IN THE SUPREME COURT
STATE OF FLORIDA

TURA YOHN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 65,~~564~~

First District Court of Appeal

CASE NO. AR-500

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BRIEF OF APPELLANT

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## CITATION OF AUTHORITIES

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## PRELIMINARY STATEMENT

Following her conviction on a charge of manslaughter on November 19, 1982, (R 128) MRS. YOHN filed a Notice of Appeal with Florida's First District Court of Appeal. (R 168) That appeal resulted in the opinion by the First District Court of Appeal which certified a question of great public importance to this Court. This Brief is, therefore, submitted by MRS. YOHN in support of her position on that certified question. Throughout this Brief the Petitioner will be referred to as MRS. YOHN, and the Respondent, STATE OF FLORIDA, will be referred to as the STATE. The symbol "R" will be used when referring to the Record on Appeal. If an Appendix is used it will be referred to by use of the symbol "A".

## STATEMENT OF CASE

On December 7, 1981 MRS. YOHN was indicted on two counts charging her with: first degree murder in the death of Angeline Hall; and attempted murder in the first degree in attempting to take the life of her husband, Charlie Yohn. Both of these offenses were alleged to have taken place on November 18, 1981. (R 1-2) On January 4, 1982, MRS. YOHN filed a Written Plea of Not Guilty and pursuant to the applicable rules also filed Notice of her intent to rely upon the defense of insanity. (R 5)

Pursuant to the STATE'S Motion for Statement of Particulars as to the defense of insanity, (R 15) MRS. YOHN filed her statement alleging that at the time of the offense that she was insane and/or mentally deranged so as not to be criminally responsible for the acts with which she was charged. This statement was filed March 16, 1982. (R 16) Almost immediately, the STATE filed a Motion which stated:

> "...the STATE is requesting to be allowed to have a psychiatrist hired by the State of Florida examine the defendant..."

so that the STATE would be in a position to rebut the defense of insanity. (R 83) This Motion was granted by an Order dated March 24, 1982. The Order allowed the STATE to have MRS. YOHN examined by Dr. John Sapoznikoff and made provision for defense counsel to be present. (R 90) The STATE then scheduled two appointments for this purpose; one on April 9 and the other on April 21. (R 91;96)

Trial was scheduled to commence and did in fact commence on April 26, 1982. (r 99) After four days of testimony, (R100-103) the jury retired for deliberations at 4:17 P.M. on April 30. (R 103) At 12:15 A.M. the jury was unable to agree on a verdict and a mistrial was declared on that date, May 1, 1982. (R103) The jury was deadlocked 11-1 in favor of a verdict of finding the defendant not guilty by reason of insanity. (R 120-121)

Trial was rescheduled for June 14, 1981, but because the STATE decided to seek review, unsuccessfully on an Interlocutory Order, both before First District Court of Appeal (A 2) and this Court (A 3) the re-trial did not actually commence until November 15, 1982. (R 123) MRS. YOHN was acquitted of the charges of first degree murder in the death of Angeline Hall, and was also acquitted of the charge of attempting to murder her husband, Charlie Yohn. (R 128) However, she was found guilty of a lesser included offense of manslaughter. (R 128)

During the course of the trials MRS. YOHN requested special jury instructions on the issue of insanity. These instructions have and will be referred to as MRS. YOHN'S Requested Jury Instructions 8, 9, 10 and 11. (R 134-138) These, and all other special jury instructions requested by MRS. YOHN were denied by the Trial Judge (R 129-138). The Trial Judge did give certain so called "Standard Jury Instructions." (R 139-151) One of those jury instructions dealt with the issue of insanity. (R 145)

During the course of the Trial the STATE called its witness, on the issue of insanity, Dr. John Sapoznikoff, who had earlier been appointed to examine MRS. YOHN at the STATE'S request. (R 90) MRS. YOHN had objected to his appointment, and during the Trial objected to Dr. Sapoznikoff being permitted to testify on the issue of insanity, as his appointment was totally void and without legal authority. (R 1069) This objection was also overuled.

Following the second Trial MRS. YOHN was sentenced to an indeterminate sentence of six months to seven years on the charge of manslaughter. (R 166) A Motion for New Trial was denied and the Appeal was instituted to the First District Court of Appeal. (R 168)

In its Opinion filed May 23, 1984 (A 4) the First District Court of Appeal did not address any of the issues raised on Appeal, save the issue of insanity, and specifically the propriety of the Trial Court's refusal to grant MRS. YOHN'S Special Jury Instructions on the issue of insanity. In the Opinion prepared by Judge Shivers, the Appellate Court held that all Special Jury Instructions accurately stated the law (A 5) but held that in view of the "Standard" Instructions, the refusal to give the requested Instructions was not error. (A 6) However, the First District Court of Appeal did certify to this Court a question of great public interest, to-wit: (A 6)

> "If the STATE has the burden to prove beyond a reasonable doubt that a defendant was sane at the time of the offense when the defense of insanity has been raised, is the giving of the

present insanity instruction, as set forth in Standard Jury Instruction 3.04 (B) along with the general reasonable doubt Instructions sufficient, notwithstanding the defendant having specifically requested the Court to instruct the jury that the STATE must prove beyond a reasonable doubt that the defendant was sane at the time of the offense?"

The question before this Court, then, reflected in certified question, will be the subject matter of this Brief.

## POINTS INVOLVED ON APPEAL

IF THE STATE HAS THE BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT A DEFENDANT WAS SANE AT THE TIME OF THE OFFENSE WHEN THE DEFENSE OF INSANITY HAS BEEN RAISED, IS THE GIVING OF THE PRESENT INSANITY INSTRUCTION, AS SET FORTH IN STANDARD JURY INSTRUCTION 3.04 (b), ALONG WITH THE GENERAL REASONABLE DOUBT INSTRUCTION SUFFICIENT, NOTWITHSTANDING THE DEFENDANT HAVING SPECIFICALLY REQUESTED THE COURT TO INSTRUCT THE JURY THAT THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS SANE AT THE TIME OF THE OFFENSE?

TO PERMIT A PSYCHIATRIST, WHO HAS BEEN APPOINTED AT THE STATE'S REQUEST, TO TESTIFY ON THE ISSUE OF INSANITY WHEN HE HAS FAILED TO FILE ANY REPORT, OR FURNISH ANY REPORT TO COUNSEL AND WHERE HE HAS BEEN THE ONLY EXPERT APPOINTED AND THERE HAS NOT BEEN A FULL COMPLIANCE WITH THE PROVISIONS OF RULE 3.216, FLORIDA RULES OF CRIMINAL PROCEDURE, CONSTITUTES ERROR.

## STATEMENT OF FACTS

Because practically every fact involved in this Trial bears upon the issue of MRS. YOHN'S sanity, and therefore the propriety of her requested Special Jury Instructions, we deem it appropriate, and proper to set forth the following, detailed recitation of facts.

MRS. YOHN was born in Panama City, Florida thirty-eight years ago. (R 873) She was raised by very conservative, and very religious, southern parents. (R 66) She met, fell in love with, and married Charlie Yohn, when she was sixteen years old and he was twenty-one. (R 966) They had three children, and at the time of the Trial had been married twenty-one years. (R 873)

Over the years, MRS. YOHN developed certain personality traits, which we all do. According to all the testing and evaluation, her personality traits were those of a compulsive, hysterical type. (R 976) These hysterical traits did not manifest themselves in yelling and screaming, but, by repression. (R 970-971; 1034-1036) When things did not go well, she would repress the true facts, and convince those around her, including herself, that everything was alright. (R 971) These traits were particularly manifest, when it came to private-family problems, which she did not wish to discuss with anyone; she was a super-private person in that respect. (R 824; 1038) She was compulsive, meaning that she knew what was right, and knew the right ways to do things, and was determined that she could, by example of her

right living, cause those around her, particularly her family, to do the "right thing". (R 1042)

She was the type of personality who would put her family first. (R 968) The family became super-important to her and was the driving force in her life. (R 1036) MRS. YOHN led a sterling, very conservative, religious, family oriented life. (R 968) She idolized her husband Charlie, and put him on some sort of pedestal. (R 967) She would believe her husband's statements about his strange behavior, in the face of almost overwhelming evidence to the contrary. (R 971) Like most hysterical personalities, when things did not go well, particularly with her family, MRS. YOHN would repress the truth. (R 1036) When she began to repress the truth, unpleasantness would begin to tear her up, mentally. (R 1037-1038)

Into this scene stepped one Angeline Hall, sometime in August of 1981. Angeline had been divorced and was at the time separated from her current husband. (R 355) Angeline had two daughters, both of whom were minors; Sandy who was seventeen, and Lisa who was fifteen. (R 892-896) Angeline's moral values were drastically different from those of MRS. YOHN. She allowed both of her children to drink. (R394; 427) When she met Charlie Yohn at a tavern called The Silver Saddle, on August 10, 1981, it was she who made a play for him and thereafter referred to that date as her and Charlie's anniversary. (R352-353) On that first meeting, after having made a play for

Charlie, Angeline was not concerned that he was married, and living at home with his wife and three children. (R. 356) In fact, within days she and Charlie are having an affair. It is at her suggestion that her seventeen year old daughter, and Mr. and Mrs. Yohn's son, Charlie, are introduced so that she and Charlie can double-date with them. All four end up spending the night together at a local motel on the evening of that first double-date. (R355; 361) The morning following this "double-date", little Charlie moved in with Angeline and her two daughters and began an affair with the fifteen year old daughter. At least, this youngest daughter is seen in the presence of little Charlie in revealing night clothes, and under circumstances which MRS. YOHN found less than desirable. (R 362; 743; 746; 889; 892; 893) MRS. YOHN, unhappy with this situation, forced her son out of the home of Angeline Hall by visiting that home and confronting her son. (R 363; 891-896) This occurred sometime in August. From that date on MRS. YOHN knows where Angeline Hall lives, but never went to her home and never threatened Mrs. Hall in any manner, (R 369; 902) even when she caught the two of them together. (R 369)

Little Charlie continued to date Lisa as a result of which MRS. YOHN had frequent telephone contact with, and recognized Lisa's voice. (R 896) MRS. YOHN did not approve of the relationship but did not attempt to terminate it, hoping that it would end naturally, which it did. (R 896-900) What MRS. YOHN

did not know was that Charlie, her husband, was at that time having an affair with Lisa's mother. Many of MRS. YOHN'S friends knew of the affair, but no one told her, for fear it would hurt her too deeply, (R 742-763; 764-770; 778; 802). They too hoped that the affair would soon blow over. (R 794; 809-818)

Angeline and her two daughters seemed proud of the adulterous affair. Even casual acquaintances such as Randall Pittman, were told within twenty minutes of meeting the family, of the relationship between Angeline and Charlie. (R 423; 447) Angeline had members of her family call Charlie to have him come out and "play". (R 384) She sought the assistance of other teenagers to pick up her lover and bring him to her trailer. She was brazen enough to come by the Yohn home on Charlie's brithday, October 10, and tempt him out of the home. (R 379)

Charlie was spending two to three nights a week with Angeline, (R 424) and stayed at her place until late at night or early morning. He would tell his wife that he was drinking with the guys, shooting pool, or just passed out in his truck on the side of the road. (R 354; 887; 900; 903-904) MRS. YOHN accepted these explanations. (R 376-377; 902; 907; 970-971) When she saw Angeline and Charlie together in the family truck on September 15, Charlie so convinced his wife that there was nothing going on between he and Angeline, that she felt like a heel for unjustly accusing Charlie. (R 890) Even after this,

when Charlie was usually late, MRS. YOHN did not think to look at Angeline's home for Charlie. As late as October 30, when MRS. YOHN was out looking for Charlie at 5:00 A. M. and asked the police to help with that search, (R 903-904) she did not think to go to Angeline's trailer. (R 902) Charlie became so adept at convincing MRS. YOHN, that he could leave her tearful embrace, call her crazy, and go to the bed of the very woman who was causing those tears. (R 360; 361; 385; 390)

The mental turmoil was caused not only by Charlie's continued absence, but was aggravated by the continued harassment of MRS. YOHN by Angeline and her daughters. (R 1042) Although MRS. YOHN did not know the source of this aggravation she began to receive harassing telephone calls, usually by unidentified female voices, who would say such things as "do you know where your husband is tonight" and hang up, or laugh, or simply say nothing. (R 715-716; 723-724; 919-921) She would get these phone calls at home and at her job, (R 921) and would get several phone calls each day, but not every day. (R 921) Many of MRS. YOHN'S friends were present when she would receive these harassing phone calls. (R 751-752; 786; 795; 807; 823) Charlie, who knew who was making the phone calls, to his credit, even asked Angeline and her daughters to stop, because the phone calls were effecting MRS. YOHN'S mental condition. (R 382-384) However, the frequency of the phone calls increased as time went on, and were more and more frequent by November 18, 1981. (R 925) Teenage girls, probably Lisa and Sandy, were seen

driving their car through the Yohn yard, yelling such things as "my mother goes with your daddy". (R 367; 775-777; 906-907) Charlie would convince his wife that all of this amounted to nothing more than kid pranks. (R 907)

The mental pressure was becomming more and more severe for MRS. YOHN. She began to take more and more time away from her job. (R 832; 835-839) She had fainting spells, both at home and at work. An official record was made of one of these fainting spells on the job, October 29, 1981. (R 830; 852) MRS. YOHN would faint four or five times in one evening, but refused medical attention. (R 749-750; 761-763)

MRS. YOHN made four distinct suicide attempts in a sixty day period. In September she walked in to the Gulf, as if to drown herself and was talked out of this effort by Charlie. (R 371-373; 914-915) On September 25, she took an overdose of sleeping pills and left a suicide note as a result of which she had to be taken to the hospital to have her stomach pumped. (R 373-375; 916-918) A few days later, embarrassed over the suicide note and the fact that Charlie was showing it to friends, MRS. YOHN held a loaded and cocked pistol to her throat until Charlie gave her the suicide note, so that she could destroy it. (R 377-378) On November 14, just four days prior to the death of Angeline Hall, MRS. YOHN was home alone, sitting in the middle of her bed, with a loaded pistol, when her husband came home unexpectedly and talked her out of shooting herself. (R 389; 926) On this occasion, little Charlie came home also, and big Charlie left his wife in the care of their son, so that

he could go and see Angeline. (R 390) Little Charlie had to handcuff his mother to a chair and force a sleeping pill down her throat, because she was so distraught. (R 928-929) During the sixty to ninety days leading up to November 18, 1981, MRS. YOHN'S friends, neighbors and relatives noticed certain changes in her personality. Absenteeism at work increased rather dramatically over the same period in 1980. (R 827-832; 835-839) She was observed crying almost daily; (R823; 851) with dark circles under her eyes (R 846); and was noted to have lost a tremendous amount of weight. (R 851-852) MRS. YOHN fell apart before the eyes of her friends. (R 795) She seemed unsure of herself, repeated herself and was nervous and prone to drop things. (R 753; 779; 785) She became unavailable to her favorite sister, (R 856) and would at times just sit and stare. (R 823) Three of MRS. YOHN'S closest friends observed that she was nearing a nervous breakdown, (R 824; 812; 819) and at least one warned Charlie that he should cool his relationship with Angeline, because MRS. YOHN was nearing a nervous breakdown. (R 822) But Charlie ignored the warnings - and the pressure on MRS. YOHN continued to mount.

MRS. YOHN tried divorce. The day after she saw Charlie and Angeline together, September 15, she saw her uncle, Bill Harris, a Panama City attorney about divorce. But, she really didn't want a divorce; she wanted Mr. Harris's help in keeping her marriage together. (R 732; 912) On November 13, five days before the fatal incident, she did in fact have Charlie served with the

divorce papers. (R 732) But, Charlie convinced her again that everything would be alright and she called Mr. Harris and cancelled these divorce proceedings. (R 387-388; 733; 867) On November 17, Charlie told MRS. YOHN he was going away for a few days to think things over, but that he would be back home within a few days and everything would be just fine. (R 394; 929-930) Unknown to MRS. YOHN, the reason for Charlie's leaving was that his lover had planned a dinner and party at a local lounge to celebrate her divorce, which was entered on November 17. (R 392)

MRS. YOHN was ecstatic. She called her lawyer and cancelled the divorce. (R 733;868;930) She called her sister and arranged for a new permanent, because Charlie was coming home. (R 856-858) She cleaned and repaired the house, (R 857; 869) she called her favorite niece who had counselled divorce, and reported happily that everything was going to be OK; Charlie was coming home. This last phone conversation occurred about 4:45 P.M. on November 18, 1981. (R 869)

Then, according to Dr. Wray (R 978) and Dr. Warner (R 1050), the two defense psychiatrists, MRS. YOHN'S "breaking point" came at about 5:15 P.M., thirty minutes later, when a young family acquaintance, Robbie Fuller called. Robbie had seen little Charlie, big Charlie, Angeline and her daughters the night before at a party at the Sea-Shell Lounge. (R 297) He had been told not to say anything about the meeting. (R 301; 393) This was the same evening that Charlie had assured his wife that he was going away to think, but that everything would be alright and he would

be home in a day or so. (R 391) Robbie Fuller was evasive to MRS. YOHN'S questions about whether he had seen big Charlie and who big Charlie was with. (R 304-306) Robbie, assuredly, but inadvertently, caused MRS. YOHN to understand that Charlie had been with Angeline again. (R 932-934) From that point on, TURA had only a patchy recollection of the rest of the events of the evening of November 18. All the psychiatrists, including the STATE'S expert, agreed that MRS. YOHN'S loss of memory was genuine; that she was not lying about it. (R 985-986; 1045-1046; 1056; 1100) Dr. Sapoznikoff testified that her loss of memory was not due to a mental defect or illness. (R 1100) But, Dr. Wray and Dr. Warner testified that the loss of memory was either due to psychogenic amnesia (R 985-986; 990), or a disassociative state (R 1051), both of which are recognized mental disorders. But, everyone agreed that MRS. YOHN did not remember anything more than "patches" or "selected incidences" for the next day or so. (R 1125) MRS. YOHN formed no thought to kill or harm either Charlie or Angeline; her only thought was to go to the trailer, take her own life, so that they could see her bleed all over their carpet. (R 1047; 1066; 1120) MRS. YOHN had no recollection of driving from her home to Angeline's trailer (R 936), a distance of over four miles. (R 322) She had no recollection of taking a gun into her possession. (R 934-939) She did remember seeing the family truck but did not know where that occurred. (R 935) She had no recollection of knocking on the trailer door, nor of Angeline coming to the door in her bathrobe. (R 936) She had no recollection of the gun

going off, or of the struggle at the trailer. (R 937)

In fact, there was a fierce struggle at the trailer between she and Charlie, and law enforcement people, to the extent that it took three men to load her in the sheriff's car and handcuff her. (R 525) She was able to free herself from the handcuffs at least temporarily. (R 525) During this struggle she was heard to scream and curse and make certain conflicting statements: that she was glad she shot the bitch; (R 495) and that if they would turn her loose she wanted to shoot the whore, as if she had no knowledge that Angeline had been shot. (R 448-450) In fact, Angeline had opened the door at which time a shot rang out and Angeline turned and ran, (R 327-332) and subsequently died of a single gunshot wound which had pierced her heart. (R 460)

MRS. YOHN'S first clear recollection, and everyone agrees that she can't remember and that she was not faking her loss of memory, (R 1056; 1100) was a vague memory of the next morning as she was walking from the jail to the courthouse with Investigator Vecker, for her first appearance. (R 954)

Everyone else associated with the events of November 18, did recall clearly how MRS. YOHN acted, and some of the things that she said. Most of these observations were made by trained law enforcement personnel. MRS. YOHN was very upset and asked to be allowed to run so they could shoot her. (R 651) She seemed unaware that anyone had been shot (R 654; 714; 726-728); and seemed more concerned about Charlie's whereabouts than she was her own welfare. (R 704-705; 736-738) She asked for a

man's tie. (R 654) She appeared in shock, with her eyes "walled" back in her head and water running from her mouth. (R 691-693) Upon being handcuffed and placed in a holding cell, MRS. YOHN attempted to cut her wrist on a steel cell cot (R 694; 539); and was placed under a suicide watch and ultimately placed in a cell with a more stable prisoner for her own protection. (R 542-546; 676; 685; 697)

Her "uncle", attorney Bill Harris was called to the jail to assist her, but could get no cooperation from her and received only non-sensical responses to his questions. He described her as being mentally out of it. (R 736-738) The Sheriff's Department Chaplain was so concerned that he stayed in the cell with her for approximately three hours. (R 702) MRS. YOHN had no recollection of these events. She did not recall seeing Bill Harris or any of the law enforcement personnel, some of whom she had known for years. (R 738-739) She did not even recall seeing her family the following morning at the first appearance. (R 859-860; 870)

Dr. Wray testified that MRS. YOHN, at the time of the fatal incident, suffered from a recognized mental defect, namely psychogenic amnesia. (R 985-986) As a result of this mental defect, MRS. YOHN could not recall the events of November 18. (R 978-984) Dr. Wray described that telephone call from Robbie Fuller as the "breaking point" after which she lost touch with reality. (R 978-984) Dr. Warner, who saw MRS. YOHN within forty-eight hours after the shooting agreed that at the time of the shooting, MRS. YOHN was not responsible, because she suffered

from a recognized mental defect, namely a disassociative state, (R 1049-1052) caused by the build-up of mental turmoil over the sixty-ninety day period prior to November 18, (R 1041) culminating in the Robbie Fuller telephone call. (R 1050) Dr. Warner testified that MRS. YOHN was temporarily and legally insane, (R 1049) and in addition was unable to recall the events of November 18, beyond the Robbie Fuller telephone call, with minor exceptions. (R 1045-1047)

The STATE'S only witness, Dr. Sapoznikoff, agreed that psychogenic amnesia and disassociative states were recognized mental defects or mental disorders. (R 1125-1128) He agreed that the only thought MRS. YOHN formed was to take her own life. (R 1120) Dr. Sapoznikoff also agreed that she could not remember what transpired.

At the conclusion of all the evidence MRS. YOHN requested a total of eleven Special Jury Instructions, specifically Special Jury Instructions numbered 8, 9, 10, and 11, all of which dealt with the shifting burden of proof, and the issue of insanity. (R 129-138) The Trial Court denied these special requested jury instructions on the basis that they were covered by the Standard Jury Instructions.

The Trial Court's handling of the defense of insanity and particularly the instructions to the jury on that issue, are now presented to this Court, for consideration.

## ARGUMENT

IF THE STATE HAS THE BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT A DEFENDANT WAS SANE AT THE TIME OF THE OFFENSE WHEN THE DEFENSE OF INSANITY HAS BEEN RAISED, IS THE GIVING OF THE PRESENT INSANITY INSTRUCTION, AS SET FORTH IN STANDARD JURY INSTRUCTION 3.04 (b), ALONG WITH THE GENERAL REASONABLE DOUBT INSTRUCTION SUFFICIENT, NOTWITHSTANDING THE DEFENDANT HAVING SPECIFICALLY REQUESTED THE COURT TO INSTRUCT THE JURY THAT THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS SANE AT THE TIME OF THE OFFENSE?

TO PERMIT A PSYCHIATRIST, WHO HAS BEEN APPOINTED AT THE STATE'S REQUEST, TO TESTIFY ON THE ISSUE OF INSANITY WHEN HE HAS FAILED TO FILE ANY REPORT, OR FURNISH ANY REPORT TO COUNSEL AND WHERE HE HAS BEEN THE ONLY EXPERT APPOINTED AND THERE HAS NOT BEEN A FULL COMPLIANCE WITH THE PROVISIONS OF RULE 3.216, FLORIDA RULES OF CRIMINAL PROCEDURE, CONSTITUTES ERROR.

We invite the Court's careful inspection of the so-called "Standard" Jury Instruction used by the Trial Judge in the instant proceeding. By actual count, from beginning to end the Court's entire instruction to the jury covers only twelve typed pages, and not all of those are complete pages. And, it contains only three-hundred-forty-seven typed lines, many of which contain only one or two words. The entire instruction took less than fifteen minutes to read aloud, deliberately, and slowly.

The writer has had occasion over the past twenty-six months to read those words over and over again. As I did so, I was reminded of the words of a former Chief Justice of this Court, Mr. Sebring, who later served as Dean of Steson University's

College of Law. While serving as Dean of that institution he also served as Chairman of the very first Judiciary Committee which attempted to draft Standard Jury Instructions. I was privileged to serve as his student assistant at the University of Florida when the Committee met over a two year period. Dean Sebring and his Committee concluded that while Standard Jury Instructions can be of great assistance to the Court and counsel, that it would be impossible to draft one set of Instructions which would cover any situation, in every case, and especially every first degree murder trial; that there were simply too many variables, depending upon the evidence in each case. That first Committee concluded, twenty-five years ago, and I submit it is a valid conclusion today that Standard Instructions are at best an outline or guideline that must of necessity be modified or amplified, depending upon the facts of each case. They further concluded that the right of the individual defendant can not be sacrificed for brevity and convenience.

We submit that nowhere is there a need to accurately instruct a jury more than in a capital felony case and even more especially in those cases in which the defense of insanity is raised. We know from published surveys, we know from the controversy over capital punishment that jurors have more difficulty, and feel more pressure in those cases in which a life has been taken, and in which the death penalty is a possibility.

We know further that there is more prejudice in the public mind against the defense of insanity than almost any other aspect of our criminal justice system. This was dramatically brought to the public attention during and after the John Finkley trial, who was accused of attempting to assasinate President Reagan. What the "public" feels is important because they ultimately constitute the jury. And, most of the public feels, for example, that the defense of insanity is raised in the majority of cases. In fact, the defense is interposed only rarely, less than ten per cent of the time. Of those persons who assert the defense of insanity, the examining psychiatrists are able to certify less than three per cent as insane. Most of those are held incompentent to stand trial, and sent to a State institution and later re-tried. The overwhelming majority of cases that go to trial, in which the defense of insanity is actually presented, the jury almost universally rejects the defense. In my private poll of Judges and Lawyers in northwest Florida, only two cases were noted in which the defendant, in a first degree murder case, was acquitted by reason of insanity, in the memory of those polled. One of those was represented by the undersigned in 1979 and is still incarcerated in the State Mental Hospital for the criminally insane and is not likely to be released in the near future.

We say all of this to illustrate our belief, and our argument, that jurors need to be told, as succinctly as possible, the law as it applies to the issue of insanity. Is that not the purpose of jury instructions, to instruct them as

to the law they must apply to the evidence they have received? Clearly, that is the purpose of jury instructions! In criminal cases the Trial Judge's responsibility relative to Jury Instructions, including those requested by the parties, is controlled by Rule 3.390, Florida Rules of Criminal Procedure. Jury charges, including special requested charges, are to explain the law which those lay persons-jurors must apply. See, Simmons v. State, 36 So.2d 207 (Fla. 1948). Those instructions are to be complete and not misleading. See, Garmise v. State, 311 So.2d 747 (3rd D.C.A. 1975) and should state the law accurately. See, Bennett v. State, 350 So.2d 556 (1st D.C.A. 1977).

The standard response of most prosecutors to defendant's requested Special Instructions is that it is "covered by the Standard Instructions". Unfortunately, we submit, this same slogan-like response seems to have been adopted by many of our Appellate Judges. Standard Jury Instructions do not always "state accurately the law of Florida". Thompson v. State, 378 So.2d 859 (1st D.C.A. 1979). This Court recognized the fallibility of Standard Jury Instructions from the very outset when in the Opinion styled, In Re: Standard Jury Instructions in Criminal Cases, 327 So.2d 6 (Fla. 1976) it was stated:

> "The Court hereby authorizes the publication and and use of such Instructions, but without prejudice to the rights of any litigate objecting to the use of one or more of such approved forms of Instructions. The Court recognizes that the initial determination of the applicable substant of law in each individual case should be made by the Trial Judge and it would be inappropriate for this Court at this time to consider the recommended Instructions

> with a view to adjudging that the legal principles in the recommended Instructions correctly state the law of Florida. Similarly, the Court recognizes that no approval of these Instructions by the Court could relieve the Trial Judge of his responsibility under the law properly and correctly to charge the jury in each case as it comes before him. This Order is not to be construed as any intrusion on that responsibility of the Trial Judges."

We submit that it is not a sufficient answer to MRS. YOHN, therefore, in the instant case, to deny her request with the shop-worn phrase, "covered by the Standard". Everyone associated with this case currently agrees that the requested Instructions are accurate statements of the law. Therefore, if not covered and not covered accurately and adequately, MRS. YOHN was entitled to have the requested Instructions given. Every defendant, in every criminal case, has the right to have his defensive theory legally explained to the jury. In Edwards v. State, 428 So.2d 357 (3rd D.C.A. 1983) the Court stated:

> "The law is settled that a defendant is entitled to have the jury instructed on the law applicable to his theory of defense when there is any evidence introduced in support thereof."

See, Holly v. State, 423 So.2d 562 (1st D.C.A. 1982); Bryant v. State, 412 So.2d 347 (Fla. 1982). Just as the State has argued here, the State argued in Dudly v. State, 405 So.2d 304 (4th D.C.A. 1981) that the defendant's defense was adequately covered by the Standard Instructions. There, as here, the Standard Instruction referred to dealt with an explanation of the various elements of the criminal offense. In that case, as well as the case at bar, the Trial Court explained various

elements of the criminal offense to the jury, in its Standard Jury Instructions, and in connection therewith recited that the State had the burden of proof. The argument of the State was rejected in the Dudly Opinion, supra, as follows:

> "...We also reject the State's contention which, while admitting the existence of some evidence as to the good faith defense, asserts that the Standard Instruction on the element of felonious intent was sufficient to cover such defense. In a sense, most theories of defense constitute negation of some element of the offense charged. However, this does not mean that an Instruction on the required elements will necessarily satisfy the requirement that the jury be separately instructed on recognized theories of defense. It is one thing to inform the jury as to the State's obligation to prove each element of its case, but quite another to inform the jury that certain matters, if established, constitute a defense to the crime charged."

For the same reasons, that argument should be rejected here.

Each of the requested jury Instructions accurately set forth the law. See the Lower Court's Opinion (A 4-9). Unless otherwise covered, MRS. YOHN was, therefore, entitled to have each of the Instructions given.

Let us look at each of those requested Instructions and measure them against the Standard Instruction actually given and the evidence in this case to see for ourselves that each of the Instructions should have been given. Requested Instruction #8 told the jury that the presumption of sanity was gone, and that the burden of proof had shifted to the STATE. This is the law. Homes v. State, 374 So.2d 944 (Fla. 1979); U.S. V. Marbley, 410 F.2d 294 (5th C.A., 1969); Byrd v. State, 297 So.2d 22 (Fla. 1974) Not only was this Instruction not given, the jury was

told exactly the opposite, when the Trial Judge read the following from the so-called Standard Jury Instruction: (R 146)

> "...You must assume the defendant sane unless the evidence causes you to have a reasonable doubt about her sanity."

Truthfully, the jury needed to be told, as requested, that the presumption of sanity had vanished and that the STATE had to prove her sane, and that if there was a reasonable doubt than they were obligated to return a verdict of not guilty by reason of insanity. Furthermore, nowhere was there even an attempt to instruct as to how the burden shifted. It was clear to the jury that the defense had raised the issue of insanity, for assuredly the STATE would not. And, it was clear to the jury that the Court had imposed upon MRS. YOHN the burden of proving her defense, as all of that evidence came in after the STATE had rested its case. All we are asking here is that the jurors be told that the presumption of sanity no longer existed, and that the STATE did in fact have the burden of proof.

Again, Requested Instruction #11 is admittedly an accurate statement of the law. Its purpose was to define for the jury the terms used throughout this trial by the Court, by the attorneys, and especially the expert witnesses. There was contained a definition of mental infirmity, disease or defect; also a definition of temporary insanity as well as the right and wrong test as was argued strenuously by both sides in closing arguments. The Trial Judge used these terms, or many of them, in his Standard Jury Instructions, but failed to define those

terms for the jury. We believe that such explanations and definitions are beneficial to a jury especially where issues of a technical nature are involved. It does criminal defendants, little if any good, to agree that certain principles of law are applicable to their case and particularly those by which the issue of insanity is to be tried, and then fail to adequately instruct the triers of fact as to those principles. For, after all, the triers of fact are lay persons, who with rare exceptions have little or no experience in legal matters and even less experience in dealing with such tenchically vague terms as temporary legal insanity. In the past twenty-three years trying cases and observing cases being tried it has been the experience of the undersigned, that when jurors are "called to the box" who have some legal or medical experience which might assist the rest of the panel, that those jurors don't even get to sit down good before they are excused. And, it has been my experience that they are usually excused by the State. Furthermore, it does criminal defendants and particularly did MRS. YOHN no good whatsoever to deny the requested Instruction in favor of so-called Standard Instructions which wholly failed to instruct on, and to define the terms used. And, it would have taken such little time to give the requested Instruction. For example, it would have taken less than fifteen seconds of the Court's time to give Requested Instruction #8; less than seven seconds to give defendant's Requested Instruction #9; approximately fifteen seconds to give defendant's Requested Instruction #10 and perhaps as much as forty-five to sixty

seconds to give Requested Instruction #11.

We submit further, that the principles of law set forth in each of the Requested Instructions was not covered by the Standard Instructions. The Opinion of the First District Court of Appeal, which is under certification, placed emphasis on the fact that the Standard Instructions on "burden of proof" satisfied the requirements of the Requested Instructions. This holding is simply not supported by the record. First, each of the Requested Instructions dealt with more than the issue of who had the burden of proof. Each Instruction dealt with a separate issue, such as: (1) presumption of sanity (2) shifting burden of proof, (3) definition of sanity and its terms. And, each Instruction, as in other instances, told the jury who had the burden of proof on these various issues and elements.

Look at the record and determine when the Standard Instructions spoke to or dealt with the question of burden of proof. As the Court defined each crime for the jury, the jury was told the STATE had the burden of proof. However, when it came to the defense of insanity, the jury was not told who had to prove what. Might the jury have concluded, based upon what it saw, and the absence of any Instruction to the contrary, that the STATE did not have the burden of proof on this issue, or else the Court would have told them so? They had been told clearly who had the burden on every other issue. Furthermore,

the jury was instructed there was a presumption of sanity (R144) when such was not the law. The jury was instructed that the STATE could overcome the defendants presumption of innocence. (R 145) Why not then instruct the jury that the defendant could and had overcome the presumption of sanity? There is no reason why not!

We submit further still, that the rationale applied in Rottenberry v. State, 429 So.2d 378 (1st D.C.A. 1982) does not apply here. First, the defense of entrapment and insanity are not similar at all. Secondly, the jury in Rottenberry, supra, was told:

> "...if you find from the evidence that the defendant was entrapped, or if the evidence raises a reasonable doubt about the defendant's guilt, you should find him not guilty."

Thus, they were told specifically who had the burden on that issue. Such was not done in the case at bar.

The error in failing to properly instruct the jury on the issue of insanity was further compounded by the inappropriate appointment of a psychiatrist, at the STATE'S request, and allowing that psychiatrist to testify at trial. The STATE filed its Motion asking the Court's permission to have the defendant examined or evaluated by a psychiatrist. (R 83) This Motion was granted by Order dated April 2, 1982, which gave the STATE permission to have MRS. YOHN examined and evaluated by Dr. John Sapoznikoff and which also gave MRS. YOHN'S counsel the right to be present during the examination. (R90) This Order recites that it is granted pursuant to the provision of

Florida Criminal Rules of Procedure, 3.216 (h). This provision of the Order, which was prepared by the Assistant State Attorney, was an obvious error as will be seen.

Subdivision (h) of the Rule under consideration has nothing whatsoever to do with the appointment of experts to examine a defendant who has raised insanity as a defense. Subdivision (h) deals with the situation where the State or the defense desires to call additional experts, other than those appointed. As, for example, a psychiatrist called to testify strictly upon the basis of his observations of the defendant during the trial, or to testify upon a hypothetical question. Subdivision (h) has nothing whatsoever to do with Court appointed psychiartists. The designation (h), which appears in the Order is there by oversight, or it is an intentional effort to breath false life into an otherwise invalid Order. To allow an intended or unintended misuse of a subdivision heading to be used to circumvent the clear meaning and purpose of the Rule, would be to make a mockery of this system we hold so dear.

It is clear that the only authority by which the Trial Court appointed experts for the purpose of "examining and/or evaluating" MRS. YOHN is found in either Subdivision (a) or Subdivision (d). Subdivision (a) deals with a situation of an indigent or partially indigent defendant who is relying upon the Public Defender or other Court appointed counsel, who himself needs the assistance of an expert to assist with the preparation of the defense of insanity. Although the undersigned may well have needed additional assistance in preparing the defense, he was not Court appointed and

Subdivision (a) was clearly not applicable. Therefore, Dr. Sapoznikoff's appointment was permissible, if at all, under Subdivision (b). That particular subdivision is the only one that contains a provision for the presence of counsel during any such examination. For that matter, Subdivision (d) is the only provision of the Rule which provides for appointment for the purpose of examining the defendant for the purpose of determining his sanity at the time of the offense. Subdivision (h) has no provision for examination. Subdivision (c) does, but deals only with compentency to stand trial.

So, regardless of how or why the designation of Subdivision (h) appeared in the Order, the Trial Judge's only legal authority to make such an appointment was under Rule 3.216 (d), Florida Rules of Criminal Procedure. Unfortunately, for MRS. YOHN the Trial Judge failed to follow all of the provisions of the Rule which require as mandatory provision;

(1) The apointment of no less than two and no more than three experts;

(2) The filing by experts of written reports which contain a description of evaluative techniques and a description of MRS. YOHN'S mental and emotional condition and her mental processes at the time of the offense;

(3) A statement of all relative factual information concerning MRS. YOHN'S behavior and an explanation as to how the expert opinion was achieved.

None of this was done.

As soon as the STATE announced its intention to call Dr. Sapoznikoff, MRS. YOHN'S attorney objected to Dr. Sapoznikoff being allowed to testify and did so on the same basis now urged before this Court; i.e. a failure to comply with Rule 3.216 (d) (R 1069). The STATE'S response then was defendant had known for almost a year of Dr. Sapoznikoff's appointment, had taken his deposition, and that MRS. YOHN was not prejudice by the failure to comply with the Rule, even if the Rule applied. (R 1071) Then as now, we repeat that the prejudice occurrs when the mandatory provisions of the Rule are not met; when the required number of experts are not appointed, when the required reports are not filed and when it is not shown that the appointed doctor followed the requirements of the Rule. Who knows, if Dr. Sapoznikoff himself had been required to list his evaluative techniques, he might have actually used evaluative techniques and arrived at a different conclusion; had he been required to describe her emotional and mental condition he too may have realized that the fainting spells, or the suicide gestures or attempts, the unexplained loss of weight, the depression and crying were in fact evidence of a mental disease or defect as had Dr. Wray and Dr. Warriner.

Furthermore, we submit that when the STATE has not complied with one of the rules of game, especially such an important rule, the defendant is entitled to have the proffered testimony excluded. Or, at the very least, the burden should be on the STATE to explain why no compliance and to establish affirmatively

the lack of prejudice. The situation is not unlike that which exists when the STATE neglects to comply with a proper Notice or Demand for Discovery. In those instances, the Court is obligated to at least make an inquiry surrounding the circumstances and the failure to make such an inquiry has been held reversible error. See, Clair v. State, 406 So.2d 109 (Fla. App., 1981); Richardson v. State, 246, So.2d 771 (Fla. 1971) When there has been a failure to comply with other rules, again for example, discovery rules, the Trial Judge has the authority to, and should exclude the proffered testimony. See, Lewis v. State, 411 So.2d 880 (Fla. App. 1981); Moore v. State, 411 So.2d 335 (Fla. App. 1981) and Morgan v. State, 405 So.2d 1005 (Fla. App. 1981).

## CONCLUSION

MRS. YOHN submits that the Trial Court so mishandled every aspect of the trial, as it bore upon the issue of insanity, that prejudicial and reversible error occurred and a new trial is mandated. A careful review of the Court's Instructions discloses a total absence of any clear definition of any of the essential terms involved in discussing the issue of insanity to be absent from the Court's Instructions. Furthermore, the Instructions were misleading and did not accurately state the law. The discrepancies and inaccuracies in the Instructions actually given, could have been corrected had the Requested Jury Instructions, which are admittedly accurate statements of law, been given. We respectfully request a reversal with directions and MRS. YOHN be given a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, The Capital, Tallahassee, Florida 32301, Attorney for Respondent, this 14th day of July, 1984.

STAATS, OVERSTREET & WHITE

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