IN THE SUPREME COURT OF FLORIDA

ERNEST LEE ROMAN,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 63,766
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
FOR SUMTER COUNTY, FLORIDA

BRIEF OF APPELLANT

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MISCELLANEOUS

Section 3.04(b), Florida Standard Jury Instructions

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	)
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	)

PRELIMINARY STATEMENT

The appellant, ERNEST LEE ROMAN, will be referred to in this brief as "Roman," "the appellant" or "the Defendant." Citations to the record on appeal will be designated by the letter "R." in parenthesis followed by the page in the record where the citation appears. (R. _____).

STATEMENT OF FACTS

At trial the state's evidence and testimony revealed the following facts:

On the evening of March 13, 1981, there was a get together at a mobile home in Sumter County. (R. 489; 537; 554; 608). The mobile home belonged to Mildred Beaudoin, the sister of the Defendant, Ernest Roman. (R. 488-489). For approximately two to three months Roman had been living in a travel trailer parked behind the Beaudoin mobile home. Arthur Reese, a state witness who was forcibly brought to Sumter County from Arizona in order to testify against Roman, had been residing with Roman for approximately two to three weeks before the murder occurred. (R. 2235-2236).

Several people came and left the Beaudoin mobile home between the hours of approximately 9:30 p.m. March 13, and 2:00 a.m. March 14; namely, Mildred Beaudoin, the owner; Ray Beaudoin, the Defendant's nephew; Kellene Smith, the mother of the two year old victim, Tasha Marie Smith; Chip Mogg, Kellene Smith's boyfriend; Reese; Roman and several others who did not testify. Wanda Lee Pritchard, who testified that she had known Roman for about five years, visited the Beaudoin residence earlier in the evening. (R. 1330). When Smith and Mogg arrived at the Beaudoin residence between approximately 9:30 and 11:00 p.m., they left the victim asleep in the back seat of Mogg's Volkswagen automobile when they entered the Beaudoin residence. (R. 489; 537; 554; 608).

Smith testified that she went to the car to check on her daughter at about midnight and she was still asleep. (R. 493). Shortly thereafter, Mogg drove Ray Beaudoin to work at a nearby truck stop where Ray Beaudoin checked into work at approximately 12:12. (R. 559). Beaudoin testified that the victim slept in the back of the car during the short journey. (R. 558). Mogg testified that he did not see Roman at anytime between 10:00 p.m. and 12:30 a.m., when he and Smith left the trailer, but Reese testified that Roman entered the trailer shortly after Mogg returned. (R. 551; 609). Smith and Mogg left the trailer approximately 5 to 20 minutes after Mogg returned. (R. 492; 539). Smith does not mention whether Roman was present after Mogg returned, and Reese does not clearly indicate whether Roman left before Smith and Mogg.

When Smith and Mogg left the trailer in Mogg's Volkswagen, they did not check the back seat for the baby. The Volkswagen ran out of gas sometime after leaving the Beaudoin trailer. Smith testified that they had driven only a few blocks, but Mogg testified that they had driven approximately four miles before they ran out of gas. (R. 496; 544). Upon running out of gas they discovered that the victim was not in the backseat and was missing. (R. 496; 540). Smith, who had been drinking that night, stated that she and Mogg returned to the Beaudoin residence within five minutes of running out of gas. (R. 510; 513). Mogg, who had also been drinking, testified that he and Smith did not return to the Beaudoin residence until approximately 1:30 to 1:45 a.m., approximately an hour to an hour

and one-half after leaving the Beaudoin residence. (R. 513; 544-545; 561).

When Smith and Mogg returned to the Beaudoin trailer they searched for the baby for approximately two hours without success before notifying the police that the baby was missing. (R. 530). The baby's body was discovered in a shallow grave at approximately 3:00-3:30 p.m. on March 14. (R. 790). The gravesite was located approximately 37 feet from an abandoned trailer. (R. 780). The abandoned trailer was approximately 300 yards from the Beaudoin trailer. (R. 754). The gravesite was partially covered by a plastic refrigerator pan and a metal refrigerator ice making unit. (R. 780-781). The victim, who was wrapped in a pink bedspread, was wearing only a T-shirt (R. 786). The victim's bottle was also recovered from the grave. (R. 786). Her left shoe was recovered from underneath a bed in the abandoned trailer. (R. 772). The right shoe was found under the residence occupied by Reese and Roman.

The state's experts testified that they found two pubic hairs and a scalp hair on the pink bedspread that were consistent with the pubic hairs and scalp hair of Roman. (R. 937; 941). A state expert further testified that fibers from clothes owned by Roman were present on the victim's T-shirt. (R. 972). In addition Roman's clothing contained fibers which came from the mattress cover and innerspring cover of a bed located in the abandoned trailer. (R. 760-761).

Dr. James Wilson, who performed the autopsy on the victim, testified that he found tears in the baby's hymen consistent with the insertion of a finger or similar sized object

into her vagina. (R. 714-718). The pathologist found dirt in the victim's nose, mouth, stomach and lungs. He further found that the victim's fingernails were caked with dirt and were shredded. He concluded that the cause of death was suffocation, probably from breathing sand. (R. 729-730).

On March 14, Roman gave a recorded statement to the police wherein he accused Reese of committing the murder. Roman admitted that he accompanied Reese to the abandoned trailer and carried the baby a short distance, but he denied participating in any sexual molestation of the victim. Roman alleges that he encouraged Reese to get out of there, but that Reese put the child in the grave. Roman admitted that he threw the refrigerator pan on top of the grave as he and Reese were leaving. (R. 853-876). Additional facts relevant to this court's analysis of the March 14, 1983, statement are more specifically detailed in the argument following Issue I in this brief.

The state elicited testimony from several witnesses as to whether Roman had been drinking on the night of the murder. Smith testified that she saw Roman at approximately 11:20 p.m. on March 13, but that he stayed in the Beaudoin trailer only a few minutes. (R. 492). Although she did not see him drinking, he left with a bottle of wine. (R. 530). Mogg saw Roman at the Beaudoin residence at approximately 6:30 p.m. on March 13, but does not recall seeing Roman at anytime between 10:00 p.m. and approximately 12:30 a.m., when he and Smith left the trailer. (R. 551). Mogg testified that he really didn't notice if Roman

was drunk at 6:30 p.m., but he didn't think so. (R. 541).

Ray Beaudoin testified that Smith and Mogg had both been drinking, and that Mogg was feeling it more. (R. 561). He stated that Roman entered the trailer shortly before he left for work at midnight, but that Beaudoin was getting ready for work and didn't pay any attention to Roman. (R. 554). He said that Reese drank often, but that he hadn't seen Reese drinking that night. Beaudoin alleged that Roman drank often and did strange things when he was drinking. (R. 567; R. 571). Wolf, who participated in the search, saw Roman walking from the direction of the abandoned trailer at approximately 3:15 a.m., but did not think that Roman was drunk.

Reese testified that Roman fell out of his chair when it tipped backwards, but that he did not think that Roman was drunk. (R. 632). Calvert, the neighbor who suggested that the police search for the baby near the abandoned trailer, testified that he saw Roman drinking at approximately 4:00 p.m. on March 13, but that he did not know if Roman was drunk. (R. 638).

The state's expert psychiatrists, Drs. Barnard and Carrera, testified that if Roman had not been drinking on the night of the murder, that he would have known right from wrong, and would have been sane. (R. 1029; 1083).

On cross-examination Dr. Carrera testified that Roman would have lost some of his ability to understand or reason if he had been drunk. Dr. Carrera could not say whether or not Roman would have been sane under the jury instructions' definition of insanity unless he knew the degree of Roman's drunkenness on the night of the murder. (R. 1104-1105). Barnard testified that

the drinking would have lowered Roman's capacity for reason, but he did not say whether it could have caused him to become insane. (R. 1055; 1061).

The defense evidence and testimony revealed the following facts:

Mildred Beaudoin testified that Roman had been drinking several bottles of wine over the course of four days, that he had been drinking from Mogg and Smith's bottle on the night of the murder, and was drunk at the time of the murder. (R. 1135). She stated that Roman fell down drunk on the floor, that she helped him off the floor and sent him home at about 1:00 p.m. (R. 1135-1136). On cross-examination the prosecutor directly inferred to the jury that Roman had confessed to the murder to Beaudoin. The Defendant moved for a mistrial because there was absolutely no evidence tending to prove the prosecutor's theory of a phantom confession, but the mistrial motion was denied. (R. 1160-1161).

Wanda Pritchard, who had known the Defendant for approximately five years, testified that she saw the Defendant at Beaudoin's residence after dark on the evening of March 13. (R. 1329-1330). She stated that Roman walked out of the trailer and fell down about three times, and that he told Pritchard that he didn't need any help and to leave him alone. She testified that he was definitely drunk and that he had been drunk for a few days. (R. 1330).

James Howton, a former police officer who assisted in the investigation, testified that he saw Roman with a wine bottle

during the early morning hours of March 14. (R. 1345). Although Howton testified at trial that he did not believe Roman was drunk, Judge Booth declared him to be a hostile witness, and allowed the defense to impeach Howton with a prior deposition wherein he indicated that Roman looked "spaced out" as though he had been roaming around and drinking all night and that he looked hung over. (R. 1347-1352).

The defense expert, Dr. Lekarczyk, testified that had Roman been drunk, he would not have had the ability to reason accurately, that he would not have known right from wrong and that he would have been insane. (R. 1260-1261; 1311). She stated that Roman was suffering from chronic alcohol syndrome resulting from excessive abuse of alcohol and that he suffered and continues to suffer from schizophrenia. (R. 1260). On the contrary, Lekarczyk testified that Roman would clearly have been sane had he been sober at the time of the murder. (R. 1304; 1311).

Dr. Lekarczyk based her insanity opinion on the fact that Roman had a thirty-one year history of alcohol abuse, had been declared incompetent in 1968, had been sent to Florida State Hospital on several occasions, had been hospitalized for alcohol abuse on approximately nine to seventeen occasions, had an I.Q. of approximately 75, (just above the recognized retarded I.Q. of 70), had hallucinated in the past, shook with tremors, had a history of blackouts, had been declared incompetent to stand trial by Drs. Carrera and Barnard, and had manifested several other signs tending to prove alcohol abuse dependency and other mental illness.

STATEMENT OF THE CASE

At approximately 12:30 a.m. on March 14, 1981, Tasha Marie Smith, a two year old girl, disappeared from the backseat of a Volkswagen where she had been allegedly sleeping. Her partially nude body was discovered in a shallow grave at approximately 3:00 p.m. on March 14, 1981. Ernest Roman, who had previously been in trouble with the law, was transported to the Sumter County Sheriff's Office for the purposes of interrogation. At approximately 11:00 p.m. Roman gave a statement wherein he accused Arthur Reese, his roommate, of committing the murder. (R. 853-876). Roman was thereafter charged with first degree murder and sexual battery upon the two year old victim. (R. 1629). On April 24, 1981, the Sumter County grand jury indicted Roman for first degree murder, sexual battery upon a person under the age of eleven years and kidnapping. (R. 1660).

On March 23, 1981, Roman filed a Motion for Psychiatric Examination which was amended on April 1, 1981. (R. 1635; 1637). The amended motion alleged that Roman was taking psychotropic medication and had been previously adjudicated to be incompetent. (R. 1637). The two court appointed psychiatrists, Drs. Barnard and Carrera, filed written reports indicating that Roman may not have been competent to stand trial. (R. 1703-1707). On May 15, 1981, Judge William F. Edwards entered an Order temporarily committing Roman to the Department of Health and Rehabilitative Serivces North Florida Evaluation and Treatment Center. (R. 1698-1699). On May 18, 1981, Judge Edwards entered an Amended Order of Commitment wherein he recited that the Defendant was

"probably" not competent to stand trial. (R. 1700-1702). On July 1, 1981, Roman filed his Notice of Intent to Rely on the Defense of Insanity. (R. 1715). On July 21, 1981, Judge Edwards entered an Order determining that Roman was incompetent to stand trial. (R. 1852-1853). Roman was involuntarily committed. The lower court's decision was predicated upon oral testimony given by Dr. Carrera which was corroborated by written reports submitted by the North Florida Evaluation and Treatment Center and by written reports filed by Drs. Barnard and Carrera. (R. 1852-1853; R. 1703-1707).

On March 9, 1982, Judge John W. Booth entered an ex parte Order for further psychiatric examination to determine whether the Defendant was sane at the time of the commission of the crime. (R. 1862-1863). The court appointed experts, Drs. Barnard and Carrera, prepared their written reports on March 20, 1982. (R. 1884-1887; R. 1889-1892). Dr. Barnard concluded that:

> "It is my medical opinion had the Defendant not been under the influence of alcohol and drugs at the time of the alleged crime, he would have been legally sane knowing the nature, quality and consequences of his actions and knowing the difference between right and wrong."

Dr. Carrera stated that he was unable to reach an opinion as to Roman's sanity at the time of the offense. (R. 1892).

On October 8, 1982, Judge John W. Booth entered an Order requesting the court appointed psychiatrists to perform further examination to determine Roman's competency to stand

trial. (R. 1896-1897). On November 2, 1982, Judge Booth entered an Order determining that Roman was competent to stand trial. (R. 1920-1922).

On November 24, 1982, Roman filed a Motion to Suppress his March 14, 1981, statement. (R. 1941). On December 8, 1982, Judge Booth entered an Order denying the Motion to Suppress. (R. 2002).

On February 24, 1983, the Defendant's Motion for Change of Venue was granted. The court transferred venue from Sumter to Citrus County, Florida. (R. 2286). On March 10, 1983, the jury found Roman guilty of first degree premeditated murder, sexual battery of a person under the age of 11 years by a person over 18 years and kidnapping. (R. 2467-2468). On March 11, 1983, a majority of the jury, by vote of 10 to 2, recommended that the court impose the death penalty. (R. 2478). On March 18, 1983, Judge Booth ordered that Roman be electrocuted. (R. 2500). Roman was given a life sentence without possibility of parole for a minimum of 25 years for the sexual battery conviction. Roman was sentenced to another life term for the kidnapping conviction. The kidnapping sentence was imposed to run consecutively to the sexual battery conviction. (R. 2504-2505).

On March 16, 1983, Roman filed a Motion for New Trial which was amended on May 18, 1983. (R. 2487-2491). The Motion, as amended, contained 17 grounds for reversal. The Motion for New Trial was argued and denied on May 23, 1983. (R. 2608). This appeal ensued.

ISSUES PRESENTED

ISSUE I

THE LOWER COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND BY ADMITTING HIS STATEMENTS INTO EVIDENCE AT TRIAL OVER THE DEFENDANT'S OBJECTION.

ISSUE II

THE COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN WITNESS CALVERT TESTIFIED THAT HE HAD OVERHEARD THE DEFENDANT'S SISTER, MILDRED BEAUDOIN, STATE THAT "ERNEST HAD KILLED ANOTHER KILLED A BABY I RECKON."

ISSUE III

THE COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR ASKED A LEADING QUESTION OF THE DEFENDANT'S SISTER, MILDRED BEAUDOIN, WHICH DIRECTLY INFERRED THAT ROMAN HAD CONFESSED TO HER WHERE THERE WAS NO EVIDENCE TENDING TO PROVE THIS PHANTOM CONFESSION; THE COURT COMPOUNDED ITS ERROR BY ALLOWING THE PROSECUTOR TO CROSS-EXAMINE BEAUDOIN REGARDING HER OUT OF COURT STATEMENT OF OPINION THAT "ERNIE HAS KILLED A BABY, I RECKON."

ISSUE IV

THE COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR ASKED A DEPUTY SHERIFF A LEADING QUESTION THAT EXPRESSLY INFERRED THAT THE DEFENDANT HAD A PRIOR CRIMINAL RECORD.

ISSUE V

THE COURT COMMITTED FUNDAMENTAL ERROR WHEN IT FAILED TO INSTRUCT THE JURY THAT THE STATE HAD THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS LEGALLY SANE AT THE TIME OF THE COMMISSION OF THE ALLEGED OFFENSE.

ISSUE VI

THE LOWER COURT ERRED BY DENYING THE DEFENDANT'S REQUESTED MITIGATING CIRCUMSTANCE INSTRUCTION DURING THE PENALTY PHASE AND FURTHER ERRED BY SENTENCING THE DEFENDANT TO DEATH.

ISSUE I

THE LOWER COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND BY ADMITTING HIS STATEMENTS INTO EVIDENCE AT TRIAL OVER THE DEFENDANT'S OBJECTION.

Prior to trial, the Defendant filed a Motion to Suppress Statements. (R. 1941). That Motion was directed toward suppressing as evidence at trial an incriminating statement given by Roman to a group of three Sumter County sheriff's deputies who interrogated him on the night of his arrest. (R. 1801-1821). The trial court held a three-day evidentiary hearing on the Motion to Suppress Statements. (R. 2013). At the conclusion of the hearing the lower court, without further elucidation, simply ruled:

> The Court: All right. Motion is denied. (R. 2226).

During the trial, over the renewed objection by the Defendant, the court allowed testimony about the statements to be admitted into evidence. (R. 840). The state also played a tape recording of the Defendant's statement for the jury's consideration. (R. 853).

The denial of the Motion to Suppress and the introduction into evidence of the Defendant's incriminating statements violated his rights guaranteed by the fifth, sixth and fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Accordingly, the admission of those statements constituted harmful, reversible error.

The evidence and testimony at the suppression hearing traced the various exchanges between Roman and the deputy

sheriffs leading up to Roman's statement. Roman was standing near the crime scene around 4:30 p.m. on March 14, 1981, as the search continued for the missing child. (R. 2099). At about that time, Deputy Foremny was instructed to go "pick-up" Roman at the scene. (R. 2108). Deputy Thompson, one of the Sumter County deputies in charge of the investigation, testified that he might have issued the pick-up order. (R. 2109). Sheriff Adams and Deputy Galvin denied responsibility for the deed. (R. 2031).

When Roman was picked up at the scene by Deputy Foremny, he was placed in the locked, rear seat of the patrol car. (R. 2108). He was not handcuffed, but he was advised of his Miranda rights by Deputy Thompson. (R. 2100-2101). Thompson testified that Roman was there "voluntarily." (R. 2102). He also testified that Roman had stated at the scene:

> "Yes. Let's go ahead and get this mess over with so I can go to Eustis." (R. 2102)[1]

Roman was transported to the Sumter County Sheriff's Office in the locked, rear part of the patrol car. (R. 2030). He arrived there at 1651 hours (4:51 p.m.) and was taken somewhere into the sheriff's department/jail facility. (R. 2107). Deputy Thompson testified that Roman probably was detained in the jail portion of the building pending questioning (R. 2117); Sheriff Adams and Deputy Galvin were unsure. (R. 2036; 2155).

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[1]Roman's reference to Eustis clearly referred to the Lake-Sumter Community Mental Health in-patient facility in Eustis, Florida, a licensed psychiatric hospital where Roman had been hospitalized on numerous occasions. (R. 1554).

The interrogation session with Roman did not begin until 1832 hours (6:32 p.m.). (R. 2108; 2136). Roman was interviewed intermittently by Adams, Galvin and Thompson in the sheriff's office investigation room. (R. 2034; 2137). The Defendant was re-advised of his Miranda rights by Deputy Galvin who read them from a printed card. (R. 2140). Roman refused to sign the Miranda card, stating that he could not do so because he had no rights. (R. 2140). According to Deputy Thompson:

> He refused to [sign the Miranda card]. He didn't - - he said he had been to Chattahoochee, and he didn't have any rights. (R. 2129).

During the interrogation session, Roman became ill and vomited a number of times. (R. 2120; 2162). The deputies testified that throughout the session Roman's hands would tremble and shake (R. 2074); on other occasions he also appeared sleepy. (R. 2184). Sheriff Adams and Deputy Thompson opined that he looked like someone "coming off a drunk." (R. 2074; 2123). At several points during the questioning, Roman would stop answering questions. (R. 2176). He was never re-advised of his Miranda rights after 6:32 p.m. (R. 2176). The sheriff's deputies continued to question Roman, even after his refusals to answer. (R. 2176).

Deputies Thompson and Galvin testified that Roman was not detained during the interrogation and that he had the right to come and go as he pleased. (R. 2115; 2154). However, Sheriff Adams testified that he had not intended to allow Roman to leave if he had wanted to. (R. 2036).

At some point prior to Roman's statement, the sheriff's

deputies learned that the victim's body had been located. (R. 2072; 2121). Although the body had been recovered, the deputies interrogated Roman about the need to recover the body for purposes of a Christian burial. (R. 2072; 2121; 2186). At the time this technique was employed, the deputies knew the body had been recovered. (R. 2121). All three officers acknowledged that this deceptive technique was used to soften Roman up, to play on his sympathy and to induce him to talk. (R. 2087; 2121; 2186).

Roman was later shown two color photographs of the murder victim taken while she was still alive. (R. 2182; 2118; 2088). According to Sheriff Adams, "that is when he [Roman] broke." (R. 2088). This apparently occurred sometime shortly before 11:00 p.m. (R. 2118; 2178). Roman gave his taped statement beginning around 11:00-11:15 p.m. (R. 2178). No tape recordings were produced for the first four hours of the interrogation session. The taped statement does not reference the time it was given. (R. 1801).

Wildwood attorney C. John Coniglio testified that he called the Sumter County Sheriff's Office on Roman's behalf between 9:30-10:30 p.m. on the night of March 14. (R. 2147). He explained that he had represented Roman and his family on prior occasions and that Roman's sisters had called him to inquire about Roman. (R. 2147). According to Coniglio, Roman's sisters explained that Roman had been arrested. (R. 2147).

Coniglio testified that he called the sheriff's office and spoke with Chief Floyd and Sheriff Adams. (R. 2147-2148). He told Adams that he had been retained by the family on Roman's behalf, and he was insistent to both that Roman not be

questioned. (R. 2148). He further testified that Adams' response to his call was, "Well, we're about through anyway." (R. 2148). Coniglio never spoke directly with Roman. (R. 2148). At no time was Roman advised by law enforcement that attorney Coniglio had called on his behalf. In fact, Adams testified that he did not recall talking with Coniglio the night of the arrest, but that he was "not absolutely positive that he [Coniglio] didn't call me. . . ." (R. 2069-2070). The state offered no rebuttal testimony to that offered by Coniglio.

The lower court's denial of the Motion to Suppress Statements was erroneous for three interrelated reasons. First, the state failed to carry its burden of showing that Roman made a knowing and intelligent waiver of his constitutional rights. Second, the statements were the fruit of an illegal detention and should have been suppressed. Third, the Defendant was impermissibly shielded from his right to counsel prior to giving his confession.

A. The State Failed to Prove That the Defendant Made a Knowing and Intelligent Waiver of His Rights.

It is without question that Roman was "in custody" following his detention at the crime scene, and that he was entitled to receive the Miranda warnings that were given to him. Roman was clearly a suspect in the murder; he was picked up at the direction of law enforcement; he was locked in the rear part of a patrol car and taken to the sheriff's office; and he was likely detained in the jail portion of the building prior to the interrogation session.

The United States Supreme Court in its Miranda ruling stated that the warnings were required when an accused is "deprived of his freedom by the authorities in any significant way and is subject to questioning. . . ." Miranda v. Arizona, 384 U.S. 436 (1966). Several years later, the Court expanded on that issue, holding that a defendant who was interrogated by police in his bedroom during the early morning hours was nevertheless in a custodial setting that mandated issuance of the warnings. Orozco v. Texas, 394 U.S. 324 (1969). Likewise, the Defendants in Daley v. State, 387 So.2d 971 (Fla. 4th DCA 1980) were found to have been the subjects of a custodial interrogation entitling them to the Miranda warnings. This was so, even though they were still at their house and were not formally under arrest. Id. at 975.

Apparently the deputies in the instant case were convinced that Roman was in custody; they advised him of Miranda at the scene and again at the jail. Although Thompson and Galvin suggested Roman had come "voluntarily," Sheriff Adams testified that he did not intend to allow Roman to leave. (R. 2036). Indeed, the suggestion that Roman went to the jail voluntarily at the request of the deputies is extremely unlikely. See United States v. Tucker, 610 F.2d 1007 (2d Cir. 1979); People v. Dowdell, 401 N.E.2d 295 (Ill. 1980).

Once Roman was advised of his rights, it became incumbent upon the state to demonstrate that he had made a knowing and intelligent waiver of those rights before any statements were made. See Tague v. Louisiana, 444 U.S. 469 (1980). This burden was never met by the state. The record

fails to demonstrate that Roman ever understood his Miranda rights and it further shows that he did not knowingly and intelligently waive those rights.

At the time Roman was detained at the crime scene, it is evident that his mental capacity was diminished. Forensic psychiatrist George Barnard testified at the suppression hearing that Roman suffered from chronic alcoholism and probably had some organic brain damage. (R. 2060). He added that Roman was only in the dull-normal intelligence level. (R. 2067). Indeed, Roman had had some 17 prior psychiatric hospitalizations and had been declared incompetent a least once. (R. 1554).

Roman's actions after he was picked up also evidence his weakened mental condition. According to Thompson who was with Roman at the scene, Roman agreed to the interrogation so he could get to Eustis, the site of the Lake-Sumter Community Mental Health Center psychiatric hospital. (R. 2102). Roman shook throughout the interrogation session and vomited several times, prompting the deputies to think he was "coming off a drunk." And in his taped statement, Roman himself mentioned being sick and needing medical help for his drinking. (R. 1816).

Perhaps most illustrative of Roman's mental state at the interrogation was his bizarre response to the Miranda warnings read to him at 6:32 p.m. He refused to sign the Miranda card acknowledging that he understood his rights. He explained to the officers that "he had no rights" since he had been in Chattahoochee. (R. 2129). It is facially apparent from his response that Roman had no idea what the officers were talking about. Significantly, he was never re-advised of his Miranda

rights, even though the interrogation continued for almost four more hours. (R. 2176).

It is gainsaid that before an accused can knowingly waive his Miranda rights, he must first understand them. A case with strikingly similar facts to the case at bar is Ware v. State, 307 So.2d 255 (Fla. 4th DCA 1975). In Ware, the Defendant was read his rights from a Miranda card prior to his interrogation at the police station. When asked if he understood his rights, he did not respond. Nevertheless, he was directed to sign the card without an explanation, which he did. The Defendant subsequently made an oral and a recorded confession. The officers involved in the interrogation testified that they had used the "family approach" to "weaken the defendant." Id. at 256.

The court held that the evidence failed to show that Ware had voluntarily and knowingly waived his rights. It added that:

> There is no showing that appellant understood the rights read to him or that he understood the significance of signing the Miranda card. Id.

The court cited and distinguished State v. Craig, 237 So.2d 737 (Fla. 1970). Unlike the Craig case, said the court, Ware gave no "verbal acknowledgment of understanding." Id. Considering the totality of the circumstances, including the deceptive approach employed by the police, the court reversed the denial of the suppression motion.

Roman's case is even stronger than that in Ware. Roman refused to sign the Miranda card. When questioned as to his

understanding of the rights, Roman's response made it clear that he was so confused or deranged that he did not understand the warnings. The record is devoid of any evidence that Roman gave any "verbal acknowledgment of understanding." Moreover, Roman came into the interrogation session with a long history of severe psychiatric problems. His mental condition was extremely suspect and, as in Ware, he became the target of a deceptive interrogation technique. It seems clear that Ernest Roman never understood the substance of his constitutional rights.

Even if Roman had understood his rights, the totality of the circumstances surrounding the questioning demonstrate that he did not make a knowing and intelligent waiver of those rights. Again, the most telling evidence is Roman's own response to the Miranda warnings. Certainly the response given by Roman, as testified to by the deputies, cannot be argued to constitute a waiver of any sort. A waiver of rights by Roman cannot be presumed; in fact, the rule is exactly the converse. Tague v. Louisiana, supra. Moreover, the Miranda Court stated that a valid waiver cannot be presumed by the fact that a confession was eventually obtained. Simply stated, there was never a clear waiver of rights by Roman and the Constitution does not allow one to be presumed.

Undoubtedly one of the major factors affecting the voluntariness of Roman's waiver, if any, was his mental condition at the time of the questioning. Mental weakness has been recognized by the courts as a factor to be considered in determining the voluntariness of a confession. Ross v. State,

386 So.2d 1191 (Fla. 1980). In the instant case, there was both lay and expert testimony which indicated that Roman was not mentally sound. Although there was testimony from the state's psychiatrist that Roman, in his opinion, had the capacity to understand and waive his rights (R. 2055-2056), it was offered in a summary fashion. The Roman record is devoid of any in-depth psychiatric testimony as to the Defendant's ability to understand the various rights contained within the Miranda warnings. See Ross v. State, supra. In fact, nothing in the Roman record even indicates that Dr. Barnard knew what the Miranda rights consisted of.

Intertwined with Roman's mental weakness as a factor affecting voluntariness is the admittedly deceptive interrogation technique employed by the deputies. They all testified that they used the "Christian burial" technique to "soften up" Roman and encourage him to talk. They also admitted deceiving Roman into believing that the victim's body had not been recovered when, in fact, it had.

The facts of this case are remarkably similar to those of Ware v. State, supra, wherein the "family approach" was criticized. The "family approach" used in Ware did not even involve the deception that was used against Roman.[2] Likewise, other Florida cases have criticized deceptive interrogation

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[2]During an objection to Sheriff Adams testimony, Assistant State Attorney Brown suggested that a policeman can "lie through his teeth to the Defendant" to obtain a confession. (R. 2085). The proper test would appear to be whether the interrogators, using the truth or using deception, overbore the will of the accused. See Ware v. State, supra; Cribbs v. State, Fex v. State, infra.

techniques aimed at overbearing the will of an accused. In Cribbs v. State, 378 So.2d 316 (Fla. 1st DCA 1980), the court found that the Defendant's statements should have been suppressed where he was erroneously advised by the police that he was not entitled to appointed counsel until after a first hearing. Also, in Fex v. State, 386 So.2d 58 (Fla. 2d DCA 1980), the court ruled that the Defendant's pre-trial statements should have been suppressed. The evidence in that case showed that the arresting officer knew the defendant, told him that the defendant had already been identified, and told him that the police already knew the answers to their questions. The court found that:

> While these statements may not rise to the level of threat, they certainly were intended to "overbear" the appellant's will. Id. at 59.

Based upon a totality of the factual circumstances, the instant case is indistinguishable from Ware, supra. Roman made no voluntary waiver of his rights and, accordingly, his statements should have been suppressed.

Finally it should be pointed out that the trial judge, at the conclusion of the suppression hearing, simply stated that the motion was denied. (R. 2226). Neither at the hearing nor the trial did he state that he found the statement was voluntary or that the state had met its burden by a preponderence of the evidence. See Peterson v. State, 382 So.2d 701 (Fla. 1980). In light of the many different factors present in this case affecting Roman's voluntariness, it is impossible to tell from the record with unmistakable clarity that the trial court found

the statement to be in accordance with constitutional requirements.

B. The Defendant's Statement Should Have Been Suppressed As Fruits of An Illegal Arrest.

From the testimony at the suppression hearing, it is clear that no probable cause existed to arrest Roman for the instant offenses until after he made his confession around 11:00 p.m. According to Deputy Thompson, there was no probable cause to arrest Roman when he was detained at the crime scene that afternoon at 4:30 p.m. (R. 2110). The deputies were aware of Roman's criminal history prior to his interrogation, and he was a suspect. (R. 2156). The Defendant's statement was the piece of evidence that provided probable cause for his arrest. (R. 2120). Thompson swore that Roman was not formally arrested until around 11:30 p.m. (R. 2120).

At the suppression hearing, the defense argued that the "pick-up" of Roman by law enforcement at the crime scene constituted an arrest which was admittedly without probable cause. Roman asserted that any statements he gave were fruits of that illegal detention and should be suppressed. (R. 2189). The trial court simply denied the multi-faceted suppression motion without findings or comments. (R. 2226). It is impossible to tell whether the trial court in its ruling:

a) found the crime scene detention to be a legal arrest based on probable cause; or

b) found that the crime scene detention was not tantamount to an arrest; or

c) found that, although the arrest was illegal, any taint attaching thereto was sufficiently attenuated by subsequent

events.

The United States Supreme Court has squarely addressed the issue of confessions which flow from an illegal arrest. In Dunaway v. New York, 442 U.S. 200 (1979), the Court ruled that an illegal arrest presumptively taints a confession and renders it inadmissible. Miranda warnings do not by themselves purge the taint of the illegal arrest. Brown v. Illinois, 422 U.S. 590 (1975). The Florida appellate courts have followed suit. Smith v. State, 424 So.2d 726 (Fla. 1982); State v. Rogers, 427 So.2d 286 (Fla. 1st DCA 1983).

State v. Rogers, supra, is factually quite similar to the case at bar. In that case, Rogers was arrested for murder without a warrant. When he was arrested, the sheriff's department knew the identity of the victim and the cause of her death. It also had information that Rogers was driving a car similar to that of the victim, and that Rogers had been dating the victim. In addition, Rogers had tried to evade the deputies who arrested him.

The First District Court of Appeal agreed with the trial court that there was no probable cause for the arrest. It suppressed both the statement Rogers made on the night of his arrest and the statement he made the following morning after renewed Miranda warnings. Quoting Taylor v. State, 355 So.2d 180, 184 (Fla. 3d DCA 1978), the court stated:

> "[A]n illegal arrest or an illegal search presumptively taints and renders involuntary any subsequent confession or admission obtained from the victim of the arrest or search. The only exception . . . is where there has been a clear

> and unequivocal break in the chain of illegality sufficient to dissipate the taint of the prior illegal action. These would certaintly be rare cases. . . ." Id. at 288.

From the foregoing, it is clear that if the crime scene detention of Roman constituted an arrest, his statements given during interrogation should have been suppressed. Roman's statements were closer in time to his detention than those of either of the Defendant's in Dunaway and Rogers which were, nevertheless, suppressed. Moreover, nothing in Roman's case intervened to break the presumptive taint of his illegal detention. If anything, Roman's interrogation became more tainted by his apparent misunderstanding of his Miranda rights.

Although two of the three interrogating officers testified that Roman had come to the sheriff's office "voluntarily," the facts adduced at the hearing belie their protestations. Roman was picked-up at the direction of one of the lead investigators at the scene; he was clearly a suspect at the time. He was detained in the locked rear seat of a patrol car, advised of his rights, and transported to the Sumter County Jail in the same vehicle. He remained at the sheriff's office--probably in the jail section--from 4:51 p.m. until 6:32 p.m. when the interrogation began. And, according to Sumter County Sheriff Adams, he did not intend to let Roman leave of his own will.

The issue of what constitutes an "arrest" or "detention" has been the subject of a number of Florida and federal cases. Melton v. State, 75 So.2d 291 (Fla. 1954) outlined four basic elements that constitute an arrest which are set forth and discussed below. See McAnnis v. State, 386 So.2d

1230 (Fla. 3d DCA 1980).

> 1) A purpose or intention to effect an arrest under a real or pretended authority.

Clearly there was an avowed intention on the part of law enforcement to seize Ernest Roman at the crime scene and detain him. Deputy Foremny was instructed to "pick-up" Roman, probably by Deputy Thompson.

> 2) An actual or constructive seizure or detention of the person to be arrested by a person having present power to control the person arrested.

Roman was locked in the rear seat of the patrol care and transported to the sheriff's office. He was detained there from 4:51 p.m. to 6:32 p.m. when questioning began. He was probably held in a secure section of the sheriff's facility during that time. The suggestion that Roman was a voluntary participant to the interrogation session is extremely unlikely. See United States v. Tucker; People v. Dowdell, supra.

> 3) A communication by the arresting officer to the person whose arrest is sought, of an intention or purpose then and there to effect an arrest.

There is no requirement that an arresting officer verbally announce his intentions to an accused with the magic words, "You are under arrest." It is sufficient if the officer's conduct communicates to the Defendant that he is being arrested. State v. Coron, 411 So.2d 237 (Fla. 3d DCA 1982). In the instant case, Roman was securely detained in a custodial setting. He was not given the option of driving himself to the jail for questioning. The tenor of the entire situation strongly communicated the officer's intent to detain Roman.

It has been suggested recently that the officer's intention to effect an arrest may be subordinate to his actual conduct in restraining the defendant's liberty. In McAnnis v. State, supra, the court quoted with approval the following language from United States v. Jones, 352 F. Supp. 369 (S.D. Ga. 1972); aff'd. 481 F.2d 1402 (5th Cir. 1973):

> If there is significant interference with a defendant's liberty, the fact that the police did not intend to make a formal arrest or did not think that their actions constituted an arrest is irrelevant. . . . Id. at 1232. (emphasis added).
>
> 4) An understanding by the person whose arrest is sought that is the intention of the arresting officer then and there to arrest and detain him.

Although there is no direct evidence in the record of Roman's impression of his detention, a reasonable construction of the evidence would indicate that he must have understood that he was being arrested. He was summoned by a deputy sheriff, locked in the rear of a patrol car, and advised of his rights. He was detained in or near a jail facility for over an hour and a half and he was never told he was free to leave.

Roman's understanding of the events was probably quite similar to that of his sister, Mildred Beaudoin, who observed the deputy take him away. She called the family attorney and, according to his unrebutted testimony, explained that Roman had been arrested and taken to jail. (R. 2147).

A review of the suppression testimony demonstrates that the Sumter County Sheriff's Department made a conscious decision to arrest and detain Ernest Roman based on nothing more than a

hunch. The sheriff's intent was clear; he intended to detain Roman in his weakened mental state and interrogate him until he broke. The state now attempts to justify these acts by asserting that Roman was not formally told that he was "under arrest." Such constitutionally impermissible actions must not be rewarded by allowing their fruits to stand.

C. Roman Was Impermissibly Denied His Right to Counsel Prior to Giving His Confession.

At some time prior to Roman's confession, an attorney called the sheriff's office at the request of the family. Speaking directly to Sheriff Adams, attorney Coniglio explained that he had been retained by the family to represent Roman and requested that interrogation of Roman cease. (R. 2147-2148). The sheriff responded, "Well, we're about through anyway." (R. 2148).[3] There is no indication that the sheriff ever advised Roman that an attorney had called on his behalf.

The Supreme Court's decision in Miranda v. Arizona, supra, laid the foundation for consideration of the instant issue, as follows:

> The police's preventing an attorney from consulting with his client in custody constitutes, independently of any other constitutional proscription, a violation of the sixth Amendment right to the existence of counsel and excludes any statement obtained in the wake of such action.

A leading Florida decision which has facts that are similar to

[3]The veracity of the sheriff's response is highly questionable. Coniglio's unrebutted testimony was that he had called the jail between 9:30 p.m. and 10:30 p.m. (R. 2147). The testimony of the officers was that Roman "broke" a few minutes before 11:00 p.m. and gave his taped statement beginning around 11:00-11:15 p.m. (R. 2178.

the instant case is Davis v. State, 287 So.2d 399 (Fla. 2d DCA 1974). In Davis, the father of a Defendant recently arrested for robbery retained an attorney for his son who was at the jail. The attorney went to the jail to see the Defendant but was not allowed to see his client because the jailers were "too busy." As the attorney waited, the Defendant was interrogated and subsequently confessed.

The Davis court found that the Defendant had been denied his right to legal counsel and ruled that the confession had to be suppressed. The court distinguished State v. Craig, 237 So.2d 737 (Fla. 1970) on two grounds. First, the Defendant was seventeen when arrested and his father had immediately retained counsel for him. Second, it was clear from the record that the attorney had requested to see Davis at least thirty minutes before the confession was made.

That same rationale is applicable in Roman's case. The family had immediately sought representation for Roman. The family clearly was aware of Roman's diminished mental state. Further, it is clear from the record of the suppression hearing that attorney Coniglio asked that all questioning of Roman cease at least thirty minutes before Roman's statement was finally obtained.

The cases cited to the trial court on this issue by the assistant state attorney during the suppression hearing are completely inapposite. (R. 2216). Colonial Press of Miami, Inc. v. Sanders, 264 So.2d 92 (Fla. 3d DCA 1972) was a civil case involving a question of agency law. Damico v. State, 16 So.2d 43

(Fla. 1943) dealt with the existence of the attorney-client privilege. Neither of these cases even mentioned the sixth amendment right to counsel.

D. Conclusion.

The totality of the circumstances very strongly mandates suppression of Roman's statements. Roman's questionable detention; his questionable understanding of his rights; his even more questionable waiver of those rights; and the questionable conduct of the sheriff regarding Roman's right to counsel demonstrate in their totality that the state failed to meet its burden of proof.

Especially troublesome is the lower court's simple denial of the Motion to Suppress without further elucidation. There is no finding that the statement was voluntary or that the state met (and the trial court applied) the proper burden of proof. Nor is there any mention in the court's ruling about the contention that Roman's arrest was illegal. The potential confusion is obvious. Did the court find that no arrest took place until after the confession? Or did the court find that the illegal arrest was overcome by intervening events? Or did the court simply find that the statements were voluntary? The difference is extremely relevant since even a voluntary waiver of Miranda will not automatically dissipate the taint of an illegal arrest.

This court should reverse the lower court's denial of the Motion to Suppress Statements and remand the case for a new trial. The erroneous admission of Roman's statements during the trial of his case was clearly harmful.

ISSUE II

THE COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN WITNESS CALVERT TESTIFIED THAT HE HAD OVERHEARD THE DEFENDANT'S SISTER, MILDRED BEAUDOIN, STATE THAT "ERNEST HAD KILLED ANOTHER KILLED A BABY I RECKON."

Mildred Beaudoin's neighbor, Douglas Calvert, had suggested that the sheriff's office search for the missing baby in the area of the abandoned trailer. During the search Sheriff Jamie Adams advised Calvert that the baby was dead, but that Calvert was not to tell anybody. (R. 643). After returning to his adjacent yard, Calvert saw Mildred Beaudoin, who was approximately 75 yards away, collapse. (R. 644-645). Calvert believed that Beaudoin fell as soon as an ambulance passed. (R. 651). The ambulance's siren was silent. (R. 646).

Calvert immediately assisted Beaudoin when she fell, and accompanied her into her house. (R. 645). Upon entering the house Beaudoin made a telephone call, apparently to her sister, wherein she allegedly said that "Ernie has done it again, he has killed a baby," or "Ernie has killed a baby, I reckon." (R. 640; 642; 655; 1372). At the time of trial Calvert was uncertain as to whether Beaudoin had said it was "a baby" or "another baby." (R. 1369).

During its case in chief the prosecutor asked Calvert to repeat what Beaudoin had said on the telephone. The Defendant objected and vigourously argued that Calvert's answer would be objectionable for the following reasons:

1. It was hearsay.

2. There had been no predicate laid to show that Beaudoin actually knew that her brother had killed a baby or

another baby.

3. That even if admissible, Calvert's answer should be excluded because its probative value was substantially outweighed by the danger of unfair prejudice and other grounds as more particularly described in Section 90.403, Fla. Stat. (1981), (R. 647-648; R. 1369-1370).

The court overruled the objection on the basis that Beaudoin's statement was an excited utterance, an exception to the hearsay rule, under Section 90.803(02), Fla. Stat. (1981). The court did not address the personal knowledge argument, but expressly found that Section 90.403, Fla. Stat. (1981), was inapplicable. (R. 654-655). The court, pursuant to defense request, impliedly confirmed that Calvert was to testify along the lines "that Ernie has killed a baby, I reckon," and not that "Ernie has killed another baby." (R. 655). Although the Defendant's objection to Calvert's proffered testimony was overruled, the prosecutor elected to forego this line of inquiry with Calvert during its case in chief.

The state abandoned the telephone hearsay issue with Calvert during its case in chief, but revived the controversy in its cross-examination of Beaudoin. (See discussion of Issue III). The state continued to press the issue when it called Calvert during its rebuttal. Immediately before recalling Calvert, however, the prosecutor advised the court that he and defense counsel had talked to Calvert, and Calvert was now uncertain of whether Beaudoin had stated that Roman had killed "a baby" or "another baby." The prosecutor thereupon advised the court as

follows:

> We have stipulated and agreed, to avoid the possibility of a mistrial, or to avoid the enhancement of a mistrial, we have stipulated and agreed that, and we have instructed the witness, that he is to testify the way he did in the proffer, without saying "another baby" unless it is something brought up on cross-examination or somehow gotten into." (R. 1369).

The Defendant renewed his objection that Calvert's statement was hearsay, was made by Beaudoin when she lacked personal knowledge and that its probative value was far outweighed by its inflammatory nature. (R. 1370). Apart from this objection, however, the Defendant agreed that Calvert was not to use the word "another." (R. 1369-1370). Thereafter the prosecutor asked Calvert the following:

> Q. Did you have occasion to overhear what, if anything, Mildred Beaudoin said in that telephone conversation?
>
> A. Yes. She said that "Ernest has killed ano(ther) killed a baby I reckon". (R. 1372).

The Defendant moved for a mistrial on the aforementioned grounds, and in addition, moved for a mistrial on the grounds that Calvert had said that Ernie killed <u>another</u> baby. (R. 1374). Defense counsel Harrison advised the Court that he "clearly heard him say the word another." The prosecutor argued that the witness never got the word out. The court reporter's notes spelled out the first three letters of the word another. The Defendant requested that the court reporter replay her audio tape, and upon listening to it, moved that the tape be preserved or that a duplicate of it be preserved. The court granted the Defendant's request to preserve the tape, but denied the Motion

for Mistrial. (R. 1376). The tape has been made a part of the record. (R. 2641).

The court's admission of Beaudoin's alleged telephone statement constitutes reversible error. At best Beaudoin's statement, even without using "another," purports to suggest that she had personal knowledge that Roman killed the baby. But there is no evidence from which it could be inferred that Beaudoin knew who had killed the baby. She testified that she had not spoken to Roman subsequent to the discovery that the baby was missing. (R. 1160-1161). The prosecutor attempted to infer that Roman had confessed to Beaudoin because Roman, in his so-called confession, stated that he spoke to Beaudoin after the murder.[1] Assuming arguendo that Roman did speak to Beaudoin that morning, however, it is entirely impermissible for the state to impute a confession by Roman to Beaudoin merely because they had spoken. There is no credible evidence in the record from which it can be reasonably inferred that Beaudoin knew that Roman killed the baby. Her telephone utterance was simply a statement of opinion.

Our legal system of proof is exacting in its insistence upon the most reliable sources of information. One of the essential ingredients of producing accurate trial testimony is to require, subject to some very limited exceptions, that the witness have actual knowledge of the subject of his testimony.

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[1]It is somewhat amusing that the prosecution relied on the truthfulness of Roman's statement when the prosecution spent a substantial part of the trial attempting to prove that Roman's statement was a lie.

Even if it is assumed that Beaudoin's telephone utterance constituted a spontaneous statement admissible as an exception to the hearsay rule, it must appear that the person who made the statement had firsthand knowledge of the event which the statement explains or describes. The statement must be the spontaneous result of an occurence operating upon the perceptive senses of the speaker, rather than the result of influence or surmise. Watson v. State, 387 P.2d 289 (Alas. 1963).

The rule of first-hand knowledge is designed to insure that the hearsay statement is reliable. A hearsay statement of a speaker without knowledge does not become more reliable simply because it arose in the context of an excited utterance. For example, assume that the alleged telephone conversation never occurred. If the prosecutor had asked Beaudoin her personal opinion as to whether Roman had killed the baby, that question would clearly be objectionable unless the prosecutor could prove that Beaudoin had personal knowledge of the facts underlying her response. If Beaudoin's in-court opinion testimony were objectionable because of its lack of trustworthiness, the hearsay statement does not become more reliable and thus admissible simply because it was made while she was excited. If this kind of evidence is excluded when elicited from a witness on the stand, it should also be rejected when offered in the form of an out-of-court statement.

In Jacobs v. State, 380 So.2d 1093 (Fla. 4th DCA 1980), the defendant stabbed the victim to death subsequent to an altercation on a congested highway. Upon cross-examination of a

defense witness, the trial court permitted the state to elicit, as part of the res gestae, a statement made to her by the defendant's sister. The witness testified that the defendant's sister told her, "I'm sorry, I know its my brother's fault." This statement was allegedly made while the two girls were following the ambulance to the hospital in another vehicle. The appellate court reversed the murder conviction because it found that, among other things, the record did not reflect whether the declarant witnessed the altercation, and thus, the statement was inadmissible.

In Watson, supra, the defendant was convicted of the second degree shotgun murder of a family friend. A police officer testified that upon advising the defendant's wife of the killing that she exclaimed, "Oh, no", and turned to her husband and said, "it's your temper, your temper has done it again." Another police officer also testified to essentially the same statement. The Supreme Court reversed because it found that the State had not proved that the defendant's wife had previous knowledge of what had occurred. Since evidence was lacking from which the essential element of perception could be inferred, the wife's excited utterance was inadmissible and highly prejudicial.

In Montesi v. State, 417 S.W.2d 554 (Tenn. 1967), the defendant was convicted of voluntary manslaughter of his wife. During the struggle between the defendant and the victim the defendant's daughter was speaking to her boyfriend on the upstairs telephone. The prosecution elicited testimony which suggested that the daughter had called the boyfriend to request that he come after her because she believed that her parents were

fighting. The Supreme Court reversed the conviction because the testimony was at best a statement of the daughter's opinion or a conclusion which had been reached based upon things that the daughter had not witnessed.

Beaudoin's hearsay statement, even if an excited utterance, was clearly inadmissible because it was merely an opinion. The state failed to lay any predicate indicating that Beaudoin had first-hand knowledge of the killing. Even if Beaudoin's opinion testimony was somehow relevant, it should have been excluded pursuant to the provisions of Section 90.403, Fla. Stat. (1981), which provides as follows:

> EXCLUSION ON GROUNDS OF PREJUDICE OR CONFUSION. - Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

The prosecution's use of Calvert to present Beaudoin's hearsay statement to the jury was highly improper, but the error became even more glaring and prejudicial when Calvert used the word "another" as though Roman had killed a baby prior to the killing of the victim in this case. The Defendant does not suggest that the prosecutor played any part in Calvert's use of the word "another," but the Defendant was damaged nonetheless. Indeed, the prosecutor wisely recognized that any reference by Calvert to Roman's killing of another baby would constitute grounds for a mistrial. (R. 1316). It is almost impossible to imagine the injection of a more prejudicial issue in any trial, especially where there is absolutely no evidence that Roman had

killed another baby.

The court overruled the mistrial motion on the grounds that it believed that the jury would have construed Calvert's use of the word "another" to be a natural stammer. Appellant's counsel have listened to the tape of Calvert's testimony, and respectively submit that Calvert's use of the word "another", as opposed to "ano" or some other stammer, is clearly audible on the tape. The tape itself is included in the record on appeal and it provides the best evidence of what the jury actually heard.

If only a single member of the jury believed that Roman may have killed another, Roman could not possibly have received a fair trial. This negative testimony would not only have inflamed the jury against Roman during the guilt phase of the trial, but would have become even more prominent during the penalty phase deliberations. For example, during their deliberations, the court received the following question from the jury.

> Is it possible for the jury to vote guilty in the first degree as charged and have the penalty so that he remains in prison for life without parole? (R. 1512).

Although the jury posed this question during the guilt phase, their question more appropriately addresses a penalty phase issue. One can only speculate as whether the jurors' question emanated from their fear that Roman had already killed another. Regardless of the answer, the testimony in question was so harmful that it warrants reversal of Roman's conviction.

ISSUE III

THE COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR ASKED A LEADING QUESTION OF THE DEFENDANT'S SISTER, MILDRED BEAUDOIN, WHICH DIRECTLY INFERRED THAT ROMAN HAD CONFESSED TO HER WHERE THERE WAS NO EVIDENCE TENDING TO PROVE THIS PHANTOM CONFESSION; THE COURT COMPOUNDED ITS ERROR BY ALLOWING THE PROSECUTOR TO CROSS-EXAMINE BEAUDOIN REGARDING HER OUT OF COURT STATEMENT OF OPINION THAT "ERNIE HAS KILLED A BABY, I RECKON."

The Defendant called Beaudoin as his first witness. On cross-examination the prosecutor asked:

> Q. "Isn't it a fact that you talked to your brother, the morning before he was arrested, and he told you what happened?"
>
> A. "No, sir." (R. 1160-1161).

The Defendant immediately moved for a mistrial upon the grounds that the prosecutor had no factual basis for suggesting an alleged confession by Roman to his sister. The prosecutor argued that the question was a fair comment on the evidence because the Defendant had stated in his confession that he had talked to Beaudoin that morning, and because Calvert had later overheard Beaudoin's telephone utterance about Ernie killing a baby. Beaudoin, in addition to denying the alleged confession, also denied that she had spoken to Roman that morning. The court nevertheless denied the mistrial motion. (R. 1161; 1165).

Thereafter, over defense objection, the prosecutor asked Beaudoin what she had said on the telephone after seeing the ambulance. When Beaudoin answered that she did not know, the prosecutor asked:

> Q. Would it refresh your recollection if I reminded you that you said, 'Ernie has

killed a baby, I reckon'."

A. I do not remember what I said on the phone. I was too upset, too hysterical -- wouldn't you be?

As noted above and in the discussion of Issue II, there is absolutely no evidence tending to indicate that Roman had confessed to Beaudoin. The prosecutor's highly improper intimation of a nonexistent confession was so prejudicial as to deny the Defendant a fair trial. This Court has recently reversed a first degree murder conviction because this prosecutor predicated part of his closing argument on an issue for which no evidence had been introduced during the trial. Huff v. State, ____ So.2d ____, 8 FLW 325 (Fla. 1983). Conceptually, the prosecutor has committed the same reversible error by stating that a confession had been made when there were no facts in evidence to justify this conclusion. When Beaudoin denied the alleged confession, the jury probably thought that she was lying, as the prosecutor would not have fabricated a confession that did not exist.

The prosecutor attempted to cover his misstatement by suggesting that the phantom confession must have occurred because of Beaudoin's alleged telephone utterance. The prosecutor's use of the telephone statement to cross-examine Beaudoin was improper for the same reasons that it was improper to elicit this testimony from Calvert. (See discussion of Issue II).

The court should have granted the Defendant's Motion for Mistrial when the prosecutor improperly suggested a phantom confession. The court confused the jury further when it allowed the prosecutor to cross-examine Beaudoin regarding her opinion as

to the Defendant's guilt. The unfair prejudice and confusion caused by these two errors was further exaggerated when Calvert later testified that he heard Beaudoin say that Roman had killed another baby.

ISSUE IV

THE COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR ASKED A DEPUTY SHERIFF A LEADING QUESTION THAT EXPRESSLY INFERRED THAT THE DEFENDANT HAD PRIOR CRIMINAL RECORDS.

The prosecutor called Deputy Sheriff Galvin to establish, over defense objection, that the real evidence pointed only to the Defendant's guilt. (R. 877-878). After eliciting this testimony the prosecutor asked the following:

> Q. In the course of the investigation, once you focused upon the Defendant, Ernest Roman, as the person who had committed these crimes, did you have occasion to look at his records in the Sumter County Sheriff's Department?
>
> A. Yes, I did.

The Defendant immediately moved for a mistrial upon the grounds that the question implied at the very least that Roman had a prior criminal record. The trial court sustained the objection to the question, but denied the Motion for Mistrial. The Defendant requested a curative instruction but withdrew that request when the court suggested that the instruction "is going to imprint it on their minds more." (R. 878-879).

The prosecutor defended his question by suggesting that it does not indicate any specific or any prior criminal record. According to the prosecutor, it was his intention to ask in his next question, "did you see a pattern in his records of the Sumter County Sheriff's Department every time he ran into the law that he claimed sick and wants the protection by hiding behind this claim of needing help for his mental illness?" The Defendant

submits that the prosecutor's real motive was to focus the jury's attention upon the Defendant's prior criminal history in order to attack the Defendant's character by suggesting a propensity to commit crime.

Although the sheriff's answer to the improper question did not specifically detail the Defendant's criminal record, the question and answer clearly brought home to the jury the fact that Roman had criminal records at the Sumter County Sheriff's Department. The question was not material to the issues being tried and served only to establish criminal propensity. The reference to Roman's criminal records does not fit into any of the allowable exceptions to the general rule excluding reference to criminal propensity. The Defendant's credibility had not been placed at issue as he had not taken the stand. The evidence of the Defendant's criminal record does not fit within any of the recognized Williams rule exceptions, Williams v. State, 110 So.2d 654 (Fla. 1959), and even if it did, the prosecution failed to give the required ten (10) day notice of its intent to offer other bad acts or offenses of the Defendant as required by Section 90.404(2), Fla. Stat., (1981).

Lastly, the evidence of unrelated criminal activity was not otherwise relevant to an issue of material fact. Even when the evidence of separate criminal activity has relevance, that evidence should be excluded if its probative value is outweighed by the prejudice that would be caused by proof of this act as provided by Section 90.403, Fla. Stat.,(1981).

In Harris v. State, 427 So.2d 234 (Fla. 1st DCA 1983), the court reversed the conviction because a police detective

testified that the Defendant had a "prior felony past." The court held that the testimony was utterly inadmissible in evidence as its sole relevance was to attack the Defendant's character or to show the propensity of the Defendant to commit crime. In addition, the court held that inadmissible Williams rule testimony has generally been considered classic grounds for a mistrial given its usual devastating impact upon the jury.

During voir dire examination of prospective jurors in Wilding v. State, 427 So.2d 1069 (Fla. 2d DCA 1983), one juror stated that he had some knowledge of previous charges against the defendant. The appellate court held that the trial court's failure to grant the defendant's Motion for Mistrial resulted in the defendant being tried by a jury which had improperly obtained knowledge of other charges against him. The prosecutor's pointed questioning in the instant case is arguably more damaging than the disclosure in Wilding because the Wilding jury was merely informed that the defendant had other pending criminal charges against him. The prosecutor and Deputy Galvin combined to emphasize that Roman had prior criminal records, which could reasonably be construed as convictions, in Sumter County alone.

In Straight v. State, 397 So.2d 903 (Fla. 1981), the prosecutor asked a question that was calculated to elicit irrelevant testimony suggesting unrelated criminal activity by the defendant. This Court, in holding that the question was highly improper, stated that it is generally harmful error "to admit evidence of other or collateral crimes independent of and

unconnected with the crime for which the Defendant is on trial." Id. at 909, quoting Nichels v. State, 106 So. 479, 488 (Fla. 1925). The Nichels court adopted a presumption of harmfulness because "evidence of other crimes will frequently prompt a more ready belief by the jury that the Defendant may have committed the crime with which he is on trial, thereby predisposing the mind of the juror to believe the prisoner guilty." Although the Straight court affirmed the Defendant's conviction because of the overwhelming evidence against him, the court clearly approved the presumption of harmfulness when unrelated criminal activity is improperly admitted.

Defense counsel, pursuant to the trial court's experienced advice, abandoned its request for a curative instruction because the instruction would have highlighted the improper evidence. Even if a curative instruction had been given, it would not have cured the prejudicial impact of such evidence because of the inherently pernicious nature of the evidence. See Harris v. State, supra, at 235.

The prosecutor's highly improper question was purposefully engineered to inflame the prejudices of the jury. The extreme damage caused by the question and answer were compounded when witness Calvert testified that he heard Beaudoin state that Ernie had killed another baby. This could only have led the jury to believe that Roman had a prior criminal record involving murder. The prejudice caused by this highly improper (and untrue) inference cannot be overlooked. The trial court's refusal to grant the mistrial motion constituted reversible error.

ISSUE V

THE COURT COMMITTED FUNDAMENTAL ERROR WHEN IT FAILED TO INSTRUCT THE JURY THAT THE STATE HAD THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS LEGALLY SANE AT THE TIME OF THE COMMISSION OF THE ALLEGED OFFENSE.

Florida follows the general rule that every man is presumed sane. The presumption is, of course, not a conclusive one, and disappears as soon as a reasonable doubt of sanity is raised by evidence coming from any source. Judicially, this has been phrased in terms that the presumption of sanity "vanishes when there is testimony of insanity sufficient to present a reasonable doubt as to the sanity of the Defendant and he is entitled to acquittal if the State does not overcome the reasonable doubt." Holmes v. State, 374 So.2d 944 (Fla. 1979); Parkin v. State, 238 So.2d 817 (Fla. 1970); Farrell v. State, 101 So.2d 130 (Fla. 1958); Sirianni v. State, 411 So.2d 198 (Fla. 5th DCA 1981); Johnson v. State, 408 So.2d 813 (Fla. 3d DCA 1982).

Florida follows the vast majority of jurisdictions that follow the view that once the presumption of sanity has been rebutted, the burden of persuading the trier of facts falls upon the state, and it must then prove insanity beyond a reasonable doubt as it must do in proving all elements of the crime. Holmes v. State; Parkin v. State; Johnson v. State, supra.

The legal doctrine that requires the state to prove sanity beyond a reasonable doubt stems from the concept of mens rea. Since mens rea, the mental element of the crime, cannot exist without a mind capable of entertaining it, a reasonable doubt respecting the sanity of the Defendant is the equivalent of a reasonable

doubt as to the Defendant's guilt. See Armstrong v. State, 9 So. 1 (Fla. 1891).

The following insanity instruction, which was given to the Roman jury, does not require the state to prove Roman's sanity beyond a reasonable doubt:

> "An issue in this case is whether the Defendant was legally insane when the crime allegedly was committed. You must assume he was sane unless the evidence causes you to have a reasonable doubt about his sanity.
>
> If the Defendant was legally insane, he is not guilty. To find him legally insane, these three elements must be shown to the point you have a reasonable doubt about his sanity. . . .
> [The elements are then enumerated.] (R. 2457).

The instruction is taken almost verbatim from Section 3.04(b), Insanity, of the Florida Standard Jury Instructions for Criminal Cases. The first paragraph of the instruction, which is consistent with Florida case law, requires the Defendant to submit evidence demonstrating a reasonable doubt about his sanity in order to overcome the vanishing presumption. Roman submits that he adduced sufficient evidence at trial, as more particularly detailed in the Statement of Facts, to raise a reasonable doubt about his insanity.

Once Roman introduced evidence causing the jury to have a reasonable doubt about his sanity, the state was required to prove beyond a reasonable doubt that he was legally sane at the time of the commission of the alleged offense. However, the second paragraph of the instruction -- the only paragraph that even remotely addresses the subject of the burden of proof -- is

defective because it does not squarely place the burden of proof on the state as is required. For example, assume that the jury believed that the Defendant had presented sufficient evidence to cause a reasonable doubt about his sanity, a presumption consistent with the evidence, thus causing the presumption of sanity to vanish. Assume further that the state presented evidence that caused the jury to believe, by a preponderance of the evidence, that the Defendant was sane. A juror listening to the second paragraph of the instruction could reasonably conclude that the Defendant had not proved the three essential elements of the insanity defense because the state had overcome that proof by a preponderance of the evidence. At best paragraph 2 of the instruction is ambiguous. At worst the paragraph can be construed to lessen the state's burden of proof, or to even shift it to the Defendant.

In Velsmid v. Nelson, 397 A.2d 113 (Conn. 1978), the jury was given the following insanity instruction:

> In a matter of a claim of insanity, we start with the presumption that the defendant. . . is sane. The defendant. . . presented evidence through Dr. Winship tending to show that he was. . . insane. . . . The jury may believe or disbelieve all or any portion of the evidence of Dr. Winship as to insanity. The state has the burden of proving sanity once the presumption of sanity has been overcome, but the state is under no requirement to produce expert testimony as to insanity. The jury is entitled to disbelieve the opinion of the Defendant's expert as to insanity, and, if it does so, the jury could disregard the defense of insanity.

Defendant submits that the Velsmid insanity instruction is substantially more precise in delineating the proper burden of

proof than is the instruction given in Roman. Nevertheless, the Connecticut Supreme Court said:

> Here, the trial court's instruction regarding the insanity defense of John Roshier referred to the presumption of sanity in an ambiguous and confusing fashion and did not make it clear that the burden had shifted to the State to prove John sane beyond a reasonable doubt. The charge was ambiguous on a crucial point and was not sufficient to guide the jury in reaching their verdict. Such a defect in the charge constitutes reversible error. Id.

In Blocker v. State, 99 So. 250 (Fla. 1924), the trial court gave the jury several lengthy paragraphs of insanity instructions, including a requested defense instruction, that caused confusion as to the burden of proof. In reversing the defendant's first degree murder conviction, the Supreme Court found that the conflicting instructions confused and misled the jury to the prejudice of the defendant.

The insanity instruction given herein does not place the burden of proof upon the state, but rather, allows a jury to reasonably conclude that the state may overcome the reasonable doubt by a preponderance of the evidence, thus compromising one of the accused's most sacred rights. The trial court's failure to instruct as to the burden of proof, notwithstanding the failure of the Defendant to specifically object, constitutes fundamental error. United States v. Jackson, 587 F.2d 852 (6th Cir. 1978).

ISSUE VI

THE LOWER COURT ERRED BY DENYING THE DEFENDANT'S REQUESTED MITIGATING CIRCUMSTANCE INSTRUCTION DURING THE PENALTY PHASE AND FURTHER ERRED BY SENTENCING THE DEFENDANT TO DEATH.

At the conclusion of the penalty phase of the trial, Roman requested that the trial court instruct the jury as to two, specific statutory mitigating circumstances. (R. 1578).[1] The Defendant requested instructions on those circumstances set forth in Sections 921.141(6)(b) and (f), to-wit:

> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> . . . .
>
> (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

The assistant state attorney objected to the instruction requested pursuant to Section 921.141(6)(b), asserting that no proof had been offered as to that circumstance. (R. 1578-1579). Over the Defendant's objection, the trial judge denied the Defendant's requested instruction, stating in relevant part:

> I think that the influence of extreme mental or emotional disturbance--I think that goes to a different type of situation than was presented here. I don't think it covers what you are wanting. (R. 1580).

---

[1]Roman also requested, and was granted, the mitigating instruction set forth in paragraph 8 of the Florida Standard Jury Instructions in Criminal Cases, 1981 Edition, under Section 921.141(6).

Following deliberation, the jury recommended imposition of the death penalty by a majority vote of ten to two. (R. 1614; 2478). That same jury, during deliberations in the guilt phase, had inquired about the possibility of finding Roman guilty of first-degree murder and having him sentenced to life in prison without parole. (R. 1512). The trial court accepted the advisory sentence and, on March 18, 1983, sentenced Roman to death. (R. 2500).

The court's Penalty Proceeding Findings of Fact found that the state had proven three aggravating circumstances beyond a reasonable doubt, to-wit:

> (b) The defendant was previously convicted of another capital felony or felony involving the use of threat of violence to the person.
>
> (d) The capital felony was committed while the defendant was engaged ... in the commission of ... rape (sexual battery) ... kidnapping ...
>
> (h) The capital felony was especially heinous (wicked, evil) atrocious, or cruel. (R. 2492-2493).

The court found that Roman had proven the mitigating circumstance set forth in 921.141(6)(f). (R. 2493). It found no proof of any other mitigating factors. (R. 2493).

In its factual discussion, the trial court noted Roman's "numerous short term hospitalizations for detoxification," and the fact that he was an "alcoholic." (R. 2498). The court failed to mention Roman's four or five confinements at the state mental hospital in Chattahoochee beginning as early as 1958. (R. 1554). The judge did mention, however, that he had found Roman incompetent to stand trial in

the instant case and that Roman had remained so for over one year. (R. 2498). The trial court also cited several lay witnesses who testified in the guilt phase that at the time of the offenses:

> "... the Defendant was sober, knowing the difference between right and wrong." (R. 2498).

Roman submits that the trial court erred by denying his requested instruction on the mitigating circumstance of "extreme mental disturbance," pursuant to Section 921.141(6)(b). In addition, the record suggests that the trial court employed the improper standard in weighing the evidence of mitigating and aggravating circumstances. Accordingly, imposition of the death penalty was erroneous.

In addition to the psychological testimony introduced by both sides during the guilt phase (see Statement of Facts, supra), the court and jury during sentencing considered the testimony of psychiatrists Langee (R. 1531) and Barnard. (R. 1552). Dr. Langee traced Roman's long history of mental illness, alcoholism and psychiatric hospitalizations dating back to 1959. (R. 1534). In 1968, Roman was declared incompetent and diagnosed as suffering from schizophrenia, paranoid type. (R. 1534). He also testified that Roman was in the borderline range of mental retardation and suffered from memory impairment. (R. 1535). Dr. Barnard testified that Roman had been hospitalized at the State Mental Hospital in Chattahoochee for four or five times, and that he had been hospitalized for alcohol detoxification ten to fifteen times. (R. 1554). There was also evidence that Roman had for a long time been treated with

psychotropic medications. (R. 1535; 1555).

This court has had a number of occasions to consider the applicability of the mitigating circumstances in Sections 921.141(6)(b) and (f) in death penalty cases. The court has recognized in those cases the close interrelation between "extreme mental disturbance" and "impaired capacity to the criminality of one's conduct." It has also been careful to note that proof of these mitigating factors is not tantamount to a finding of not guilty by reason of insanity.

As early as 1976, the Florida Supreme Court recognized that although a Defendant might properly be found guilty of murder where insanity was the defense, it was still necessary for the trial court to consider all psychological factors during sentencing. In Jones v. State, 332 So.2d 615 (Fla. 1976), the court found that the evidence was sufficient to convict under the M'Naghton Rule, despite Jones' claim of insanity. In regard to sentencing, however, the court noted that Jones suffered from paranoid psychosis, and it stated that his emotional condition should have been considered. The court remanded the case for imposition of a mandatory life sentence.

Interestingly, the state in Jones relied on the same three aggravating circumstances that the trial judge found were proven against Roman in the instant case. Id. at 617. Also similar to Roman, Jones introduced in the way of mitigation evidence that he was suffering from "a chronic paranoid schizophrenic illness associated with alcohol addition." Id.

In Kampff v. State, 371 So.2d 1007 (Fla. 1979), the

Defendant was convicted of the first degree murder of his ex-wife. There was testimony that Kampff was suffering from an obsession, and that he had an extreme and chronic problem with alcoholism. The trial court imposed the death penalty finding that no mitigating factors existed.

The Florida Supreme Court reversed the death penalty and remanded the case for imposition of a mandatory life sentence. Speaking to the issue of the mental condition of the Defendant for purposes of sentencing, the court ruled:

> On review of the record we conclude that there was evidence which could and should have been considered, tending to establish the following two mitigating circumstances:
>
> (a) The defendant has no significant history of prior criminal activity.
> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Id. at 1010. (citations omitted).

Certainly if the mitigating circumstance of "extreme mental disturbance" "could have and should have been considered" in Kampff, the judge and jury in Roman's case should have also been specifically instructed to consider it.

Mines v. State, 390 So.2d 332 (Fla. 1980) is perhaps the leading case on this issue. It involved a factual situation quite similar to the case at bar. Mines was arrested for first degree murder and was indicted for that offense on December 2, 1975. On April 30, 1976, he was found incompetent to stand trial and committed to the state hospital. Psychiatrists diagnosed Mines as being schizophrenic, chronic paranoid type. He was subsequently found competent to stand trial in December of 1976.

At trial, Mines raised insanity at the time of the offense as a defense. He was found guilty as charged and the Supreme Court upheld that conviction. The court, however, reversed the death penalty imposed by the trial court. The Supreme Court noted the long standing mental illness of the Defendant -- a condition severe enough to initially cause the trial judge to find Mines incompetent to stand trial. Addressing the mitigating circumstances at issue, the court stated:

> Under the provisions of Section 921.141(6), Florida Statutes, (1975), there are two mitigating circumstances relating to a defendant's mental condition which should be considered before the imposition of a death sentence: "(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance"; and "(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." From the record it is clear that the trial court properly concluded that the appellant was sane, and the defense of not guilty by reason of insanity was inappropriate. The finding of sanity, however, does not eliminate consideration of the statutory mitigating factors concerning mental condition. The evidence clearly establishes that appellant had a substantial mental condition at the time of the offense. Id. at 337. (emphasis added).

The court remanded Mines' case to the trial court for resentencing. The court stressed the interplay between Sections 921.141(6)(b) and (f) in its holding:

> The trial court erred in not considering the mitigating circumstances of extreme mental or emotional disturbance under Section 921.141(6)(b) and the substanial impairment of the

> capacity of the defendant to appreciate the criminality of his conduct under Section 921.141(6)(f). These circumstances may not be controlling, but they were present in this cause and should have been considered. Id.

Roman's situation is virtually identical to that in Mines. He had a long history of chronic mental illness and psychiatric hospitilizations. And he was initially declared incompetent to stand trial, requiring his hospitalization for more than one year. Mines teaches that where evidence relevant to a defendant's mental condition is presented, the jury must be instructed and the judge must consider the mitigating circumstances contained in Sections 921.141(6)(b) and (f).

The Supreme Court recently reiterated the Mines rationale in Ferguson v. State, 417 So.2d 631 (Fla. 1982) and Ferguson v. State, 417 So.2d 639 (Fla. 1982). These two decisions involved the same defendant who was tried separately for unrelated murders. At both trials, Ferguson raised insanity at the time of the offense as a defense. In both instances, the trial judge found the Defendant competent to stand trial. And in both instances, Ferguson was found guilty as charged by the jury and sentenced to death. The Supreme Court found that the evidence in each trial was sufficient to support the jury's verdict and determination of sanity.

The court ruled, however, that the trial court had erred during the sentencing phase, and it vacated the death sentence in each case and remanded it for further proceedings. The sentencing phase testimony and the trial court's findings of fact indicated the presence of severe mental problems in

Ferguson. He was diagnosed in the past as suffering from "basic paranoia schizophrenia psychotic process; Ganser syndrome; malingering and a behavior commonly referred to as sociopathic." Ferguson v. State, 417 So.2d 631, 637. He also had been previously committed to the state mental hospital. Id. It is not clear from either opinion how the jury was instructed during the penalty phase as to possible mitigating circumstances. However, in both trials, the lower court rejected the existence of the "mental condition" mitigating factors set forth in Section 921.141(6)(b) and (f). The trial court findings of fact indicated that these were rejected because:

> There is nothing that would indicate that this defendant did not recognize the criminality of his conduct at the time of the commission of the subject offenses. The evidence requires the finding that this defendant was sane at the time of the commission of the instant offense consistent with the standards of the M'Naghton Rule....Id. at 637-638. (emphasis added).

The Supreme Court, in vacating the death penalty, ruled that the trial judge had "misconceived the standard to be applied in assessing" the factors in Sections 921.141(6)(b) and (f). Id. at 638. Although the trial judge discussed Ferguson's ability to "recognize the criminality of his conduct" (Section 921.141(6)(f)), his findings rejected that factor based on his finding that the Defendant was legally sane.

Roman's case is again factually similar to the Ferguson decisions. The judge in Roman was confronted with a trial record replete with evidence of Roman's mental illness. Yet he refused to instruct the jury of the possible mitigating

circumstance contained in Section 921.141(6)(b). And he failed to consider that same factor in his findings of fact.

Moreover, in his discussion of the mitigating factor contained in Section 921.141(6)(f), the trial judge shows the same confusion that bothered the court in Ferguson. Although he considered Roman's ability to "recognize the criminality of his conduct," his findings are mixed with expressions more akin to the M'Naghton Rule. For instance, the trial judge noted and considered the lay testimony of seven state witnesses who testified that at the time of the offenses, Roman:

> "... was sober, knowing the difference between right and wrong." (R. 2498). (emphasis added).

The strong indication from this is that Judge Booth impermissibly mixed the M'Naghton Rule with the standard for consideration of mitigating circumstances. For this reason alone the death sentence should be vacated.

Of perhaps greater concern is the trial court's refusal to instruct the jury during sentencing of the mitigating factor in Section 921.141(6)(b). The magnitude of this error must not be overlooked. Under our statutory scheme in capital cases, the judge and jury must engage in a balancing test to determine whether death is appropriate. It is abundantly clear that the jury should have been instructed as to both Section 921.141(6)(b) and (f) in the case at bar. Ferguson v. State, supra; Mines v. State, supra. By refusing to specifically instruct the jury that they could consider the "extreme mental condition" mitigating factor in Section 921.141(6)(b), the trial judge impermissibly tipped the scales in favor of death. If the jury had been told

that they could find two statutory mitigating factors instead of just one, the recommendation might well have gone the other way. (R. 1512).[2]

In summary, the lower court erred by failing to specifically instruct the jury during the penalty phase about the mitigating factor in Section 921.141(6)(b). The lower court magnified that error when it refused to consider that same factor in its findings of fact. Finally, Roman's death sentence must be vacated since it appears from the record that the trial court likely employed an improper standard in considering and weighing the mitigating factors.

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[2]The lower court's ruling is especially curious in light of Lockett v. Ohio, 438 U.S. 586 (1978). If the jury is allowed to consider any factor in mitigation of death, it would certainly seem they should be able to consider the specific statutory mitigating factors.

CONCLUSION

Based upon all of the foregoing arguments, the appellant respectfully urges this Court to reverse the judgment and sentence of the lower court. If the Court finds that Roman's confession was improperly admitted into evidence, this case should be remanded for a new trial with instructions that the statements be suppressed. Likewise, if this Court finds error on any of Issues II through V, this case should be remanded for a new trial. As to Issue VI, this Court should either vacate the sentence of death and impose a mandatory life sentencing or remand the case to the trial court for a new sentencing proceeding.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail this _____ day of October, 1983, to MARGENE R. ROPER, Assistant Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida, 32014.

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