to the one he made to Hrs. Engel (R557):

> MR. ECONOMOU [prosecutor]: I saved you for last, Mrs. Barendse. How do you feel about capital punishment?
>
> PROSPECTIVE JUROR BARENDSE: I really don't know. ...
>
> MR. ECONOMOU: That's a valid answer. That's not probably something that a lot of people think about until they're probably faced with it. I don't know how to ask you to see perhaps if you could give me an indication.

(R447-48)

... ...

> MR. ECONOMOU: Mrs. Berger, how do you feel, ma'am, about capital punishment?
>
> PROSPECTIVE JUROR BERGER: I have no strong feelings one way or the other. I have just never spent that much time thinking about it.
>
> MR. ECONOMOU: Certainly, this probably isn't the type of subject that one spends a great deal of time on unless you're actually confronted with this. And again, as I stated, every feeling is a valid feeling.

(R944)

... ...

> MR. SEYMOUR [prosecutor]: That's what I was asking you. Hrs. Fleming, how do you feel about the death penalty?
>
> PROSPECTIVE JUROR FLEXING: I have a problem with that. I'm not sure. I honestly -- I mean, you want my honest opinion? I'm really not sure.
>
> Q. That's the only thing we're asking for, is honest opinions.
>
> A. My problem is, I don't feel that they should be out -- in other words, I feel in locking them up and never letting them out again. But I don't know whether I could pull the switch on them.
>
> Q. The law doesn't provide for that.
>
> A. I know, and that's why I say I'm confused on my thinking on it.
>
> Q. A lot of people haven't thought about it before. Have you really thought about it?

(R341-42)

In light of these comments, the prosecutor's later statement, in excusing Ms. McDuffie, that "[s]he said at one point she wasn't against the death

penalty, but she said she had never really thought about it much, didn't know much about it" seems considerably less than sincere.

Finally, Ms. McDuffie's responses concerning mental illness as a mitigating circumstance do not justify her excusal. The legislature of Florida, in enacting the death penalty statute, also considered a defendant's mental illness, if established by the evidence, to be an important factor in determining whether or not he should be executed. Two related but distinct statutory mitigating circumstances were adopted:

> Extreme mental or emotional disturbance is a ... mitigating consideration pursuant to Fla.Stat. § 921.141(7)(b), F.S.A., which is easily interpreted as less than insanity but more than the emotions of the average man, however inflamed.
>
> ... ...
>
> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Fla. Stat. § 921.141(7)(f), F.S.A. Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

Ms. McDuffie's comment that mental illness *'would be the most important thing" (R203) (made in response to the question '*You think that would be important?") should be considered in light of the fact that mental illness was the only specific mitigating factor anyone mentioned to her. When the court explained that he would instruct the jury on what were the aggravating and mitigating circumstances, and asked her if she would consider them as given to her by the judge, she replied that she could. (R204) On the whole, Ms. McDuffie's answers were not substantially different than those given by several white jurors who served, including Mr. Reed, Mr. Loopengood, and Mr. Cook. (see R359-60, 475-76, 526, 3485-88)

As previously discussed, the excusal of even one minority juror for impermissible reasons - reasons which are unsupported by the record or which appear to be a subterfuge for racial discrimination - is reversible error. Tillman; Thompson; Floyd; Stubbs; Jennings; Williams; Mitchell; Mayes. It is the trial judge's responsibility to critically evaluate the credibility of the

prosecutor's explanation, and not merely accept it at face value. Slappy; Tillman; Roundtree; Parrish; Knowles; Mitchell. As stated in Timmons v. State, 548 So.2d at 256, "[t]he absence of an evaluation by the trial court of any explanation by the state and the absence of a determination by the trial court that such an explanation was supported by the record require that we reverse and remand for a new trial."

D. PROSPECTIVE JUROR JOHNSON

The reasons given by the prosecutor for the excusal of Mrs. Johnson were hardly better:

> Mrs. Johnson, we did not inquire further on this to embarrass her, but she had a member of her family charged with a crime. She stated that she had no -- at one point, she stated she had no opinion on the question of capital punishment, and did state that the first execution -- I believe she remembered the name of Spinkellink; that the Spinkellink execution bothered her a good deal. And I also think she was a social worker.

(R1699-1700)

As with Hrs. McDuffie, it appears that the prosecutor was listening for reasons to excuse her, instead of listening to what she said. Mrs. Johnson stated on voir dire that she was married, was the mother of four children, and was employed as a secretary by the Manatee Opportunity Council, which is a community action agency in Bradenton. (R1195) The prosecutor asked her no further questions relating to her employment, or any effect it might have on her ability to fulfill jury duty.[12] Mayes v. State, 14 FLW at 2384; see also Peed v. State, 14 FLW at 299. The fact that the prosecutor, in challenging two different black jurors, misstated the juror's answers on voir dire, is a strong indication that the reasons given were a pretext for racial discrimination.

The prosecutor also explained that Mrs. Johnson had a member of her family charged with a crime. She had been asked on voir dire:

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[12] In response to questioning by defense counsel, Mrs. Johnson stated that the agency is federally and state funded to try to satisfy the needs of low income residents. (R1233) The agency has a program to help weatherize the homes of elderly people, and they try to help with rent or utility bills for people who are about to be evicted. (R1233) There is also a food distribution program, which Mrs. Johnson works with three days out of every month. (R1233-34) None of the principals involved in this case were recipients of public aid.

MR. SCHAUB [prosecutor]: Have you or any member of your immediate family ever been to court before?

PROSPECTIVE JUROR JOHNSON: My son.

Q. And what was this concerning?

A. He was a juvenile defendant.

Q. I see. Juvenile offense? Anything else?

A. No.

(1195)

A few pages earlier in the record, Mr. Schaub was questioning Mr. Reed, a white juror who was accepted to serve, (R1189, see R3485) Mr. Reed, like Mrs. Johnson, was married and had children. (R1189) Unlike Mrs. Johnson, Mr. Reed was asked only whether he personally had ever been in court before[W]. (R1190) He answered yes. (R1190)

MR. SCHAUB: In what capacity?

PROSPECTIVE JUROR REED: Simple assault, 1967.

Q. You were charged?

A. Well, yeah. He asked me if I did what I did, and I told him yeah, so he fined me $50.

Q. Any other time?

A. No.

(R1190)

Granted, Mr. Reed's "criminal history" was long in the past and relatively trivial, and did not necessarily reflect on his ability to serve as a juror. But this may well be equally true of Mrs. Johnson. See **Slappy**. The prosecutor asked her a broader question than he asked Mr. Reed, and then failed to follow it up to find out whether her son's juvenile charge was serious or relatively trivial, or how long ago it happened, or whether it would in any way affect her ability to serve impartially. See **Slappy**; **Williams**; **Mayes**. The state's claim

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[13] Of the first group of prospective jurors, some were asked whether they or any member of their immediate family had ever been in court before (R1172, 1183-84, 1193, 1195), and some were asked only whether they personally had been in court. (R1141, 1155, 1175, 1186, 1190) Many of the later jurors were not asked either question.

that it did not inquire further so as not to embarrass her does not justify removing a minority juror after questioning which is too perfunctory to satisfy the requirements of Slappy. Moreover, that self-serving statement is belied by the fact that, in examining Mrs. Davis (the black juror whose excusal appellant does not contest), the prosecutor was not deterred by concern for embarrassing her from going into her two sons' serious criminal involvement, even to the point of mentioning them by name. (R1604-05) The examination of Mrs. Davis -- and her responses -- were sufficient to satisfy the requirements of Slappy, but the perfunctory examination of Mrs. Johnson, and the bare fact that one of her four children had once been in juvenile court, is not sufficient, especially in light of the disparate treatment accorded a white juror who had once pled guilty to a misdemeanor. See Slappy; Roundtree; Reed; Floyd; Parrish; Mitchell; Mayes.

On the matter of the death penalty, in response to the prosecutor's questioning, Mrs. Johnson stated that she had no strong opinions against capital punishment, and no religious or personal convictions against it. (R347) If the state proved its case beyond a reasonable doubt, she could vote for the death penalty if it were appropriate under the law. (R347) She could weigh the aggravating and mitigating circumstances as the law defines them. (R348) When later asked by defense counsel how she felt about the death penalty, she replied:

> When Spinkellink was put to death. I didn't even know the guy, and it bothered me terribly. But if I had to make a decision, listen to the evidence and weigh it, I believe I could be honest in my decision.
>
> Q. You see, we're not asking you to be in favor of it. We just want to know how you feel about it. Okay? The Court will give you some instructions, and what you're asked to do there is just to consider and to follow the instructions.
>
> A. I don't think I'd have any problem with that.
>
> Q. And you would consider the death penalty as a possible form of punishment?
>
> MR. SEYMOUR [prosecutor]: Objection, Your Honor. Again, that's a misstatement of the law. It's not for her to consider it. It's for her to vote for if it's appropriate under the law.
>
> THE COURT: I think what he's saying is, would you consider applying

the death penalty if she found it was appropriate under the situation.

Is that correct, ma'am? You're saying you would if you found the facts to be there after all the instructions on the law from the Court?

PROSPECTIVE JUROR JOHNSON: Yes, sir.

(R382-83)

As with Ms. McDuffie, the record provides no support for the state's excusing Mrs. Johnson from the jury based on supposed "weakness" on the death penalty. See Roundtree v. State, 546 So.2d at 1045; cf. Timmons v. State, 548 So.2d at 256. This is particularly true in light of the state's acceptance of a white juror, Mrs. Engel, who was far more equivocal about her ability to recommend death in appropriate circumstances than was Mrs. Johnson (compare R557-60 [Engel] with R347-48, 381-83 [Johnson]).

Appellant is entitled to a new trial, with a jury selected free of racial discrimination.

ISSUE III

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS AND DENYING HIS MOTIONS FOR MISTRIAL MADE IN RESPONSE TO THE STATE ATTORNEY'S IRRELEVANT, MISLEADING, AND PREJUDICIAL CROSS-EXAMINATION OF DR. TANAY.

A. THE "HIRED GUN" ATTACK

In cross-examining Dr. Tanay, the State Attorney brought up a speech given by Tanay some ten years earlier to the American Academy of Forensic Sciences. In that address, Dr. Tanay had made the jocular remark that "the contemporary, ideal forensic psychiatrist is a man who writes extensively on the subjects of law and psychiatry but avoids tarnishing his image by entering the courtroom." The State Attorney asked Tanay whether, in that speech, he had made the following statement:

"For example, Doctor Thomas Szasz, who is a recognized authority in the area of law and psychiatry, has written several books and innumerable articles on the subject without any significant exposure to the legal process. He proudly admits that he has testified in the courtroom on only two occasions. The recently-organized American Academy of Psychiatry and the Law took, as one of its basic tenets, avoidance of any involvement with courtroom testimony. Lack of experience is usually a reflection upon one's competence, but not in the field of forensic psychiatry."

(R2317-18)

The State Attorney, for no relevant purpose, continued to cross-examine Tanay about Dr. Szasz:

MR. SCHAUB: Now, Doctor Thomas Szasz is a recognized expert, is he not, who you mentioned here?

DR. TANAY: No. I am facetiously saying, "How can he be an expert if he doesn't ever get involved in the Process?" He is a psychiatrist, but he is a person who indeed, in my opinion, is not a suitable person to be an expert because he does not know the subject matter.

Q. Doctor Szasz is from Syracuse University; isn't he?

A. Yes, he is.

Q. Probably the best known psychiatrist in the country today; is he not?

A. Oh, I don't think so at all. I think he's a person who has been generally recognized as holding views that are really bordering on the ridiculous.

Q. I didn't understand your answer.

A. My answer, sir, is that Doctor Szasz' views are generally held in great disrespect in psychiatry.

Q. Why do you accuse him of that? Is that because he called you once a hired gun?

(R2319)

Defense counsel objected and asked to approach the bench. The following proceedings ensued:

MR. SLATER [defense counsel]: Move for a mistrial. Mr. Schaub knows better than that.

MR. SCHAUB: I don't know that at all. That's exactly what I'm setting out to prove.

MR. SLATER: Accusing this doctor as a hired gun is the most inflammatory thing Mr. Schaub has said.

I move for a mistrial and I move that the Court sanction Hr. Schaub for such a statement.

THE COURT: Mr. Schaub --

MR. SLATER: I mean, my Lord.

THE COURT: Mr. Schaub, I will deny the motion for a mistrial, but I think you should --

MR. SCHAUB: I have it right here. He said it himself.

THE COURT: Ask him if he said it.

MR. SCHAUB: He said the man accused him of being a hired gun. No, sir, I'm not inventing this.

MR. SLATER: Who said this?

MR. SCHAUB: Tanay said that Szasz had accused him of being a hired gun. And that's what I'm trying to show.

(R2320-21)

Defense counsel asked for a curative instruction to the jury to disregard the comment. The following then took place, before the jury:

THE COURT: The Jury will disregard the last question or statement, whichever it was, by Mr. Schaub in regards to the hired gun. There's no prior proper predicate laid for that.

Q. (By Mr. Schaub) Did you or did you not say that Thomas Szasz accused you of being a hired gun?

MR. SLATER: Objection. Irrelevant.

Q. (By Mr. Schaub) I'll direct your attention to a --

MR. SLATER: Excuse me, Mr. Schaub.

MR. SCHAUB: Well, I'm going to lay a predicate.

THE COURT: When he's finished, I'll let you object. Go ahead.

Q. (By Mr. Schaub) This was in the course of a debate that you and he had called "Hero or Hoax" concerning the validity of forensic psychiatry.

I believe you had it in Detroit on November 8, 1982, before a Jewish organization.

MR. SLATER: Objection. Irrelevant and immaterial.

THE COURT: What is your objection?

MR. SLATER: Irrelevant and immaterial.

MR. SCHAUB: I don't think it's irrelevant, Your Honor.

THE COURT: I'll overrule the objection. Did you or not say that? Answer his question?

THE WITNESS: I recall taking part in a debate, Your Honor. I do not recall if I made that specific statement about Doctor Szase or made that statement that is being attributed to me. I don't recall that. I do recall taking part in a debate.

(R2322-23)

The State Attorney then produced a transcript of the debate and directed Dr. Tanay's attention to page 6. Tanay explained that "Doctor Szasz has called psychiatrists generally like me hired guns."

DR. TANAY: It had to do with psychiatry. And I would like to tell you that in my view, Doctor [Szasz] is a hired mikvah polluter; and

that deals with other subjects that had to do with that particular Jewish audience in which the context of that debate took place.

So he was referring to psychiatrists who take part in civil commitment proceedings as hired guns.

Q. (By Mr. Schaub) Including yourself?

A. All psychiatrists. He said all psychiatrists who take part in civil conmitment proceedings because he says that there is no such thing as mental illness; mental illness is a myth. You know, the book is entitled "The Myth of Mental Illness."

So anybody who recommends civil commitment is considered, by him, hired gun. He is the person who's responsible, in large measure, for the fact that we have so many homeless people who are mentally ill wandering in the streets.

That was what the whole debate was about, was about civil commitment. It had nothing to do with anything else. Civil commitment was the issue.

MR. SLATER: Your Honor, I would object.

Q. (By Hr. Schaub) My statement was correct; was it not, Doctor, then?

MR. SLATER: Excuse me --

Q. (By Mr. Schaub) -- that "Doctor Szasz has called psychiatrists like me hired guns?"

A. No, sir. You said that he called me. That's what you said, sir.

That is not accurate.

(R2325-26)

Defense counsel once again strenuously objected to what was occurring:

MR. SLATER: Your Honor, I have an objection. Obviously, it has no relevancy at all to this particular proceedings.

The only purpose of it is for Mr. Schaub to inflame the Jury on irrelevant and immaterial facts regarding something to do with civil commitments; nothing to do with the area of criminal law, nothing to do with the issue of insanity, nothing to do with the issue regarding Rick Nowitzke's sanity or insanity or competency.

It's absolutely ludicrous that this has any bearing in this court.

MR. SCHAUB: There's nothing about civil here, Your Honor.

THE COURT: Mr. Slater, I'm prone to disagree with you in that this man has been offered as expert, testifying about the condition of your client of an affair that took place in November of '85. And if he has made statements that the State wishes to bring in, I think they should be allowed to, that differ with his present situation -- I'm not saying that I'm endorsing either statement by him or by you or either side. All I'm saying is that he has a right to bring them in.

I want to ask him now or instruct him now to move on. He's done that and its sufficient.

(R2326-27)

The State Attorney's entire attack on Dr. Tanay based on Dr. Szasz having called him a "hired gun" was irrelevant, improper, and amounted to nothing more than unfair character assassination. See DeSantis v. Acevedo, 528 So.2d 461 (Fla. 3d DCA 1988); Simmons v. Baptist Hospital of Miami, Inc., 454 So.2d 681 (Fla. 3d DCA 1984). The proper method for impeaching an expert's opinion "[is] by the introduction of contrary opinion based on the same facts, not to elicit from one expert what he thinks of another." Schwab v. Tolley, 345 So.2d 747, 754 (Fla. 4th DCA 1977); see Ecker v. National Roofing of Miami, Inc., 201 So.2d 586, 588 (Fla. 3d DCA 1967); Carver v. Orange County, 444 So.2d 452, 454 (Fla. 5th DCA 1983). "A trial should not be turned into a debate on irrelevant and immaterial issues such as the reputation of one expert witness, as determined or judged by the personal opinion of another expert witness for the other side." Ecker v. National Roofing of Miami, Inc., 201 So.2d at 588. Moreover, "testimony with regard to [a witness'] reputation for truth and veracity must be bottomed upon the reputation in the person's comnunity of residence. .... So called expert opinion as to the truthfulness of a witness is inadmissible." General Telephone Co. v. Wallace, 417 So.2d 1022, 1024 (Fla. 2d DCA 1982). See generally, Fla. Stat. § 90.609; Florida East Coast Railway Co. v. Hunt, 322 So.2d 68 (Fla. 3d DCA 1975); Lamazares v. Valdez, 353 So.2d 1257 (Fla. 3d DCA 1978); Pike v. State, 455 So.2d 628 (Fla. 5th DCA 1984); see also Antone v. State, 382 So.2d 1205, 1214 (Fla. 1980) (impeachment witness was properly allowed to testify to witness' [Haskew's] reputation for truth and veracity in the community, but trial court correctly sustained objection to a question seeking to elicit the impeachment witness' individual and personal view of Haskew's credibility; "[t]he clear weight of authority allows only the general reputation of the witness in the community to be admissible").

In the instant case, the State Attorney's effort to impeach Dr. Tanay's credibility by bringing up the fact that Dr. Thomas Szasz had called him a "hired gun" was highly improper and deliberately misleading. Dr. Szasz'

personal opinion of Tanay's credibility would not have been admissible even if Szasz had been present in court as a witness, and subject to cross-examination and to the jury's assessment of his credibility. Schwab; Ecker; Carver; Antone. To introduce Szasz' opinion in the manner which was done here was not only improper impeachment, but also violated appellant's Sixth Amendment right of confrontation. In addition, the "hired gun" accusation was made by Szasz in such a completely different context from any issue relevant to appellant's trial, that its only effect on the jury could be to mislead and inflame them. The comment was made in a debate before a Jewish organization in Detroit, on the subject of civil commitment of the mentally ill. Dr. Szasz has long been known as an opponent of civil commitment on political, psychiatric, and moral grounds. In a number of books, including "The Myth of Mental Illness'' (see R2325) and "Law, Liberty, and Psychiatry", Dr. Szasz has cogently expressed that view, and also the view that insanity should not be recognized as a legal defense in criminal prosecutions. However, the legislature of Florida has not chosen to adopt Dr. Szasz' views, since civil commitment and the insanity defense are both recognized by the laws of this state. Cf. Garron V. State, 528 So.2d 353, 357 (Fla. 1988). In the 1982 debate, Dr. Szasz was expressing his opinion - consistent with the theme of his writings - that any psychiatrist, including Dr. Tanay, who participates in the civil commitment process is a "hired gun." As Tanay testified "That was what the whole debate was about, was about civil commitment. It had nothing to do with anything else."

The personal views of a non-testifying expert on the wisdom of the legislative policy decision to provide for civil commitment, or on the ethics of those psychiatrists who participate in the process, were totally irrelevant to any issue in this trial, including the issue of Dr. Tanay's credibility. See Garron. The State Attorney's purpose in bringing up - and belaboring - the "hired gun" accusation had nothing to do with the point Dr. Szasz was trying to make, but instead was to insinuate to the jury that Dr. Tanay is dishonest, that his testimony is for sale. See Commonwealth V. Shelley, 373 NE.2d 951, 953-54 (Mass. 1978) (prosecutor's statements concerning credibility of defense expert

witnesses unfairly insinuated that these witnesses were "bought"). In fact, in his closing argument, the very first comment Mr. Schaub made to the jury concerning Dr. Tanay was "Then we heard from I think someone Doctor Szasz called the hired gun. Doctor Emanuel Tanay of Detroit." (R3175) The effect of such improper impeachment in a case involving the insanity defense - where conviction or acquittal depends in large part on which expert witnesses the jury finds credible - may well have been devastating. See State V. DiGuilio, 491 So.2d 1129 (Fla. 1986).

B. DR. TANAY'S BILL

It is proper, in cross-examining an expert witness, to bring out the fact that the witness is receiving financial compensation. See Pandula V. Fonseca, 199 So. 358, 359-60 (Fla. 1940); H.I. Holding Co. V. Dade County, 129 So.2d 693 (Fla. 3d DCA 1965); Alvarez V. Mauney, 175 So.2d 57 (Fla. 2d DCA 1965); Lipsius V. Bristol-Myers Co., 265 So.2d 396 (Pla. 1st DCA 1972). It is also within the trial court's discretion to permit cross-examination regarding the amount of compensation. See Langston V. King, 410 So.2d 179 (Fla. 4th DCA 1982):

> Much of ... modern day litigation involves a "battle of experts." Under these circumstances we believe the trier of fact, who ultimately must make some assessment of the credibility of such witnesses, is entitled to know the extent of any financial arrangements made to secure their participation in the case.

Needless to say, it is not proper for the party doing the cross-examining to lie about the amount of compensation the expert witness is receiving, or to intentionally try to deceive the jury by portraying the witness as a liar and a thief - when the very exhibit the attorney is using for this purpose belies the attorney's accusation! See, generally, Commonwealth V. Shelley, 373 NE.2d 951, 954 (Mass. 1978); People V. Tyson, 350 NW.2d 248, 252 (Mich. App. 1984).

The misconduct of the State Attorney in the instant case far exceeds what was condemned in Shelley and Tyson. He cross-examined Dr. Tanay as follows:

> MR. SCHAUB: Doctor, of course, you're getting paid for being here today; are you not?
>
> DR. TANAY: Yes.
>
> Q. And what do you normally charge for your services?
>
> A. $150 an hour.

Q. Now, do you recall the last time I came to Detroit to depose you?

A. I recall you being there, yes.

Q. We spent exactly three hours in a deposition; did we not? I think it was three hours to the minute?

A. I don't recall the duration.

Q. I told you it would be three hours and I think I bragged that we did it in exactly three hours. We started at 2:00 and completed at 5:00?

A. I don't question whether it was so. I don't specifically recall if we started at 3:00 or 9:00 in the morning. I do recall you being there.

(R2393)

The State Attorney had the Clerk mark for identification State Exhibit 62. He then turned his attention back *to* Dr. Tanay, and challenged him:

Q. (By Mr. Schaub) I submit what has been marked for identification purposes as State's Exhibit Number 62, and ask you if this doesn't show that you charged 18 hundred dollars for that three hour deposition?

(R2394)

Defense counsel objected on relevancy grounds. The State Attorney replied that the question was relevant "[t]o show why he's testifying the way he is", and also suggested that he was impeaching Dr. Tanay with an inconsistent statement:

THE COURT: He's testified he gets $150 an hour. Are you trying to show something inconsistent?

MR. SCHAUB: This shows $600 an hour.

THE COURT: If it's an inconsistent statement, I might agree with you.

(R2394-95)

The trial court overruled the defense objection, and the State Attorney proceeded with his tactic designed to bait Dr. Tanay and make him appear to be a liar and a crook:

Q. (By Mr. Schaub) You charged 18 hundred dollars; did you not, for a three-hour deposition?

DR. TANAY: Sir, this is an outrageous misstatement. What you just handed to this Court shows that I charged, it's says so here, "Review of entire file including additional material submitted, six hours; review of three tape recordings, three hours, giving of deposition, 2 to 5, three hours; total 18 hundred."

How can you make such broad statements in this courtroom? That is terrible.

Q. Are you asking me a question? I'd like to ask the questions.

A. That's terrrible. That's terrible. I have never seen anything like that.

THE COURT: Gentlemen, Doctor--

(R2395-96)

Defense counsel asked to approach the bench and said:

Your Honor, I'm going to move for a mistrial. I cannot believe the means in which Mr. Schaub will go about in making misrepresentations before this court. Mr. Schaub just tried to mislead this Jury.

I want the Court to take a look at this particular document.

THE COURT: He's just read this document. It's what it was and I think the doctor made it perfectly clear.

MR. SLATER: And it makes the doctor mad because the doctor sees this Prosecutor here trying to mislead this Court and this Jury. And I move for a mistrial based upon this person's misleading statements. I can't believe such a thing would be said.

MR. SCHAUB: He's charged 18 hundred dollars for a three-hour deposition.

(R2396-97)

The trial court denied the motion for mistrial, stating that "[t]he doctor has cleared the situation." Defense counsel requested that Dr. Tanay's bill be made part of the record "[w]ith regard to these misstatements by the State Attorney." The prosecutor stated that he also wanted the exhibit to be introduced. (R2397) State Exhibit 62 is a statement sent by Dr. Tanay to State Attorney Schaub listing the following charges:

RE: NOWITZKE, FREDERICK

DATE	DESCRIPTION	CHARGES
10-1-87	Review of entire file including additional material submitted. (See Index) 6 hours.	$900
10-1-87	Review of three tape recordings. 3 hours.	$450
10-2-87	Giving of deposition, 2:00 to 5:00 p.m. 3 hours.	$450
10-6-87	BILLED	BALANCE DUE $1800

As is immediately apparent on the face of the document itself, the State Attorney's repeated accusation that Dr. Tanay charged $1800 for a three hour deposition was a lie. Mr. Schaub also purported to impeach Dr. Tanay's testimony that he normally charges $150 an hour by pointing to the not-yet-introduced document and saying "This shows $600 an hour" - also a lie. Mr. Schaub was deliberately trying to bait Dr. Tanay, and to inflame the jury against him by painting him as a liar, a mercenary, and a thief.[14] In view of the prejudicial effect of this misleading cross-examination - and especially in view of the fact that the prosecutor intended for it to have that effect on the jury - the trial court's reasoning that "[t]he doctor has cleared the situation" was an insufficient basis for his overruling appellant's objection and denying his motion for mistrial. Garron v. State, 528 So.2d 353, 359 (Fla. 1988). As in Garron, the State Attorney here "overstepped the bounds of zealous advocacy and entered into the forbidden zone of prosecutorial misconduct." Indeed, Dr. Tanay's (understandably) angry and defensive response to the State Attorney's patently false accusations was very much a part of what Mr. Schaub was trying to achieve by baiting him. The blatantly unfair tactic employed here had no legitimate relationship to Dr. Tanay's motivation to testify. Compare Pandula; H.L. Holding Co.; Alvarez; Lipsius; Langston. In fact, even apart from the State Attorney's deceit, it is questionable at best whether Dr. Tanay's hourly rate for preparing for and giving depositions is relevant to his credibility; since that is not the same thing as "the extent of any financial arrangement made to secure [his] participation in the case." Langston, 410 So.2d at 180.

By implanting in the jurors' minds the unpalatable notions of "18 hundred dollars for a three hour deposition" and "$600 an hour", the State Attorney was seeking to inflame them as taxpayers against Doctor Tanay, and put him on the defensive. In that way, when Tanay angrily tried to explain what Schaub already

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[14] And thereby compounding the effect of his earlier misconduct in characterizing Dr. Tanay (through an out-of-court, out-of-context statement made by Dr. Szasz) as a "hired gun."

knew - that he had charged $1800 for twelve hours of preparation and deposition, at a rate of $150 dollars an hour, the jurors' instinctive reaction would be "Big deal. It's still too much."

Even after Dr. Tanay attempted to explain the charges in his bill - even after the trial court opined that the doctor had made it perfectly clear - even after defense counsel moved for a mistrial "based upon this person's misleading statements" - the State Attorney still insisted at the bench that "He's charged 18 hundred dollars for a three hour deposition." Because of the prosecutor's misconduct, the same thought may well have persisted in the jurors' minds, and unfairly affected their perception of Dr. Tanay.

In Commonwealth v. Shelley, the Supreme Court of Massachusetts held that prosecutorial argument unfairly insinuating that the defendant's expert witnesses were "bought" was improper and, standing alone, "so prejudicial in nature as to require reversal."

> The [prosecutor's] argument essentially urged the jury to discount the testimony of the defendant's expert witnesses because they were paid large fees by the defendant's family. There was evidence that the witnesses were paid by the family, but there was no evidence that they received anything more than their usual fees. Thus, to urge an inference that the expert testimony was purchased by the defendant was improper and unfair.
>
> Second, the argument attempted impermissibly to play on the prejudices of the jurors. Suggestions were made, albeit in disclaimer form, that the expert witnesses were "mercenary soldiers" and "prostitutes."[15]

Commonwealth v. Shelley, 373 N.E.2d at 954.

See also People v. Tyson, supra, 350 N.W.2d at 252 (prosecutor committed misconduct in making statements to jury inaccurately characterizing the facts concerning payment of court-appointed psychiatrist; "[t]his argument appears to have been a deliberate attempt to inject prejudicial error into the trial.")[16]

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[15] Compare State Attorney Schaub's accusation - not made in disclamier form - that Dr. Tanay is a "hired gun."

[16] The Michigan Court of Appeals went on to hold that defense counsel in Tyson waived his claim of error on this point, and that his decision to do so was "a reasonable tactical choice." In contrast, defense counsel in the instant case waived neither his objection (R2394-95) nor his motion for mistrial. (R2396-97) When the judge said "He's just read this document. It's what it was and I think the doctor made it perfectly clear", defense counsel repeated his

C. THE TOTALITY OF THE CROSS-EXAMINATION

Mr. Schaub's cross-examination of Dr. Tanay consumes nearly 200 pages of the record. The irrelevant and misleading questioning and the outright prosecutorial misconduct set forth in this Point on Appeal are the most egregious examples, but they are not the only examples. At various points throughout the cross-examination, the State Attorney stated his personal opinions, misstated Tanay's answers, intentionally provoked the witness with gratuitous insults (including not-so-subtle jibes at his European education and his home city of Detroit), and ignored the trial court's rulings by persisting in irrelevant lines of questioning after defense objections had been sustained. As part of his generalized attack on psychiatry as a profession, the State Attorney cross-examined Dr. Tanay about completely irrelevant matters such as the "Rosenhan study" (in which a Stanford professor had eight students from his class feign mental illness and have themselves admitted to mental hospitals) [see People V. Criscione, 177 Cal.Rptr. 899, 903-04 (Cla.App. 1981)]. (R2252-57); a book by a Dr. Jay Ziskin in which Ziskin contended that psychiatric evidence should not be admissible [see Garron v. State, 528 So.2d 353, 357 (Fla. 1988)]. (R2252-53, 2261-62); the Tarasoff lawsuit out of California (ostensibly for the purpose of showing that psychiatrists cannot predict future dangerousness; a non-issue in this case). (R2257-60); and former Chief Justice Warren Burger (to suggest - misleadingly - that Burger had "held" that psychiatrists are incompetent to render opinions on sanity). (R2328-31) The State Attorney repeatedly asked Dr. Tanay about his testimony in unrelated trials (including the Ferry case) and insinuated that Tanay had had "problems" with the judges in those cases. Mr. Schaub persisted in this tactic before the jury even after defense objections were sustained and the trial court made it clear that the line of questioning was irrelevant. (R2192-94, 2287-88, 2298-99, 2302, see especially 2327-28)

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request for a mistrial, based on the State Attorney's intentionally misleading the jury and baiting Dr. Tanay. (R2396-97) When the judge denied the motions for mistrial, defense counsel requested that the Exhibit (62) be made part of the record "with regard to these misstatements by the State Attorney." (R2397)

To get the full flavor of the hatchet job which was done on Dr. Tanay, it is necessary to read the cross-examination in its entirety. Because of the prosecutor's unfair tactics in cross-examining this critical defense witness, appellant is entitled to a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN ALLOWING THE STATE ATTORNEY TO BRING OUT BEFORE THE JURY, ON CROSS-EXAMINATION OF DR. VAUGHN, THAT IT IS NOT UNCOMMON FOR PERSONS FOUND NOT GUILTY OF HOMICIDE BY REASON OF INSANITY TO SPEND ONLY SIX TO EIGHT MONTHS IN THE STATE MENTAL HOSPITAL.

Of all the improper, irrelevant, and prejudicial cross-examination engaged in by the State Attorney in this trial, the single most outrageous example occurred during the testimony of Dr. Vaughn. Vaughn had been appellant's treating physician at North Florida Evaluation and Treatment Center, when appellant was committed there as incompetent to stand trial. At trial, Dr. Vaughn testified that in his opinion appellant was insane, as defined by Florida law, at the time of the offense. On cross-examination, the following took place:

> MR. SCHAUB [prosecutor]: All right, sir. You're retired from the State of Florida hospitals?
>
> DR. VAUGHN: That's correct.
>
> Q. So therefore, you have pursued your career in hospitals for the mentally insane since you've retired, as well?
>
> A. That's correct, I have.
>
> Q. And isn't it true that the usual duration of the stay of murderers in state hospitals is between two months and five years?
>
> A. Well, I would say that's indeed true.
>
> Q. And actually, a stay in these type of hospitals for them for six to eight months is not uncommon; is it?

(R2595)

Defense counsel objected on the ground that the questioning was irrelevant and immaterial. The trial court disagreed; "I believe the man's qualified. See if he can answer the question. I think it's relevant. I'll overrule the objection. You may answer." Because Dr. Vaughn was confused, the State Attorney twice repeated the question:

Q. Actually, a stay in these type of hospitals for them, the mentally insane -- criminally insane, I guess it is -- of six to eight months is not uncommon; is it?

(R2596)

... ...

Q. This question was simply: A stay in a state hospital for the criminally insane is actually about six to eight months, is not uncommon?

A. I'm sure that's about a reasonable stay, yes.

MR. SLATER [defense counsel]: Excuse me. Is this to the issue of competency or to the person that's found insane at the time of commission of an offense in a homicide?

MR. SCHAUB: A person found insane at the commission of a homicide.

Q. (By Mr. Schaub) Isn't about normal?
A. No.

Q. All right.

Q. Didn't you tell me on page 5 of your deposition, or -- I don't know if I took the deposition, whoever did -- I guess I did.

A. Okay.

Q. "But have you seen many murderers," I have page 5 here. Do you see where I'm talking about?

A. Which one are we talking about?

Q. Your deposition,

A. October 10? What page?

Q. Page 5.

A. All right.

Q. On the upper third or so, Question: "But you have seen many murderers." Do you see where I'm -- "All right, but you have seen many murderers."

That's the question.

A. Yes.

Q. Answer: "Yes, sir."

MR. SLATER: I would like a continuing objection to this line of questioning as to what relevance it has to this particular case.

THE COURT: Well, I'm going to have to find out. I hope he can go on and do something. Go ahead.

Q. (by Mr. Schaub): Question: "And patients in statg hospitals?"

Answer: "Yes sir I have."

Question: "And would you say the average stay for them is about three to six months?"

Answer: "For which type, now, sir? You're talking about -- yeah, I've seen them as little as two months and I've seen them as long as five years. It's hard to get an average."

A. That's correct.

Q. I'm talking about murderers now, right?

A. That is correct.

Q. "W ldn't six months be about right?"

Answer: "Si o eiaht months is not uncommon."

Did you make those statements?

A. I think, yes, I did.

Q. And you agree with them?

A. Yes, I do.

(R2597-99)

The State Attorney's cross-examination of Dr. Vaughn on this matter was plainly, grossly, and incurably prejudicial to appellant's right to a fair trial. In Williams v. State, 68 So.2d 583 (Fla. 1953) this Court reversed a first degree murder conviction based on "the trial court's refusal to sustain the defendant's objection to certain remarks made by the State Attorney in his closing argument to the effect that if the jury should find the defendant not guilty by reason of insanity he would be sent to the insane asylum and soon after being confined there would be released to commit another homicide.'' The Attorney General conceded that reversible error was committed and this Court agreed. In Johnson v. State, 408 So.2d 813, 816 (Fla. 3d DCA 1982) a second degree murder conviction was reversed on other grounds, and the court observed:

> Our decision to reverse defendant's conviction renders it unnecessary for us to review the propriety of the state's comment during closing argument that it was "unheard of" for a person to spend more than two years in the state hospital system if found insane. We agree that so prejudicial a comment should not have been made to the jury. Evalt v. United States, 359 F.2d 534 (9th Cir. 1966); Williams v. State, 65 So.2d 583 (Fla. 1953).

See also Register V. State, 163 So. 219 (Fla. 1935).

Numerous other jurisdictions have also recognized that comments or cross-examination designed to draw the jury's attention to the defendant's possible early release in the event of an insanity acquittal are grossly improper and prejudicial, to the point of denying a fair trial. See e.g. Evalt v. United States, 359 F.2d 534, 544-47 (9th Cir. 1966) (prosecutorial argument); United States v. Birrell, 421 F.2d 665, 666 (9th Cir. 1970) (argument); State v. Wall, 715 P.2d 96, 97-98 (Ore. 1986) (cross-examination); Jetton v. State, 435 So.2d 167, 169-72 (Ala.Cr.App. 1983) (argument); Whisenhant v. State, 370 So.2d 1080, 1098-1102, (Ala.Cr.App. 1979) (direct examination and closing argument); People v. Lewis, 195 NW.2d 30, 31-33 (Mich.App. 1972) (cross-examination and argument); State v. Johnson, 267 SW.2d 642, 645-46 (Mo. 1954) (argument); State v. Makal, 455 P.2d 450, 451-52 (Ariz. 1969) (direct examination); Smith v. State, 220 So.2d 313, 316-17 (Miss. 1969) (argument); Dailey v. State, 406 NE.2d 1172, 1173-75 (Ind. 1980) (argument); State v. Myers, 222 SE.2d 300, 306 (W.Va. 1976) (argument); People v. Criscione, 177 Cal.Rptr. 899, 906-07 (Cal.App. 1981) (cross-examination and argument); People v. Sorenson, 41 Cal.Rptr. 657, 659-60) (Cal.App. 1964) (argument); People v. Castro, 5 Cal.Rptr. 906, 908-10 (Cal.App. 1960) (argument); w e a l t h v. Killelea, 351 NE.2d 509, 513-15 (Mass. 1976) (argument).

The fact that the State Attorney in the present case used his cross-examination of Dr. Vaughn to raise the spectre of appellant's possible release from the state hospital in as little as six to eight months if acquitted by reason of insanity, made its impact even more powerful than if he had done it in closing argument. Jurors are instructed that what the lawyers say is not evidence. (see R1706) Dr. Vaughn's testimony, on the other hand, is evidence, and in view of his long experience as a psychiatrist in the state hospital system, his statement that homicide defendants acquitted by reason of insanity commonly spend as little as six to eight months in the hospital may have particularly alarmed the jury. When the prosecutor began this line of questioning, defense counsel objected on relevancy grounds, and the trial judge stated (apparently in the hearing of the jury) I believe the man's qualified. -

-- I think it's relevant. I'll overrule the objection."[17] Compare Edwards v. State, 428 So.2d 357, 359 (Fla. 3d DCA 1983) ("Here a timely objection to the [prosecutor's] argument was immediately overruled by the court without comment, which ruling stamped approval on the argument, thereby aggravating its prejudicial effect").

In Wall v. State, 715 P.2d at 97-98, the prosecutor, in cross-examining the defense psychiatrist, brought out (over defense counsel's relevancy objection) the fact that under Oregon law a person found not responsible because of mental disease or defect can only be confined during such time as he remains actively mentally ill. The appellate court reversed the defendant's murder conviction, and said:

> Defendant's specific claim of error is that the disposition of a person found not guilty by reason of mental disease or defect is not to be considered by the jury. He argues that the information elicited in the cross-examination of his psychiatrist witness could have influenced the jury to find him guilty in order to avoid his early release back into society, thereby depriving him of a fair trial.
>
> The state has a duty to see that a criminal defendant has a fair trial. [Citations omitted]. That line of questioning by the state was improper, and admission of the answers constituted prejudicial error.
>
> ... ...
>
> The dispositive question in a case of prosecutorial misconduct is whether the defendant was prejudiced by the conduct or remarks, i.e., whether the jury was likely to be influenced by them. [Citation omitted]. The inquiry in this case, suggesting that the state could not keep defendant confined if he were found not guilty by reason of mental disease or defect, was very likely to have influenced the jury. It encouraged the jury to make its determination on impermissible grounds by injecting into its deliberations a factor which was beyond the scope of its inquiry. t placed before the jury the spectre that, if it found def

[17] After defense counsel had objected to the cross-examination about how long insanity acquittees commonly spend in the hospital on the specific ground of irrelevancy [see Wall v. State, 715 P.2d at 97; DeSantis v. Acevedo, supra, 528 So.2d at 462; cf. Jackson v. State, 451 So.2d 458, 546 (Fla. 1984)]; and the judge overruled the objection, stating that he thought the testimony was relevant, the issue was fully preserved for appellate review. Simpson v. State, 418 So.2d 984, 986 (Fla. 1982); Bullard v. State, 436 So.2d 962, 963 (Fla. 3d DCA 1983); Simmons v. Baptist Hospital of Miami, Inc., 454 So.2d at 682. As this Court explained in Simpson, "No purpose would be served by requiring a futile motion for mistrial after the trial court has already overruled the defendant's contemporary objection. 418 So.2d at 986.

> not guilty by reason of mental disease or defect, he would be back in society very soon, perhaps to kill again. It appealed to the fears of the jurors and tended to persuade them to convict rather than risk that defendant would soon be released.

State v. Wall, 715 P.2d at 97-98.

In State v. , 455 P.2d at 451-52, the prosecutor elicited the following testimony on direct examination of his own medical expert:

> "Q. If he were in fact sent to the state hospital, the state hospital at any time within their discretion could release him; is that not correct?
>
> "A. That's right.
>
> "Q. And in your experience you have seen cases where persons have been found not guilty by reason of insanity and have been back on the streets soon thereafter; haven't you?
>
> "A. That's right."

The Supreme Court of Arizona reversed Makal's three homicide convictions in the deaths of his wife and children:

> The court's admission of the testimony of the state's expert witness was obvious error. The only real issue to be decided by the jury was whether Makal was sane at the time of the commission of the offense. The disposition of an insane defendant by society is determined by the laws of the state as enacted by the Legislature. With that disposition the jury has neither concern nor responsibility.
>
> "When evidence introduced is not of a subsequent act but of a possible future act, it does not shed any material light on an accused's mental state at the time of the offense charged. It can only have relation to the possibility or even probability that an accused will in the future commit a criminal act or will be a danger to society, and such evidence tends to destroy by fear the recognized defense of not guilty by reason of insanity." Farris v. Commonwealth, 209 Va. 305, 163 S.E.2d 575 at 577.

See also People v. Criscione, 177 Cal.Rptr. at 906 ("The sole and central issue at the sanity phase of the trial was appellant's mental condition at the time he killed his victim. How appellant would be treated, or how long incarcerated, in the event he were to be found insane, were of course not permissible subjects for speculation by the jury.")

The State Attorney's irrelevant cross-examination of Dr. Vaughn, which told the jury that if it found appellant not guilty by reason of insanity there was a good chance that he would be released from the hospital within a matter of months, was irreparably prejudicial. The trial court's error in allowing

this line of cross was so serious as to render appellant's trial fundamentally unfair [Evalt v. United States, 359 F.2d at 546], and to deny him his right, guaranteed by the Florida and United States Constitutions, to a fair trial. See alsao People V. Sorenson, 41 Cal.Rptr. at 660. Appellant's convictions must be reversed for a new trial. Williams; Johnson; Evalt; Wall; Jetton; Whisenhart; Lewis; Johnson; Makal; Smith; Dailey; Myers; Criscione; Sorenson; Castro; Killelea.

ISSUE V

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ELICIT *AN* OPINION ON THE ISSUE OF SANITY FROM *AN* EXPERT WITNESS WHO ACKNOWLEDGED THAT HE WAS NOT EVEN FAMILIAR WITH THE DEFINITION OF INSANITY UNDER FLORIDA LAW.

A. THE MOTION TO EXCLUDE DR. PADAR'S TESTIMONY

In its rebuttal case, the state called Dr. Stephen Padar, a neurosurgeon. Defense counsel objected on the ground that Padar's testimony was improper rebuttal, since the defense had never contended that appellant suffered from organic brain damage. (R2895) In fact, defense witness Dr. Rufus Vaughn, who is board certified jointly in psychiatry and neurology, testified both on direct and cross that there was no indication of any organic brain damage. (R2895-96, see R2590-92, 2608-09) The State Attorney, consistent with his established strategy [see Issue III-C], made it clear that he wanted Padar's testimony for another purpose:

> MR. SCHAUB: This is the best specialist of all in determining [sanity] and insanity. It's not like the psychiatrists.
>
> THE COURT: You mean at the time of the --
>
> MR. SCHAUB: He has seen him, yes. And he has interviewed him and he has a genuine opinion which I think is of far greater value than any other psychiatrist.
>
> THE COURT: As to sanity or insanity at the time of the crime?
>
> MR. SCHAUB: yes, sir.
>
> MR. SLATER [defense counsel]: No, that is absolutely wrong. That is a bold out lie by the State Attorney.
>
> MR. SCHAUB: What do you mean, a lie? It's not a lie.

(R2896)

At this point, the jury was taken out of the courtroom, and the argument

resumed:

> THE COURT: It's my understanding, Mr. Slater, that you are objecting on the ground that this Doctor can't give his opinion?
>
> MR. SLATER: That is exactly right, Your Honor, and I'll cite the Court to page 13 of the sworn deposition of this particular doctor where Mr. Schaub asked him if he could go back two years and make a judgment as to sanity or insanity.
>
> And his answer was, "I would be going out on the limb. I really don't know. All I could tell is that at the time I examined him on August the 4th, he was sane and he was neurologically intact."
>
> Now, let me go further than that. First of all, this doctor cannot testify that he's familiar or knows the standards for insanity or sanity under the laws of Florida. This individual, the only purpose for his examination is to show that this person had no organic brain damage.
>
> The Defense has never presented or indicated in any way that Rick Nowitzke has any organic brain damage.
>
> So number one, it's not rebuttal. Number two, he can't testify as to the issue of sanity at the time of the offense. And number three, basically it has no bearing in this case.

(R2897-98)

The State Attorney replied:

> If it please the Court, this is a medical doctor licensed to practice medicine in the State of Florida, any of whom can give such an opinion. In addition to which he is in the specialty that is best able to give such an opinion. And he was seen at the direction of this Court to determine his sanity, and he has made such a determination.[18]
>
> And the fact that he cannot go back, it's our position that no one can go back; that they can give an estimate, and that's all we're operating on from here. And I believe that's what he'll testify to.
>
> And I think he's the most eminently qualified person you're going to hear in the course of this trial.

(R2898)

Defense counsel asked that the state be required to proffer Dr. Padar's testimony outside the presence of the jury, *to* determine whether his opinion was admissible. The State Attorney protested:

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[18] As defense counsel pointed out, Dr. Padar was not appointed to determine whether appellant was sane or insane at the time of the commission of the act. (R2898-99) Rather, he was appointed, in conjunction with the July, 1987 competency evaluation, to determine whether appellant suffers from any neurological or organic brain damage. (R3896)

We didn't once ask to do that. We're got a neurosurgeon here, a brain surgeon, the top expert on sanity there is, and he is disputing it; and we would like, Your Honor, to present his testimony as to what he did.

(R2899-2900)

The State Attorney explained that he believed that Dr. Padar would probably testify that he had no opinion as to appellant's sanity at the time of the shootings, and would further testify that in his opinion pobody was capable of forming a reliable opinion as to a person's sanity on some previous date.

MR. SCHAUB: As to whether or not at the time -- I'll have to ask him and see. I don't think so. I think he's going to say that it cannot be done. And that is my -- the position of the State, that this is all a bunch of hogwash and --

THE COURT: Excuse me. Then you're going to have him testify that all the psychiatrists, including your witnesses, are hogwash? That's the term you used.

MR. SCHAUB: Well I think he's going to say that it cannot be done, you cannot look back.

THE COURT: But you're impeaching your own witnesses.

MR. SCHAUB: The whole --

THE COURT: You're impeaching everybody that's been on.

MR. SCHAUB: Yes.

THE COURT: Go right ahead.

MR. SLATER: May we do it outside the presence of the Jury?

THE COURT: Why?

MR. SCHAUB: No, sir.

MR. SLATER: It's not admissible.

THE COURT: It certainly is, sir, and I so rule that it is.

MR. SLATER: Now, if Mr. Schaub cannot present this evidence before the Court, we will move for a mistrial.

THE COURT: Fine. You've only done that about 400 times. It will be 401.

(R2902)

B. DR. PADAR'S TESTIMONY

Dr. Padar testified before the jury that he performed a neurological examination of appellant on August 4, 1987. There was no sign of his ever having had epilepsy or seizures. His face, eyes, and neck were normal, as was

his speech. He had complete control of his body movements, and there were no abnormalities or organic lesions. His deep tendon reflexes and Babinski reflexes were normal. Dr. Padar found no organic damage or physical deformities, nor was there any evidence that appellant was suffering from any organic damage on November 16, 1985. (R2907-09)

Dr. Padar spent about 45 minutes talking with appellant, observing him, and checking him physically.

> MR. SCHAUB [prosecutor]: Did you observe any signs that he had sustained any kind of mental illness or suffered from any mental illness when he committed these crimes on November 16, 1985?
>
> DR. PADAR: Well, on August 4, 1987, he was neurologically intact and he appeared sane to me.

(R2911)

When the State Attorney again directed his attention to the date of the shootings, Dr. Padar stated that "at least neurologically as far as an organic brain lesion is concerned ... I did not think he had it back in 1985. I cannot for sure go back from a functional standpoint."

> Q. (by Mr. Schaub) And you saw no signs that would indicate that he had been insane at the time of the commission of these crimes in 1985; did you not?
>
> MR. SLATER: Objection. It's been asked and answered and he's already stated he couldn't go back to that time as far as that issue.
>
> MR. SCHAUB: I asked him if he saw any indication, Your Honor.
>
> THE COURT: I'll overrule the objection. Did you see any indication?
>
> THE WITNESS: No, I did not.

(R2911-12)

On cross-examination, Dr. Padar acknowledged that he is not familiar with the law on insanity in Florida regarding a criminal act. When he refers to sanity, he means "organically sane." Dr. Padar's specialty deals with the organic or physical functioning of the brain, while psychiatry is the perception of thoughts and the organization within the brain. Dr. Padar could not say whether appellant was suffering from paranoid schizophrenia or any other type of psychosis on November 16, 1985. (R2913-14)

On re-direct, he testified:

Q. (by Mr. Schaub) But you saw no sign that he was suffering from schizophrenia, paranoia or psychosis; did you, Doctor?

A. lo.

MR. SLATER: On what date?

MR. SCHAUB: At any time.

Q. Did you see any sign at any time that he had suffered from any of those illnesses?

A. Well. when I saw him on Auaust 4th. he appeared sane to me.

(R2914)

At the close of Dr. Padar's testimony, defense counsel renewed his motion for mistrial, "based upon the fact this testimony was allowed before the Jury." The trial court denied the motion, saying 'The only thing that he did was eliminate any physical disorder", and "I think its in issue. Why should your doctors have any precedence over him." (R2915-16)

In the State Attorney's closing statement to the jury, it again became apparent (as it was in his argument to the trial court opposing the defense's motion to exclude the testimony) that the real purpose of Dr. Padar's testimony was not merely to eliminate organic brain damage, but rather went to the central issue of appellant's sanity or insanity at the time of the shootings:

> But the State also presented testimony from all three disciplines that treat and diagnosis mental illness, all three specialties: A psychologist; a psychiatrist; and particularly the genuine scientist he neurosurgeon, the man who considers so many things that none of them considered, none of the others.
>
> He wasn't just waving a wand or trying to practice some guesswork. He told us what he did; that he elicited a history about 45 minutes, about the same as the others. But in his history, he got down to nuts and bolts. He told us the different tests he made and what he found and what he didn't find.
>
> He found the Defendant to speak fluently and rationally; he had no difficulty talking or walking, no cranial lesions were seen. These are were all matters he testified to. The neck was supple and freely mobile. The pupils are equal and reactive. Fundii, which he explained to us -- which I can't recall now -- are normal. Extraoccular movements are full without -- well, I don't think he said this word because I haven't heard this word before and I won't mention it. Faces moves symmetrically on both sides, I remember him saying that. And there was no weakness in either arm or leg. Deep tendon reflexes are summetrically active and there are no Babinski reflexes. Sensory examination is normal.
>
> Now, that's what he testified to. So he did something. He

looked at some manifestations that might indicate some nerve problems, might indicate something's wrong with the brain. As we all know, the brain controls the entire nervous system. And he did so and he found nothing wrong with the man.

He wasn't going to try to project he could say something happened months before, but he told us that when he saw him, he found nothing wrong with the man; that, in his opinion, he was sane and he saw nothing to indicate that he was anything but sane at any other time.

That was Doctor Stephen Padar. He made the only scientific findings we've heard during the course of this trial.

(R3186-88)

C. IMPROPER REBUTTAL

Dr. Padar's testimony that appellant does not suffer from organic brain damage did not rebut any evidence introduced by the defense or any argument made by the defense. In fact, a defense expert - Dr. Vaughn - testified on direct (as well as cross) that there was no indication of any organic brain damage. Padar's testimony on this point was therefore improper rebuttal. See Garcia v. State, 359 So.2d 17 (Fla. 2d DCA 1978); Donaldson v. State, 369 So.2d 691, 695 (Fla. 1st DCA 1979); see also Carter v. State, 332 So.2d 120, 125 (Fla. 2d DCA 1976) If Padar's testimony had been confined to the non-existence of organic brain damage, it could properly have been considered cumulative and therefore harmless. However, as the State Attorney made clear in his argument to the trial court concerning the admissibility of Padar's testimony, and as he made even clearer to the jury in his closing statement, he was not simply using Padar to "rebut" organic brain damage, but was presenting him as the one and only "genuine scientist" in this trial to state an opinion on the issue of sanity.

D. IMPROPER OPINION TESTIMONY ON THE ISSUE OF SANITY

In requesting that Dr. Padar's testimony be excluded, and then in asking in the alternative that the state be required to proffer it outside the presence of the jury, defense counsel pointed out that in his deposition, when asked if he could make a judgment as to appellant's sanity at the time of the offenses in November 1985, Dr. Padar had replied, "I would be going out on the limb. I really don't know. All I could tell is that at the time I examined him on August the 4th [1987], he was sane and he was neurologically intact." Defense counsel further emphasized that Dr. Padar "cannot testify that he's familiar or

knows the standards for insanity or sanity under the laws of Florida." When the judge refused to require the state to proffer Padar's testimony, defense counsel moved for a mistrial. Denying the motion, the judge said "... I don't have any idea what the doctor is going to say, but I think he has a right to an opinion or whatever it may be or whatever its based on."

Sure enough, Dr. Padar admitted on cross-examination that he was not familiar with the law on insanity in Florida regarding a criminal act. By that time, however, the state had already elicited his opinion that when he examined appellant on August 4, 1987, "he was neurologically intact and he appeared to be sane to me." Even more harmfully, the State Attorney had asked Dr. Padar, "And you saw no sign that would indicate that [appellant] had been insane at the time of the commission of these crimes in 1985, did you not", and received (over the defense's renewed objection) the answer "No, I did not."

Because Dr. Padar was unfamiliar with the definition of insanity under Florida law, he was clearly unqualified to offer an expert opinion on that issue. In Gurganus v. State, 451 So.2d 817, 820 (Fla. 1984), this Court said:

> It is well established in Florida that the test for insanity, when used as a defense to a criminal charge is the McNaughton Rule. Under McNaughton the only issue are: 1) the individual's ability at the time of the incident to distinguish right from wrong; and 2) his ability to understand the wrongness of the act committed. Brown v. State, 245 So.2d 68 (Fla. 1971), vacated on other grounds, 408 U.S. 938, 92 S.Ct. 2870, 33 L.Ed.2d 759 (1972); Campbell v. State, 227 So.2d 873 (Fla. 1969), cert. dismissed, 400 U.S. 801, 91 S.Ct. 7, 27 L.Ed.2d 33 (1970); Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978), cert. denied, 372 So.2d 472 (Fla. 1979); Evans v. State, 140 So.2d 348 (Fla. 2d DCA 1962). Evidence which does not go toward proving or disproving an individual's ability to distinguish right from wrong at the time of an incident is irrelevant under the McNaughton Rule, including evidence of irresistable impulsive behavior, Wheeler v. State, 344 So.2d 244, 246 (Fla. 1977), Campbell, 227 So.2d at 877, evidence of diminished mental capacity, Brown, 245 So.2d at 7, or evidence of psychological abnormality short of an inability to distinguish right from wrong, Evans, 140 So.2d at 349.

In Gurganus, two psychologists testified on proffer that the defendant "was not in effective control of his behavior", that he had "a mental defect", and that his judgment "would have been seriously impaired." However:

> When asked specifically about Gurganus' ability to distinguish right from wrong at the time of the offense, neither psychologist was able to state within a reasonable degree of certainty that Gurganus did or did not have that ability. The testimony of both was that there were equal probabilities of Gurganus' sanity and insanity under the

> McNaughten Rule. In effect, neither psychologist was able to form an opinion on the issue. We find this testimony to be of no evidentiary value because it did no more to prove Gurganus' case than it did to prove the state's case. Since it did not tend to prove or disprove the legal insanity of Gurganus, we agree with the trial court's decision to exclude the testimony on the issue as being irrelevant.

Gurganus v. State, supra, 451 So.2d at 821.

Dr. Padar, by his own admission, was not even familiar with the McNaughton Rule. Rather, as he also acknowledged on cross, he was using his own definition of the term; i.e. "organically sane" or insane. Therefore, Padar's testimony that appellant appeared to be sane at the time of the examination in August 1987, and that he saw no indication that appellant was anything other than sane at the time of the shootings in November 1985, was irrelevant [Guruanus], and was elicited only to confuse and mislead the jury.[19]

If the state should contend on appeal that the error was "harmless" on the theory that "the only thing he [Padar] did was eliminate any physical disorder", appellant would simply call the Court's attention to the state's use of Padar's testimony before the jury. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). In persuading the trial judge to admit the testimony, the State

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[19] Dr. Padar was not qualified to offer an expert opinion on the issue of sanity at the time of the offenses because he was not even familiar with the definition of insanity under Florida law. Since his opinion was not based on the McNaughton Rule, it was of no evidentiary value. If the state should contend on appeal that Padar was qualified to offer a lay opinion on appellant's sanity, based on his examination of appellant nearly two years after the shootings, such a contention is refuted by Garron v. State, 528 So.2d 353, 357 (Fla. 1988):

> A lay witness, testifying on his or her personal observation as to a defendant's sanity, must have gained this personal knowledge in a time period reasonably proximate to the events giving rise to the prosecution. Thus, the opinion testimony as to appellant's sanity could only come from those whose personal observation took place either at the shooting or in close time proximity thereto. Those lay witnesses whose opinions were based on observations occurring the next day, or sometime thereafter, should not be admitted. A nonexpert is not competent to give lay opinion testimony based on his personal observation that took place a day removed from the events giving rise to the prosecution. This is clearly the domain of experts in the field of psychiatry. Any lay opinion testimony as to the appellant's sanity must necessarily be based on observations made in close time proximity to those events upon which appellant's sanity is in question.

Attorney repeatedly contended that Padar was "the best specialist of all in determining [sanity] and insanity", and that "he has a genuine opinion [as to sanity or insanity at the time of the crime] which I think is of far greater value than any other psychiatrist." And that is exactly how the State Attorney presented it to the jury in closing argument. After characterizing Dr. Padar as the only "genuine scientist" to testify in the trial, he concluded as follows:

> He wasn't going to project he could say something happened months before, but he told us that when he saw him, he found nothing wrong with the man; that, in his opinion, he was sane and he saw nothing to indicate that he was anything but sane at any other time.
>
> That was Dr. Stephen Padar. He made the only scientific findings we've heard during the course of this trial.

It is apparent that the purpose - and the effect - of Dr. Padar's testimony was not merely to eliminate the possibility of organic brain damage, especially since the defense's own expert had testified that there was no indication of brain damage. Instead, the purpose and effect was to create the illusion of "scientific" evidence that appellant was sane at the time of the shootings, which dovetailed with the State Attorney's strategy of denigrating psychiatry as a profession [see Issue III-C], and enabled him to present Dr. Padar to the jury as the state's key witness on the dispositive issue of sanity. The state cannot meet its burden of showing that the erroneous admission of Dr. Padar's opinions as to sanity at the time of the examination and at the time of the offense did not have the effect on the jury which the State Attorney intended. Gunn v. State, 83 So. 511, 512 (Fla. 1919); State v. DiGuilio, supra.

ISSUE VI

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT IRRELEVANT AND INFLAMMATORY TESTIMONY ABOUT THE CRIMINAL BEHAVIOR PATTERNS OF DRUG ADDICTS.

In his rebuttal case, the State Attorney asked Roy Hackle, one of the arresting police officers, if he had become acquainted, during his three years of working criminal intelligence and narcotics, "with what narcotic addicts might do to keep their habit?" (R2700-01, see R2698) Defense counsel interjected:

> Your Honor, I object to this question again as to what narcotic

addicts might do, with the idea it's not relevant to this situation. And if it involves his experience from other cases, other investigations, I see no connection between his experience from other cases and this case before the Jury.

I object to that question. It calls for a conclusion. It's totally speculative as to what all addicts all over, any time, anywhere might do.

(R2701)

The trial court overruled the objection and the State Attorney continued:

Q. (By Mr. Schaub) Based on your experience, what did you find that cocaine or regular users might do to satisfy their cocaine habit?

OFFICER HACKLE: We've had cases -- I'm aware of cases where they would steal stuff, sell whatever they had to obtain money.

We've had robberies that was contributed to the fact of the individual -- this is what he was stating, that he was getting money for his narcotics habits that --

MR. COMBS [defense counsel]: Based on the answer of the witness, I would ask that it be stricken because there's no evidence of theft, robberies or any sort of conversion of property in this case. And I would ask the Court to admonish the Jury to disregard the last question and answer.

MR. SCHAUB: It shows desperation.

THE COURT: I'll deny the objection. I think he's trying to show an overall picture.

Q. (By Mr. Schaub) Would they ever commit any crimes agains their own Parents?

MR. COMBS: Your Honor, this is pure speculation. There is no foundation for the question, It calls €or a conclusion on the part of this witness. It is irrelevant as to what drug addicts will do to satisfy a habit.

It's pure speculation and it calls for a conclusion. It is prejudicial. The probative value is outweighed by any relevancy of this question and answer.

MR. SCHAUB: I submit it's very relevant.

THE COURT: I'll deny the objection. If he can answer -- and I think he said that he's worked on cases of this nature -- if he can answer it, fine. Maybe he can; maybe he can't.

(R2701-02)

Officer Hackle testified that he had been in law enforcement for 17 years.

(R2702) The State Attorney again asked:

Based on your experience and your intensified work in narcotics with the Sheriff's Office, are you acquainted with instances where a defendant might commit crimes against his own parents to satisfy his drug habit?

MR. COMBS: Your Honor, object to the question as being leading.
THE COURT: I'll overrule. Go ahead.

A. Yes, I've worked cases where kids have stolen stereos, T.V.s, stolen money out of their own homes.

Q. All right. And are you acquainted with any cases where a drug user committed murder to satisfy his habit?

MR. COMBS: Your Honor, objection. It's a leading question.

MR. SCHAUB: No, it's not.

MR. COMBS: It's irrelevant and immaterial to the issues before this Jury, and it's prejudicial.

MR. SCHAUB: I asked him if he's aware of any cases where they have done that, Your Honor.

THE COURT: I'll overrule the objection. You may answer if you can.

Q. (by Mr. Schaub) Are you aware of any cases where drug users, regular drug users might commit murder to satisfy their habit?

A. There's been homicides involved in narcotics deals, for whatever reason. I'm not sure.

(R2703-04)

Defense counsel moved for a mistrial, saying "This whole line of questioning is improper as to his experience with drug traffickers, as to what addicts might or might not do to satisfy their habit, as to whether or not drug addicts would commit crimes against their parents."[20] The trial court denied the motion. (R2705-06)

The state's introduction of this testimony was patently improper and inflammatory. See Hirsch v. State, 279 So.2d 866 (Fla. 1973); Whitted v. State, 362 So.2d 668, 672-73 (Fla. 1978); Kellum v. State, 104 So.2d 99, 101-03 (Fla. 3d DCA 1958); v. State, 356 So.2d 1327, 1329 (Fla. 4th DCA 1978); Armstrong v. State, 377 So.2d 205 (Fla. 2d DCA 1979); Rolle v. State, 431 So.2d 326 (Fla. 3d DCA 1983); pulliam v. State, 446 So.2d 1172 (Fla. 2d DCA 1984); Quick v. State, 450 So.2d 880 (Fla. 4th DCA 1984); Jenkins v. State, 533 So.2d

[20] The State Attorney also pursued a briefer but similar line of questioning, over defense relevancy objection and motion for mistrial (R2680-81, 2688-89), with another of the arresting officers, Sgt. Larry Costanzo. (R2688)

297, 299-300 (Fla. 1st DCA 1988). These decisions collectively stand for the proposition that such testimony "is not relevant to the crime charged and is highly prejudicial by inferring criminal conduct on the part of the defendant from criminal conduct of a third party" or parties. **Armstrong**, 377 So.2d at 206 (citing Hirsch); Pulliam, 446 So.2d at 1173.

That sort of "guilt-by-association is exactly what the prosecutor achieved here. The defense's position at trial was that appellant was insane at the time of the shootings, while the prosecution contended that his behavior was drug induced. There was some evidence at trial that appellant had used drugs in the past, and there was evidence that he had done some cocaine on the day of the offenses. So far no problem. But then, by his questioning of Officers Hackle and Costanzo, the prosecutor began delving into "what narcotic addicts might to do keep their habit." To begin with, there was no evidence whatsoever that appellant was an addict.[21] The prosecutor's questioning was all based on the false assumption that a user is necessarily an addict. More importantly, however, the effect of this questioning was to invite the jury to infer that, because drug addicts in general have a propensity to commit crimes, that appellant (being a user) has the same propensity. [Otherwise, the testimony about drug addicts would be wholly irrelevant]. It invited the jury to speculate that appellant might have stolen money or property from his parents, or committed other thefts or robberies to satisfy his "habit", even though there was no evidence of any such crimes. It also suggested to the jury that appellant shot his family in order to satisfy a drug habit, because the officers were aware of other cases where drug users had committed murder with that motive.

The irrelevant testimony elicited by the prosecutor about the criminal behavior patterns of drug addicts stacked misleading and prejudicial inference upon inference. One, because appellant was a user, he was an addict. Two,

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[21] In his sentencing order, the trial court rejected cocaine addiction as a mitigating factor, stating "It was shown and brought out that the Defendant did have a drug habit in the past, but that had been overcome to a great degree." (R3789)

because addicts commit thefts and robberies to support their habit, and steal money and property from their families, appellant may have committed thefts and robberies and stolen from his family. Three, because drug use or addiction was a motive or causal factor in other murders the officers were aware of, it (rather than insanity) must have been the motive for *or* cause of the killing of appellant's mother and step-brother. The testimony about crimes committed by drug addicts was irrelevant, and even assuming arguendo that there was any marginal relevancy, it was greatly outweighed by the "danger of unfair prejudice, confusion of the issues, [and] misleading the jury ... ." Pulliam, 446 So.2d at 1173, Jenkins, 533 So.2d at 300; see Fla. Stat. § 90.403. (See R2702) Especially in view of the sociopolitical climate of the late 1980s, where the last two Presidents have heralded a nationwide "war on drugs" and drug abuse is widely considered the number one social problem in the country, the introduction of testimony designed to link appellant in the jury's mind with the whole panoply of crimes drug users will commit "to satisfy their habit" was inflammatory in the extreme. Appellant had a right to a fair trial on the issues in his case, without being "tarred by the brush of [his] peers' misdeeds" [Quick v. State, 450 So.2d at 881], and his convictions must be reversed for a new trial. Hirsch; Kellum; Buckhann; Pulliam; Quick.

ISSUE VII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S RELEVANCY OBJECTIONS AND DENYING HIS MOTIONS FOR MISTRIAL, WHEN THE STATE INTRODUCED EXTENSIVE EVIDENCE RELATING NOT TO APPELLANT'S SANITY BUT RATHER TO HIS COMPETENCY TO STAND TRIAL, AND WHEN THE PROSECUTOR USED THIS EVIDENCE TO MISLEADINGLY SUGGEST TO THE JURY THAT DR. VAUGHN HAD CHANGED HIS MIND ON THE ISSUE OF APPELLANT'S SANITY.

On cross-examination of Drs. Tanay and Vaughn and in its rebuttal case, the state introduced (over repeated defense relevancy objections and motions for mistrial) a substantial amount of evidence relating not to appellant's mental condition on November 16, 1985, but instead to his mental state and his behavior during the summer and fall of 1986 when he was hospitalized at the North Florida Evaluation and Treatment Center, after the trial court had determined that he was incompetent to stand trial (see R2354-88 [Tanay]; 2636-50 [Vaughn]; 2756-59, 2766-67, 2771, 2791-92, 2793-2813, 2823-29 [NFETC counselor Douglas Bonar];

2735-42, 2754 [Termination of Treatment Summary from NFETC]).

The introduction of all of this evidence going to competency rather than sanity enabled the State Attorney to misleadingly impeach Dr. Vaughn, and to misleadingly argue to the jury that Vaughn had "changed his mind" on the issue of sanity, and could not be counted upon not to change his opinion again in a couple of days or a couple of weeks. (see R2648-50, 3085-87, 3180-86) The truth was that Dr. Vaughn **never** changed his opinion that appellant was insane at the time of the shootings. During the time he was appellant's treating physician at the state hospital, Dr. Vaughn was prohibited by state policy from addressing the issue of sanity or insanity. After he retired from the state hospital system, Vaughn was no longer bound by that policy. State Attorney Schaub, knowing that Vaughn had found appellant competent, thereupon retained him to examine appellant on the issue of sanity. At that point, Vaughn for the first time watched the videotape of appellant's statement to the police on the night of the shootings, and reviewed other materials concerning the incident. He then interviewed appellant, and formed the opinion that he was insane at the time of the charged offenses. Vaughn reported his findings back to Mr. Schaub.

Undoubtedly, the State Attorney was disappointed with Dr. Vaughn's opinion. Unquestionably, Vaughn posed a problem for him in the courtroom, since it was he who had initially retained him. However, the State Attorney was not entitled to solve his problem by introducing extensive evidence on the matter of competency to stand trial[22], and then using that evidence to wrongly argue to the jury that Vaughn had done a "90 degree turn" (see R2650) on the issue of sanity.

ISSUE VIII

THE TRIAL COURT ERRED IN THE PENALTY PHASE AND AT SENTENCING (1) WHEN HE ALLOWED THE PROSECUTOR TO ARUGE LACK OF REMORSE TO THE JURY, AND (2) WHEN HE CONSIDERED IT HIMSELF IN WEIGHING THE AGGRAVATING AND MITIGATING FACTORS.

In Trawick V. State, 473 So.2d 1235, 1240 (Fla. 1985), this Court stated that "under the statute it is error to consider lack of remorse for any purpose

[22] A legal question which was not within the scope of the jury's inquiry.

in capital sentencing." See also Hill v. State, 549 So.2d 179, 184 (Fla. 1989); Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983); Patterson v. State, 513 So.2d 1257, 1263 (Fla. 1987); Robinson v. State, 520 So.2d 1, 6 (Fla. 1988).

In the instant case, the prosecutor argued lack of remorse in his penalty phase closing argument to the jury, ostensibly for the purpose of showing that appellant knew the difference between right and wrong. (R3457-58) Defense counsel's motion for mistrial was denied. (R3458).[23] Then, in imposing sentence and in concluding that the aggravating factors outweighed the mitigating factors, the trial court made the following finding:

> I have not noted or seen any demonstration by this Defendant to the extent that he's in any way remorseful about what he did. He's appeared throughout this trial, throughout the trial he did, to be cold, calculating and, as he looks at me now, resigned to the fact he did this, "But, so what?" That appears to be his attitude.

(R3788)

Both the jury recommendation and the sentence were tainted by improper consideration of lack of remorse [Trawick; Bill], and appellant is entitled to a new penalty trial.

JSSUE IX

THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTIONS DURING DEFENSE COUNSEL'S PENALTY PHASE CLOSING STATEMENT.

A. THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTION TO DEFENSE COUNSEL'S COUNTER-ARGUMENT CONCERNING THE PLEA OFFER, AFTER THE PROSECUTOR HAD BROUGHT UP APPELLANT'S REFUSAL TO ACCEPT THE PLEA OFFER IN HIS OWN CLOSING STATEMENT.

In his closing argument to the jury in the penalty phase, immediately after arguing lack of remorse, the prosecutor then stated that appellant had told Dr. Werin that "he wasnt' going to accept any kind of a deal that the state might offer him because 'I'm insane. I'm insane. I ought to get out'." (R3458) To counter that argument, defense counsel in his closing statement said:

> ... the State Attorney's office is asking you to punish this young man because he went to trial. And you say, "Well, why?" Because

[23] Defense counsel (who argued after the prosecutor did) never contended that remorse should be considered as a mitigating factor (see R3463-75), so neither the prosecutor's argument nor the trial court's finding can be considered "rebuttal."

> as you well heard in this courtroom, the State Attorney's Office offered Mr. Nowitzke a plea to 75 years in prison if he accepted it; and because he hasn't, they want to kill him.

(R3470)

The prosecutor objected. (R3470-71) Defense counsel pointed out:

> He brought it out in his own case through Doctor Merin and they talked about it in their closing arguments, how he didn't accept the plea, that he wanted to go to trial because he was going to be found not guilty by reason of insanity. And he brought it out with Doctor Merin.
>
> This man was offered 75 years in prison. I have a right to go into it. He opened the door in his opening argument, and Mr. Schaub brought it up in his case.

(R3471)

The prosecutor contended that "[t]his is in no way a mitigating circumstance and it shouldn't go in." The court sustained the objection, and instructed the jury to disregard the statement. (R3470-71)

The state cannot have it both ways. If the offer of a plea is not a mitigating circumstance, it is even more clear that appellant's refusal to accept a plea offer is not an aggravating circumstance. A defendant's exercise of his constitutional right to go to trial rather than enter a plea should not be placed before the jury in the penalty phase of a capital case. See Bassett v. State, 449 So.2d 803, 809-11 (Fla. 1984) (Justice Overton, joined by Justice McDonald, concurring in part and dissenting in part). The state opened the door to appellant's counter-argument, and should not have been heard to complain about it.

B. THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTION TO DEFENSE COUNSEL'S ARGUMENT THAT APPELLANT, IF SENTENCED TO LIFE IMPRISONMENT, WOULD SERVE A MINIMUM OF 50 YEARS IN PRISON BEFORE BECOMING ELIGIBLE FOR PAROLE.

The trial judge sustained the prosecutor's objection to defense counsel's argument that, if he were sentenced to life, appellant would be imprisoned for at least 50 years before even being considered for parole. (R3472-74) The judge admonished defense counsel, "[P]lease do not refer to it anymore, please, sir. They're to decide which he should get, not the amount or the time or the severity of it."

The trial court's ruling was wrong, and extremely prejudicial. Harvey v.

State, 529 So.2d 1083, 1086-87 (Fla. 1988) (a case in which, as here, the defendant had been convicted of two counts of first degree murder), represents the "flip side" of the same issue. In Harvey, the prosecutor argued, over defense objection, that appellant would become eligible for parole in 25 years if the death penalty was not imposed. On appeal, this Court held that the prosecutor's argument was properly allowed because it "accurately reflected the sentencing alternatives for those convicted of a capital felony." 529 So.2d at 1087.

Similarly, in the instant case, defense counsel's argument accurately reflected the sentencing alternatives. While it is technically true that the trial court here could have ordered two life sentences to run concurrently, it is equally true (and as a practical matter a whole lot more likely) that the judge in Harvey could have ordered that defendant's sentences to run consecutively. Since there should be no "double standard" in capital trials [see O'Connell v. State, 480 So.2d 1284, 1287 (Fla. 1985)], defense counsel should not have been prohibited from making this argument.*

ISSUE X

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THREE UNPROVEN AGGRAVATING CIRCUNSTANCES; "COLD, CALCULATED, AND PREMEDITATED", "AVOID LAWFUL ARREST," AND "PECUNIARY GAIN."

Another of the peculiarities in this case is that the judge instructed the jury on aggravating factors he did not find; and then turned around and found aggravating factors on which he did not instruct. (see R3477, 3787) [See Issue XII].

This Court has recognized that "aggravating circumstances must be proven beyond a reasonable doubt before they may properly be considered by judge or jury." Atkins v. State, 452 So.2d 529, 532 (Fla. 1984). See also Stewart v.

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24 The significance of the error is further illustrated by the fact that, during its deliberations on penalty, the jury submitted a question to the court, "Can we recommend sentences consecutive." (R3379) The judge replied that that decision could solely be made by the court. (R3780) Subsequently, the jury came back with a 9-3 life recommendation as to Frances' murder, but a 7-5 death recommendation for the killing of Bret. (R3779-80, 3483-84, 4209-10)

State, 549 So.2d 171, 174 (Fla. 1989) (jury is to be instructed only on those aggravating factors for which evidence has been presented). In the instant case, three of the four aggravating factors upon which the jury was instructed were not proven beyond a reasonable doubt, and no evidence was presented which would satisfy the legal definitions of those aggravators.[25]

The "cold, calculated, and premeditated" aggravating circumstance requires proof of "heightened premeditation, i.e., a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a conviction for first-degree murder." Nibert v. State, 508 So.2d 1 (Fla. 1987) (emphasis in opinion); see also Rogers v. State, 511 So.2d 526, 533 (Fla. 1987); Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988) (CCP factor requires "a careful plan or prearranged design.") The facts of the instant case demonstrate the opposite of a contemplative, methodical, and controlled killing. Even the state's own psychiatric expert, Dr. Arturo Gonzalee, did not believe the killings were the result of any prearranged plan:

> ... I think that this is a combination of factors. Here, we have a man that, obviously he has a personality disorder, he's an antisocial personality. As such, he's explosive and could be violent.
>
> And this individual, now compounding that problem, has taken cocaine, has abused cocaine that day, has himself drank ten beers; and the combination of the alcohol, the drugs, the cocaine, plus his personality created a very explosive situation.

(R2886-87)

In light of these contributing factors, it was Dr. Gonzalez' opinion that what triggered the already volatile situation was Clay Carroll grabbing the shotgun away from appellant.

> Q. [by Mr. Slater]: What you're saying is that there was a split-second decision made after the confrontation?
>
> A. After Clay is wrestling the gun from him, he pulls out the gun. At that moment, he's going to shoot Clay. He

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[25] The instructions on the "CCP", "avoid arrest", and "pecuniary gain" factors were all given over defense objection. (R3436-37, see R3265-69, 3391-93, 3415-19, 3421-22, 3426-29) The only aggravating factor in this case which was proven beyond a reasonable doubt was "prior conviction of a felony involving the use or threat of violence", based on the contemporaneous conviction for the attempted murder of Clay Carroll.

> knows, whether it's ten seconds -- And in the seconds that go on -- I don't know how long, perhaps 15 seconds, 20 seconds in the struggle -- he makes up his mind he's going to shoot him and he's going to do it.

(R2886-87)

Where the circumstances of a homicide are "susceptible to other conclusions than finding it committed in a cold, calculated, and premeditated manner", the evidence does not establish this aggravating factor beyond a reasonable doubt. Peavy V. State, 442 So.2d 200, 202 (Fla. 1983). In fact, at one point in his closing argument the prosecutor himself acknowledged that "Maybe it wasn't thought out in advance. Maybe it wasn't well-planned in advance ---." (R3446) Nevertheless, he urged the jury to find the "CCP" aggravating factor (R3453-54), and the trial court's instruction told them that they could.

As in Garron V. State, 528 So.2d 353, 361 (Fla. 1988), this case involves serious problems within a family, not an organized crime or underworld killing. Even putting aside the extensive evidence of appellant's mental illness, it was the state's theory that his bizarre behavior in the months leading up to the shootings was caused by drug abuse. One of the state's own experts testified that the shootings occurred because of the explosive combination of alcohol, cocaine, and personality disorder, triggered by Clay's grabbing away the shotgun. There was no competent and substantial evidence of heightened premeditation [see Scull V. State, 533 So.2d 1137, 1142 (Fla. 1988)], and the trial court erred in giving an instruction which allowed the jury to find this aggravating factor. Atkins. Especially in view of the closeness of the jury's death verdict (as to Bret's murder), the error may well have tainted their recommendation. See Morgan V. State, 515 So.2d 975, 976 (Fla. 1987).

Similarly, the record is devoid of any competent substantial evidence that Frances was killed for pecuniary gain or that Bret was killed to avoid arrest. The state's theories as to these aggravating factors were sheer speculation at best. See scull V. State, 533 So.2d 1137, 1141-42 (Fla. 1988). In order to establish the "avoid lawful arrest" aggravator, the requisite intent to avoid capture or eliminate a witness must be shown to be the "dominent or only motive

for the killing." Scull, 533 So.2d at 1141-42; Garron, 528 So.2d at 360; Floyd v. Statg, 497 So.2d 1211, 1214-15 (Fla. 1986). In the instant case, there is no evidence at all that Bret was killed in order to eliminate him as a witness. Moreover, it was the state which repeatedly argued to the judge and jury that appellant's motive was resentment of his stepfather; that "anything that belonged to Clay Carroll, he was going to try to destroy." (R1826) In his opening and closing statements in both the guilt and penalty phases, the prosecutor argued that appellant killed Clay's wife, killed Clay's son, killed Clay's dog, killed Clay's car, and killed Clay's boat. (R1716, 3081-82, 3448-49). "All acts aimed at Clay Carroll. We don't know exactly why he did it that day. We know that drugs were a big part of this." (R3449)

There was no evidence that would support a finding by the judge or by the jury [see Atkins] that Bret was killed to avoid arrest, and the jury should not have been instructed that it could consider this aggravating factor. See also Stewart. Especially in light of the fact that the jury recommended death on this count by a margin of a single vote, appellant is entitled to a new penalty trial.[26] See Morgan, 513 So.2d at 976.

ISSUE XI

THE TRIAL COURT ERRED IN FAILING TO PROVIDE WRITTEN FINDINGS IN SUPPORT OF ITS IMPOSITION OF TEE DEATH PENALTY.

The trial court made his findings in support of the death sentence orally. While he stated that he would "reduce these to writing" and file them, he never did. (R3787, 4280) Florida's death penalty statute requires written findings, prior to or contemporaneous with the imposition of sentence. Grossman v. State, 525 So.2d 833, 841 (Fla. 1988); Stewart v. State, 549 So.2d 171, 176 (Fla. 1989). Although sentencing in this case took place prior to Grossman, appellant

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Similarly, there was no evidence to support a jury instruction on the "pecuniary gain" aggravator, as to Frances' death. The state's main hypothesis, as previously discussed, was that all of appellant's acts were the motivated by intra-family resentment. The state's subsidiary theory - that Frances was killed in order to inherit her estate and collect on her life insurance policy - was pure speculation. See also Simmons v. State, 419 So.2d 316, 318 (Fla. 1982); Scull v. State, 533 So.2d at 1142. Thus, only one of the four aggravating factors heard by the jury was appropriate under the evidence.

believes that this Court should simply reduce his sentence to life imprisonment rather than remanding for written findings as it did in Stewart. There would be little point in having the trial court reduce his oral findings to writing now, because (1) the jury's death recommendation was tainted by improper evidence, argument, and instructions: (2) the trial court's oral findings are replete with error as to aggravating factors and his consideration of lack of remorse; and (3) the death penalty is proportionally unwarranted under the totality of the circumstances of this case.

ISSUE XII

THE TRIAL COURT ERRED IN FINDING UNPROVEN AGGRAVATING FACTORS AND NON-STATUTORY AGGRAVATING FACTORS.

The trial court made the following findings as to aggravating circumstances:

> I find that the Defendant had been convicted of a felony of attempted murder on Clay Carroll, and this can be used under the Rules and regulations in deciding this sentence.
>
> I find that the crime for which the Defendant is to be sentenced was committed while attempting to kill Clay Carroll.
>
> And I find that the crime was especially wicked, evil, atrocious and cruel. I believe that the Jury finds that.
>
> I believe that the evidence showed that the Defendant went to his home, the home of his stepfather and his mother where he was staying, solely for the purpose of committing the crimes that he committed. I think this was proven beyond a reasonable doubt.
>
> I think that mitigating circumstances are outweighed by the aggravating circumstances.

(R3787)

In mitigation, the trial court found both that appellant was acting under the influence of extreme mental or emotional disturbance, and that his capacity to conform his conduct to the requirements of law was impaired by the use of cocaine. (R3787-88) He stated that "while the statutory criteria for mental emotional disturbance are met, there is less than insanity here and I believe that this man should be and must be held responsible for his actions." (R3788-89)

The trial court's use of the contemporaneous conviction for the attempted murder of Clay Carroll to establish the "prior violent felony" aggravator was

the only valid finding in aggravation.

His next finding, "that the crime for which the Defendant is to be sentenced was committed while attempting to kill Clay Carroll", was either surplusage or a non-statutory aggravating circumstance. Fla. Stat. § 921.141(5)(d) provides for an aggravating factor where

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Attempted murder is not one of the enumerated felonies. Therefore the judge's finding is non-statutory and invalid. Trawick v. State, 473 So.2d 1235, 1240 (Fla.1985); Barclay v. State, 470 So.2d 691, 695 (Fla. 1985); Blair v. State, 406 So.2d 1103, 1108 (Fla. 1981).

The next finding, "especially heinous, atrocious, or cruel", is invalid because this was a shooting death, and was not accompanied by additional acts which would set the crime apart from the norm of capital felonies. The trial court had earlier ruled, correctly, that there was no evidence to support a jury instruction on the "HAC" factor, and, accordingly, no instruction was given. (R3433, see R3477) Then, in imposing sentence, the judge turned around and said "... I find the crime was especially wicked, evil, atrocious, and cruel. I believe that the jury finds that." (R3787)

Bret's death was caused by a gunshot wound to the right temple. This injury would have caused him to lose consciousness immediately, or very nearly so. When the paramedics arrived at the house and rolled him over, Bret momentarily opened his eyes and said "He's coming back to get us." By the time he arrived at the emergency room, he was in a coma. (R1747, 1775, 1861-62, 1876-77, 1882, 2033, 2040)

In Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983) this Court invalidated a finding of "HAC" and said:

> The criminal act that ultimately caused death was a single sudden shot from a shotgun. The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.

Similarly, the fact that Bret also sustained a non-fatal gunshot wound to the left side moments before the fatal shot to the head does not set this crime apart from the norm of capital felonies. See e.g. Brown V. State, 526 So.2d 903, 904, 906-07 (Fla. 1988); Amoros v. State, 531 So.2d 1256, 1257, 1260-61 (Fla. 1988); Lewis V. State, 377 So.2d 640, 641-42, 646 (Fla. 1979) In Amoros, for example, the defendant shot the victim three times at close range; twice in the arm and once (fatally) in the chest. There was evidence that the victim "made a futile attempt to save his life by running to the rear of the apartment, only to find himself trapped at the back door." This Court disapproved the trial court's finding of "HAC", and stated that the facts "do not set this murder 'apart from the norm of capital felonies.'" 531 So.2d at 1260-61.

Under the standard adopted by this Court, the killing of Bret Carroll does not meet the definition of "especially heinous, atrocious, or cruel." To hold otherwise would result in overbroad application of the aggravating factor in violation of the Eighth Amendment of the United States Constitution. Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. ___, 100, L.Ed.2d 372 (Fla. 1988). The trial court's last finding is enigmatic:

> I believe that the evidence showed that the Defendant went to his home, the home of his stepfather and his mother where he was staying, solely for the purpose of committing the crimes that he committed. I think this was proven beyond a reasonable doubt.

Undersigned counsel assumes that this is either (a) surplusage, (b) a finding of simple premeditation, used as a non-statutory aggravator (which, of course, would be improper; Trawick; Barclay; Blair); or (c) an insufficient attempt to find the "CCP" aggravating factor. Assuming arguendo that the trial court intended to find "CCP", the finding is invalid because the evidence in this case does not establish "heightened premeditation, i.e., a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a conviction for first degree murder." See also Roaers: Garron; Scull; and appellant's argument on the "cold, calculated, and premeditated" factor in Issue X.

Since only one valid aggravating factor exists (and that one was based on a contemporaneous conviction arising out of the same incident), and both mental

mitigators were found, appellant's sentence should be reduced to life imprisonment.

ISSUE XIII

IMPOSITION OF THE DEATH PENALTY IS PROPORTIONALLY UNWARRANTED IN THIS CASE.

Under the totality of the circumstances in this case, imposition of the death penalty is proportionally unwarranted. Only one valid aggravator (based on a contemporaneous conviction) exists. There was extensive evidence of mental illness, as well as use of cocaine and alcohol on the day of the shootings. The trial court found both that appellant was under the influence of extreme mental and emotional disturbance, and that his capacity to conform his conduct to the requirements of law was impaired. This was not an organized crime or underworld killing, but one arising out of intra-family disharmony. See Garron v. State, 528 So.2d 353, 361 (Fla. 1988). Prior to this one explosion, appellant had no history of violent behavior.

"The death penalty, unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied 'to only the most aggravated and unmitigated of most serious crimes.'" Holsworth v. State, 522 So.2d 348, 354-55 (Fla. 1988), citing State v. Dixon, 283 So.2d 1, 7 (Fla. 1973). See also Caruthers v. State, 465 So.2d 496, 499 (Fla. 1985); Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985); Wilson v. State, 493 So.2d 1019, 1023-24 (Fla. 1986); Sonaer v. State, 544 So.2d 1010, 1011-12 (Fla. 1989). This is not such a case. Appellant's sentence should be reduced to life imprisonment.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court grant the following relief:

As to Issues 1 through 7: Reverse the convictions and sentences and remand for a new trial.

As to Issues 8 through 13: Reverse the death sentence, and remand for imposition of a sentence of life imprisonment without possibility of parole for twenty-five years.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 26 day of February, 1990.

Respectfully submitted,

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