IN THE SUPREME COURT OF FLORIDA

BETTY REESE, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	Case No. 65,633

INITIAL BRIEF OF PETITIONER

Respectfully submitted,

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TABLE OF CONTENTS

AUTHORITIES CITED

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, Florida.

Petitioner was the Appellant and Respondent was Appellee in the Fourth District Court of Appeal.

In the brief the parties will be referred to as they appear before this Honorable Court or in the trial.

The following symbol will be used:

"R"	Record on Appeal.
"T"	Transcript of Trial
"SR"	Supplemental Record of Petitioner's Statement of Proceedings in the Trial Court.

STATEMENT OF THE CASE

Petitioner was charged by an Amended Information, filed in the Fifteenth Judicial Circuit, with attempted first degree murder. (R 461) She raised the defense of insanity by a written notice. R 452, 455.

At the conclusion of the trial, Petitioner was found guilty of the lesser included offense of aggravated battery. R 469, T 542. Petitioner was sentenced to ten (10) years in prison. R 473, 474. Petitioner timely appealed to the Fourth District Court of Appeal which affirmed her conviction, See Appendix I, with Chief Judge Anstead concurring in part and dissenting in part in a written decision. The Fourth District Court of Appeal certified the following question as one of great public importance:

> If the state has the burden to proof 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 had 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?

On July 17, 1984, Petitioner invoked the discretionary jurisdiction of this Honorable Court. See Appendix II.

POINT INVOLVED

IF THE STATE HAS THE BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT A DEFENDANT WAS SANE AT THE TIME OF THE OFFENSE AND 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 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.

STATEMENT OF THE FACTS

The first witness called by Respondent was Viola May McCarthy of 155 W. 27th Street in Riviera Beach, Florida. T 5. Ms. Georgia Capri is a neighbor of Ms. McCarthy. During January through May, 1981, Miss Capri employed Petitioner to care for her sister who was struck with an illness. T 6.

On Sunday, May 10, 1981, at approximately 8:00 a.m., Viola McCarthy went over to the home of Ms. Capri. T 6. Petitioner was at the house. T 8.

Georgia Capri of 159 W. 27th Street, Riviera Beach, Florida, testified that she lived at that residence with her sister, who had a case of terminal cancer. T 13. Ms. Capri cared for her sister. T 15. Thereafter, Georgia Capri hired Petitioner, in January, 1981, to care for her sister. T 15. Petitioner was employed as a practical nurse by Georgia Capri until May 10, 1981. T 16. Petitioner resided in the home. T 19.

Georgia Capri's sister's medical condition began to worsen. T 20. Georgia Capri decided to place her sister in a nursing home. Arrangements were made to have her enter the nursing home on May 11, 1981. T 21. Petitioner was given one (1) month notice of her termination. T 21. Petitioner's last day of employment was to be May 10, 1981. T 22.

On the evening of May 10, 1981, at approximately 8:00 p.m., Georgia Capri was sitting in her bedroom. T 36. Petitioner came into the bedroom. T 36. Petitioner pulled her out of the chair and began to strike her with a stick or bat. T 36. Ms. Capri was struck on the head and arms. R 37. Ms. Capri bled from her head. R 46. Her fingers and arms were crushed. T 47. The beating continued for about twenty (20) minutes. T 38. Ms. Capri pleaded with Petitioner to stop the beating. T 38. Ms. Capri believed that her son's failure to give Petitioner an additional sum of money angered Petitioner. T 38.

After the club broke, Petitioner took a pick-ax outside with her. T 39. Petitioner threatened to kill Ms. Capri. T 39. Ms. Capri rang an alarm. Thereafter, the police and ambulance arrived on the scene. T 41. Ms. Capri was hospitalized for three (3) days. T 41.

Ms. Capri testified that during her stay, Petitioner did not receive any medical attention. Ms. Capri was not aware of any medical problems. T 43. Ms. Capri never observed Petitioner "black out" or appear to be suffering from a seizure. T 43-44.

Detective Davis of the Riviera Beach Police Department responded to the incident scene on the night in question. T 73. He observed Ms. Georgia Capri standing in the doorway saturated with blood. R 73.

Detective Steven R. Wiesen is a crime scene detective with the Riviera Beach Police Department. T 89-90. He went to the residence in question to process the scene. T 91-92. He took various photographs of the house interior and exterior. T

95-99. Blood was found on the floor in the area of the sewing room. T 98. Also,blood was found in Ms. Capri's bedroom. R 99. In addition, wooden pieces were found under the bed in this bedroom T 99, behind the door T 101, and under the bookcase shelf. T 112. Some small pieces of wood were found on the sewing room floor. T 131. Detective Wiesen testified that all the pieces of board found at the scene fit together into one larger board. T 103-112.

Dr. Richard Allan Dube was the attending physician in the Emergency Room at St. Mary's Hospital on May 10, 1981. T 163,177. He examined and treated Georgia Capri. T 177-178. Dr. Dube observed that Georgia Capri was in shock. T 179. She had a very large scalp laceration and a clot of blood on the top of her head. T 179. She was also beaten about here eyes, right forearm and left hand. T 179. She had sustained loss of blood. T 181. According to Dr. Dube these injuries were caused by repeated blows from a blunt instrument. T 182.

Detective Wiesen investigated the outside of the residence. He recovered a pick ax. T 107-109. He observed a pile of wood out there T 110 and took some wood from the wood pile. T 125. Detective Wiesen compared the pieces of board he found in the residence with wood found in the wood pile. T 128. He found what appeared to be identical pieces. T 128.

Petitioner called Ms. Carol DeVine, employed as a nursing clinic supervisor in a specialized clinic of the Department of Health, known as the Seizure Control Center. T 196. Ms. DeVine treated Petitioner at the Seizure Control Center. T 197. Ms.

DeVine read Petitioner's patient chart from March 1, 1982 to the jury, testifying that Petitioner "had bad seizure," in quotes "2/26/82", and in quotes, "blackout on Sunday. Placed on Dilantin, 400 milligrams by Dr. Zuniga, Macavin (phonetic) for headaches, had EEG done Monday at Dr. Zuniga's office." T 198. Ms. DeVine testified that Dilantin is an anticonvulsant drug used for the treatment of persons with epilepsy. T 210-211.

Mrs. Virginia Reese, Petitioner's mother testified that when Petitioner was eight or nine years old she sustained a head injury in a car accident. T 217. Thereafter, Petitioner suffered headaches. T 218-220. Mrs. Reese also testified that Petitioner went into a violent rage during 1980. T 222.

Dr. Peterson is a licensed clinical psychologist. T 232. Dr. Peterson examined Petitioner on two (2) separate occasions since May 10, 1981. T 238. Dr. Peterson was appointed by the Court to determine her competency to stand trial and her general mental state. T 239. He performed tests and examined Petitioner's medical history. T 241. Based on his examination of Petitioner and review of the police reports and depositions, Dr. Peterson formed an expert opinion as to whether Petitioner was legally insane at the time of the incident. T 241-246, 268. According to Dr. Peterson, Petitioner's condition was as follows:

> A. Well, in my best professional judgment, I believe Miss Reese was suffering under the effect of an acute seizure disorder reflecting itself in an uncontrollable and a boundless rage reaction, at which time she would not have been even aware

of her surroundings, much less aware of the rightfulness and wrongfulness of her acts or the ramifications thereof.

Q. (Petitioner's counsel) Or the nature of her acts?

A. Exactly.

T. 241-242

Dr. Peterson testified that an organic brain disorder is a disorder in a person's ability to function related to a neurological anomaly within the tissue of the brain. T 243. A person with this disorder might very well appear to be normal most of the time. T 244. Petitioner suffers from non-organic brain disorder. T 256.

Dr. Hernandez is a psychiatrist in private practice. T 283. Dr. Hernandez was appointed by the Court to examine Petitioner. T 285. He examined her on two (2) occasions, reviewed her medical history and the police reports and deposition of Georgia Capri. T 285-286. Dr. Hernandez testified that epilepsy is a symptom of a broad combination of illnesses that could be qualified as organic brain syndrome. T 286.

Dr. Hernandez stated that Petitioner told him that she did not have any recollection of the incident with Mrs. Capri. T 290. In Dr. Hernandez' opinion it is quite probable that she may have suffered that epileptic equivalent the day of the incident. T 292. On May 10, 1981, Petitioner may not have had the capacity to discern right from wrong. T 293. The electroencephalogram and Cat Scans of Petitioner were normal. T 299. However, the fact that the examination and electroencephalogram were normal

does not rule out epilepsy. T 300. According to Dr. Hernandez, because of her attack, Petitioner could not distinguish between right from wrong or would not know the consequences of her act. T 334.

On rebuttal, Respondent called Dr. Richard Dube, a medical doctor. T 351. In response to a hypothetical question involving the facts of this case and the medical condition of Petitioner, Dr. Dube testified that Petitioner's actions were not a manifestation of typical mental illness. T 361-362.

Dr. Dube also testified as to the percentage of the general incidence of epilepsy in the population T 383, the incidence of temporal lobe epilepsy with normal electroencephalogram and cat scan T 384-385 and its incidence with complex automatisms lasting more than ten (10) minutes. T 384-385.

Dr. Edward Adelson is a psychiatrist. T 397-399. Dr. Adelson testified that he was appointed by the Court to examine Petitioner. T 400. Dr. Adelson examined Petitioner, obtained a medical history, reviewed the police reports and came to a medical opinion as to Petitioner's mental condition on the date of the incident. T 403. In Dr. Adelson's opinion Petitioner was sane at the time of the offense. T 404. Dr. Adelson believed that Petitioner did not suffer from temporal lobe epilepsy T 404, nor has a specific psychiatric diagnosis. T 409.

POINT INVOLVED

IF THE STATE HAS THE BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT A DEFENDANT WAS SANE AT THE TIME OF THE OFFENSE AND 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 REA-ABLE 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.

ARGUMENT

IF THE STATE HAS THE BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT A DEFENDANT WAS SANE AT THE TIME OF THE OFFENSE AND 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 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.

Petitioner contends that the certified question must be answered in the negative in that the standard jury instructions do not set forth the state's burden to prove that the defendant was sane at the time of the offense where the issue of insanity is raised.

I

THE STATE HAS THE BURDEN OF PROOF AS TO THE DEFENDANT'S SANITY.

In its certified question, the Fourth District Court of Appeal states: "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...."

Although the Fourth District used this rather equivocal language, this Honorable Court has unequivocally held that the state has the burden to prove beyond a reasonable doubt that a defendant was sane at the time of the offense where the issue of insanity has been raised. As stated in Parkin v. State, 238 So.2d 817, 821 (Fla. 1970):

> It is a cornerstone of a workable system of criminal law that every person is presumed sane, and capable of controlling their actions and being held responsible for these actions. M'Naghten's Case, 10 Clark & F. 200, 8 English Reprint 718 (1843); Hodge v. State, 26 Fla. 11, 7 So. 593 (1890). Obviously, this is only a presumption, and may be overcome. When the presumption of sanity is rebutted, then the State must prove sanity beyond every reasonable doubt, just as it must other elements of the offense. Hodge v. State, supra. (emphasis added)

See also Thomson v. State, 78 Fla. 400, 83 So. 291 (1919); Farrell v. State, 101 So.2d 130 (Fla. 1958); Byrd v. State, 297 So. 2d 22 (Fla. 1974); Jones v. State, 332 So.2d 615 (Fla. 1970), Mr. Justice Sundberg, specially concurring; Holmes v. State, 374 So.2d 944 (Fla. 1979), cert denied, 446 U.S. 913, 100 S. Ct. 1845, 64 L.Ed. 2d 267 (1980).

14 The presumption of sanity is rebutted or, in other words, it vanishes, when there is evidence sufficient to create a reasonable doubt in the minds of the jurors as to the defendant's sanity. Farrell v. State, supra; Byrd v. State, supra; Jones v. State, supra; Holmes v. State, supra.

Thus, Florida Law establishes three steps in this area:

1. Every defendant is presumed sane;

2. This presumption vanishes where there is evidence sufficient to create a reasonable doubt as to the defendant's sanity; and

3. The burden then rests on the state to prove the defendant's sanity beyond every reasonable doubt.

II

THE FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES DO NOT SET FORTH THE STATE'S BURDEN TO PROVE THE DEFENDANT'S SANITY.

Standard Jury Instruction 3.04(b) provides:

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:

1. The defendant had a mental infirmity, defect or disease.
2. This condition caused the defendant to lose his ability to understand or reason accurately, and
3. Because of the loss of these abilities, the defendant:
   a. did not know what he was doing, or
   b. did not know what would result from his actions, or
   c. did not know it was wrong, although he knew what he was doing and its consequences.

In determining the issue of insanity you may consider the testimony of expert and non-expert witnesses. The question you must answer is not whether the defendant is legally insane today, or has always been legally insane, but simply if the defendant was legally insane at the time the crime allegedly was committed.

This Honorable Court has pointed out that its approval of the standard jury instructions does not relieve the trial judge of his responsibility of correctly charging the jury. In In the

Matter of the Use by Trial Court's of Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 598 (Fla. 1981), this Honorable Court stated:

> The Court hereby authorizes the publication and use of the revised instructions in criminal cases and the instructions in misdemeanor cases, but without prejudice to the rights of any litigant objecting to the use of one or more of such approved forms of instructions. The Court recognizes that the initial determination of the applicable substantive law in each individual case should be made by the trial judge. Similarly, the Court recognizes that no approval of these instructions by the court could relieve the trial judge of his responsibility under the law to charge the jury properly and correctly 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.

Nowhere in the standard jury instructions is the jury informed that the state has the burden of proof as to the Defendant's sanity when the issue of insanity is raised. This burden is certainly not set forth in Standard Jury Instruction 3.04(b). In fact, the opposite impression, i.e., that the defendant has the burden of proof, is created by that instruction. This glaring deficiency is succinctly analyzed by Chief Judge Anstead in his dissenting opinion in this case:

> Since Florida case law is clear that once the presumption of sanity is rebutted the prosecution must prove sanity beyond every reasonable doubt, Reese was entitled to have the jury informed of this. In fact, under federal law, the trial court decides as a matter of law whether any competent evidence of insanity has been presented at trial so as to create an issue as to the defendant's sanity. Once that determination is made the cause proceeds with the prosecution carrying the burden of proof on the sanity issue

and the jury being so informed. That would appear to be the procedure contemplated by Parkin.

Contrary to the federal procedure and the law set out in Parkin, the Florida standard instructions make no reference to burden of proof. The standard instruction is in two parts, the first part states that insanity is an issue and that the jury must assume that the defendant is sane unless the proof "causes you to have a reasonable doubt about her sanity." While arguably the instruction is a correct statement of the law to this point, it obviously says nothing about the burden of proof. I say the instruction is arguably correct because it is true that there is a presumption of sanity under the law, but that presumption ceases to exist in the face of competent evidence to the contrary, and once it does the prosecution bears the burden of proving sanity "beyond a reasonable doubt." Again, arguably the provision that "unless the evidence causes you to have a reasonable doubt about her sanity" is correct since the jury is bound to find the defendant legally insane for purposes of defense if the evidence creates "a reasonable doubt about her sanity." The bottom line is that this instruction says nothing about the burden of proof, a burden critically important to every defendant since in many cases the only "defense" available to a defendant is the contention that the state has not carried its heavy burden of proof.

The second part of the standard instruction states the issue as a defense issue: "If the defendant was legally insane, she is not guilty." Again, this framing implicitly suggests the burden is upon the defendant to establish the defense of insanity. That burden is made more explicit by the remainder of the instruction which says: "To find her legally insane, these three (3) elements must be shown to the point you had a reasonable doubt about her sanity." Shown by whom? Obviously by the Defendant, who has raised the issue. This is contrary to the federal scheme and the scheme contemplated by Parkin. This instruction confuses the burden of presenting some competent evidence as to insanity, commonly referred to as the burden of going forward with evidence, with the ultimate burden of proof. The instruction erroneously suggests that the burden of proof is upon the Defendant to establish a reasonable doubt as to his sanity.

Since Florida Law leaves to the jury the decision as to whether there has been sufficient evidence of insanity presented to rebut the presumption of sanity (See Holmes v. State, supra; State v. Jones, Mr. Justice Sundberg specially concurring, supra.), it is all the more crucial that the jury be clearly instructed on the state's ultimate burden to prove that the

defendant was sane at the time of the offense. Instead, Standard Jury Instruction 3.04(b) stops after instructing the jury on the presumption of sanity and the requirement that the elements of insanity be "shown" sufficiently to raise a reasonable doubt as to the defendant's sanity. The instruction frames the issue as one of finding the defendant legally insane. This places the burden of proof on the defendant's shoulders since it will always be the defendant who will be showing his or her insanity. The jury is never told that the state must prove anything in regard to the sanity issue. Rather, the jury is left with an erroneous impression as to the burden of proof -- that the defendant must show/prove his or her insanity.

The general standard jury instructions on reasonable doubt and burden of proof do not rectify the failure of Standard Jury Instruction 3.04(b) to set forth the state's burden of proof as to the defendant's sanity. In analogous situations, the Second Circuit Court of Appeal has held that general reasonable doubt and burden of proof instructions do not cure the impression left by erroneous specific instructions.

In United States v. Robinson, 554 F.2d 301(2d Cir. 1976) the Defendant was charged with uttering forged checks. Specific intent to defraud was an element of the offense. The trial judge instructed the jury that they could infer that a person intends the natural and probable consequences of his acts unless the contrary appeared from the evidence. The jury was further instructed that the government bore the burden of proof beyond a reasonable doubt and that intent was an essential element of the

crime charged. The Second Circuit concluded that the general instructions on reasonable doubt did not cure the possible erroneous impression created by the specific instruction that the defense bore the burden of proof as to intent.

> Viewing the instructions as a whole, we find little that might have served to cure the error or to insure that the jury was not misled. The instructions on the burden of proof beyond a reasonable doubt were general in nature, while the instruction on intent was specific. We cannot conclude that the jury ignored the specific, erroneous instruction.

Id, at 306

Similarly, in Lopez v. Curry, 583 F.2d 1188 (2d Cir. 1978), which involved a prosecution for possession of cocaine, the jury was instructed that where it was shown that the defendants were present in a vehicle containing cocaine, they were presumed to possess the cocaine unless the defendants raised a reasonable doubt that they knowingly possessed it. The trial judge also instructed the jury that the state always bears the burden of proving the defendants guilty beyond a reasonable doubt and that the presumption did not affect this burden. The Second Circuit held that the instructions as a whole were erroneous as to to the burden of proof:

> In charging that defendants were required to come forward with evidence that would "raise a reasonable doubt in your minds that the defendants possessed this cocaine," the trial

> judge clearly shifted the burden of proof on the element of knowing possession.
>
> * * * * * * * *
> Indeed, after deliberating for a period, the jury asked Justice Garbarinho for further instructions on the presumption. "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy," Bollenbach v. United States, 326 U.S. 607, 612-3, 66 S. Ct. 402, 405, 90 L.Ed. 350 (1946), but instead the judge, over the objections of counsel for all three defendants, merely repeated the substance of his earlier charge.

Id. at 1193.

Although these two Second Circuit cases did not involve insanity instructions, they did refer to elements to be proven by the prosecution. Sanity is an element of the prosecution's case where the issue is raised. Parkin v. State, supra; Holmes v. State, supra. See also United States v. Lyons, 704 F.2d 743 (5th Cir. 1983); United States v. Manetta, 552 F.2d 1352 (5th Cir. 1977). Therefore, the sanity issue must be presented to a properly charged jury. United States v. Lyons, supra.

In the instant case, the jury made it especially clear that the general instructions as to burden of proof and reasonable doubt donot cure the failure of Standard Jury Instruction 3.04(b) to set forth the state's burden to prove the defendant sane at the of the offense.

Approximately one hour and fifteen minutes after retiring to deliberate, the jury tendered a question to the court "as to what

burden of proof rests with the state." T 406. The following colloquy ensued outside the presence of the jury as to what response should be given:

> THE COURT: The burden of proving, in this case, rests upon the State to prove -- what do you want me to say?
>
> MR. WINKLER: [defense counsel] I would say "every element, including sanity beyond a reasonable doubt." That is the law.
>
> MR. ACTON: [prosecutor] I agree it is every element beyond every reasonable doubt. I see no purpose in giving an instruction to any element in particular.
>
> MR. WINKLER: I think it should be made clear to them that that includes sanity.
>
> THE COURT: You know, they know. I will just say, "prove every element beyond a reasonable doubt."
>
> MR. WINKLER: Note defense objection to the Judge's decision.
>
> If I may, the reason I am really saying that, ordinarily sanity is not an element unless it is a presumption of sanity. I want to make it clear that they understand that that is an element, and it is clear that they have to prove sanity beyond every reasonable doubt. I think it should be included in there just so it is clear to them. There is no argument among anyone that that is the State's burden as to sanity. T 468-469

The trial judge then instructed the jury that the "burden of proof rests upon the state to prove every element to the exclusion of and beyond every reasonable doubt." T 470. The jury immediately made known its dissatisfaction with this response:

JUROR NUMBER FOUR: May I speak? Sir?

THE COURT: You can ask a question.

JUROR NUMBER FOUR: That is what I mean. I want to be absolutely correct --

THE COURT: I am trying to respond only to the question. I don't try to go out to the question.

JUROR NUMBER FOUR: The question didn't communicate what we wanted.

THE COURT: I thought it might not.

JUROR NUMBER FOUR: May I say what I think we heard and have you tell me whether it is right or wrong?

THE COURT: I don't want to get into a colloquy, that is one thing. Just tell me the are that you are referring to.

JUROR NUMBER FOUR: The assumption of sanity area.

THE COURT: Are you talking about the instruction as it concerns sanity?

JUROR NUMBER FOUR: Yes. I believe that will answer the question. T 470-471

A further colloquy occurred during which Petitioner's counsel reiterated his request to specify to the jury that the state has the burden of proof as to the issue of sanity. T 472. The trial judge nonetheless re-read Standard Jury Instruction 3.04(b) to the jury. T 472-474.

Thereafter, the jury twice requested complete reinstruction. T 486, 528.

The jury specifically asked who had the burden of proof. The trial judge, in response to Petitioner's counsel request to specify to the jury that the State's burden of proof included sanity, stated "you know, they know." T 469. Unfortunately, the jury did not know that the State's burden of proof also included the defendant's sanity in that when they were instructed by the court that the burden of proof extended to every element, they immediately made known that they needed further instructions specifically as to the area of sanity. SR 470-471. This clearly shows that the jury separated the general instructions on burden of proof and reasonable doubt, and the trial judge's further specific reference to burden of proof as to every element, from the specific insanity instruction.

The jury's separation of the instructions was understandable. Standard Jury Instruction 2.03 (plea of not guilty; reasonable doubt and burden of proof) refers to the prosecution having to prove two elements. It also attaches the presumption of innocence to each allegation in the information. The instructions on the individual crimes also refer solely to the proof of elements. The statement in Standard Jury Instruction 2.03 that the defendant is not required to prove anything is made solely in that context as to proof of elements.

On the other hand, Standard Jury Instruction 3.04(b) does not refer to the issue of the defendant's sanity as an element of the State's case. Rather, it juxtaposes this issue as something

needing to be shown by the defense, that is, it establishes a requirement that insanity be shown/proved, with the sole possible inference being that it be shown by the defense.

Standard Jury Instruction 3.04(b) certainly lacks the clarity found in federal jury instructions which set forth federal law that operates as does Florida law in placing the ultimate burden of proof on the prosecution as to the defendant's sanity. See e.g. United States v. Manetta, supra; United States v. Lyons, supra. For example, the Seventh Circuit Pattern 4.02 instruction reads as follows:

> The sanity of the defendant at the time of the offense charged is an issue. This means that, in addition to proving beyond a reasonable doubt the elements of the offense charged, the government must also prove beyond a reasonable doubt either that at the time of the offense charged the defendant did not have a mental disease or defect, or that despite the mental disease or defect he had substantial capacity both to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law. 1 E. Devitt and C. Blackmar, Federal Jury Practice and Instruction (Section 14.17 (3d Ed. 1983)

Similarly, the Fifth Circuit Special Pattern Instruction No. 10 provides:

> There is an issue in this case concerning the sanity of the Defendant at the time of the acts or events alleged in the indictment.
>
> The sanity of the Defendant at the time of an alleged offense must be established by the Government beyond a reasonable doubt because willful intent, as you have been instructed,

> is an essential element of the offense charged, and a person who is insane is not capable of forming such intent.

Pattern Jury Instructions (Criminal Case) (5th Cir. 1978).

It must also be pointed out that any analogies to the entrapment instruction should not be drawn. Unlike the entrapment defense, the issue of sanity is an element of the State's case once the issue is raised. Parkin v. State, supra; Byrd v. State, supra; Holmes v. State, supra. See also United States v. Lyons, supra. Moreover, the entrapment instruction does not contain any presumption whereas the presumption of sanity is an integral part of the Standard Jury Instruction 3.04(b). That presumption distinguishes the two issues and makes it all the more important for the jury to be informed of the State's ultimate burden of proof.

Even assuming arguendo that insanity is an affirmative defense, once a defendant introduces evidence on his theory of defense, the jury should be instructed that the standard of proof beyond a reasonable doubt applies to the affirmative defense. United States v. Corrigan, 548 F.2d 879 (10th Cir. 1977). Specific instruction which is defective in respect to the burden of proof is not remedied by correct general statements elsewhere in the charge unless the general statement clearly indicates that

it applies to the defective instruction. Id. In the case of an affirmative defense, the potential for misinterpretation is too great to permit ambiguity. Id.

III

A FURTHER ANALYSIS OF THE INSANITY INSTRUCTION 3.04(b)

The Florida Standard Jury Instruction 3.04(b, as read to the jury, provided:

> An issue in this case is whether the Defendant was legally insane when the crime allegedly was committed. You must assume she was sane unless the evidence causes you to have a reasonable doubt about her sanity.
>
> If the Defendant was legally insane, she is not guilty. To find her legally insane, these three (3) elements must be shown to the point you had a reasonable doubt about her sanity:
>
> One, the Defendant had a mental infirmity, defect or disease;
>
> Two, the condition caused the Defendant to lose her ability to understand or reason accurately;
>
> And three, because of the loss of these abilities, the Defendant did not know what she was doing or did not know what -- or did not know what would result from her actions, or did not know it was wrong, although she knew w2hat she was doing and its consequences. T 455-456.
>
> In determining the issue of insanity, you may consider the testimony of expert and non-expert witnesses.
>
> The question you must answer is not whether the defendant is legally insane today, or has always been legally insane; but simply if the defendant was legally insane at the time the crime allegedly was committed. T 455-456.

In Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450 (1979), the United States Supreme Court indicated that:

> The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes. See Ulster County Court v. Allen, 442 U.S. 140, 157-163, 99 S. Ct. 2213, 2224-2227, 60 L.Ed. 2d 777 (1979). That determination requires careful attention to the words actually spoken to the jury, see id., at 150-159, n. 16, 99 S. Ct., at 2225 for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable joror could have interpreted the instructions.

"Id. at 514, 99 S. Ct. at 2454"

At bar, the Standard Jury Instruction 3.04(b) clearly provides that the jury must or shall presume an individual is sane. The Sandstrom court held that an interpretation of such a jury instruction "requires careful attention to the word actually spoken" to the jurors and "depends upon the way in which a reasonable juror could have interpreted the instruction." The focus is thus on the pertinent language of the instruction. This Honorable Court should apply the "reasonable juror" interpretation of the instruction test formulated in Sandstrom in its analysis.

An analysis of the Standard Jury Instruction 3.04(b) should begin with "careful attention to the words actually spoken," Sandstrom. The first sentence of this instruction provides: "An issue in this case is whether the Defendant was legally insane when the crime allegedly was committed." This "issue" arises as follows: First, under Florida law, a person is presumed to be sane. Parkin. Second a defendant must enter a not guilty plea

and notify the court if he intends to rely on the defense of insanity. Fla. R. Crim. P. 3.216. In Preston v. State, 444 So. 2d 939 (Fla. 1984), this Honorable Court citing Parkin held "the burden is on the Defendant to place in evidence matters that show his insanity. Id., at 544.

Hence, the "issue" of insanity would have to be raised by the defense during the trial. The defendant would have to introduce evidence on this issue or, at the very least, raise it through the State's case in chief. Thus, the first sentence of the instruction would be an indication to the jury that "an issue" of insanity has been raised by the defense. Obviously, the State will not raise "an issue" of insanity.

The second sentence of this insanity instruction provides: "You must assume he was sane unless the evidence cause you to have a reasonable doubt about his sanity." This sentence establishes the presumption of sanity and indicates that it is rebuttable. The initial phrase of this sentence expressly informs the jury that they must or shall apply a presumption that the Defendant is sane. This automatically relieves the State of any burden of establishing a defendant's sanity.

The insanity instruction mandates a rebuttable presumption of sanity. Parkin a presumption is interjected into a criminal crime trial where the Defendant has raised "an issue" of insanity through the appropriate pleading plus carrying the defense burden to place in evidence matters that show his insanity. Parkin, Preston. How is this rebuttable presumption of sanity explained to the jury?

The second phrase of the sentence states: "....unless the evidence causes you to have a reasonable doubt about her sanity." Although the instruction does not expressly state, that unless the evidence from the defense causes you to have a reasonable doubt about the defendant's sanity, this is a clear implication from the instruction. First, the defendant raised "an issue" of insanity. Second, the defendant is presumed sane. Third, a defendant would, of necessity, have to come forward with evidence to rebut this presumption of sanity. Parkin, Preston. It seems clear that the burden is shifted to the Defendant to produce "evidence" to cause the juror to find a reasonable doubt about the defendant's sanity. The insanity instruction establishes the state's presumption of sanity, but shifts to the defendant the burden of producing evidence to create a reasonable doubt as to the defendant's sanity. A "reasonable juror" could have interpreted the instruction to require a defendant to prove or establish a reasonable doubt about the defendant's sanity.

The second paragraph of the Standard Jury Instruction on Insanity 3.04(b) further compounds this error. The instruction states:

> "If the Defendant was legally insane he/she is not guilty. To find him/her legally insane, these three (3) elements must be shown to the point you had a reasonable doubt about his/her sanity...."

These instructions are silent as to who must establish the three (3) elements to the point the jurors have a reasonable doubt as to the Defendant's sanity. However, it appears from the instruc-

tion that the Defendant is given the burden of proof to prove insanity. A defendant is presumed sane. The Defendant to prevail must naturally overcome this presumption. The result is an improper burden on the Defendant to establish a reasonable doubt as to his or her sanity. There is no indication in the Standard Instruction on Insanity 3.04(b) as to the State's ultimate burden of proof on the issue of the Defendant's sanity. This instruction on insanity is in contrast to Florida law as stated by this Honorable Court in Parkins, supra:

> "When the presumption of Sanity is rebutted then the State must prove Sanity beyond every reasonable doubt, just as it must prove other elements of the offense."
>
> Id., at 821

The instruction never informs the jury that the presumption of sanity vanishes upon introduction of evidence of insanity. Frynch.

Applying the "reasonable juror" test as delineated in Sandstrom, a reasonable juror could reasonably have understood the instruction to require a defendant to prove that he or she was insane or prove beyond a reasonable doubt that she was insane. The insanity instructions clearly places an affirmative burden on the Defendant to prove that he or she is insane to overcome the presumption of sanity. The instruction clearly does not inform the jury that: "When the presumption of sanity is rebutted then the state must prove sanity beyond a reasonable doubt, just as it must prove other elements of the offense." See

Parkin. Therefore the standard instruction on insanity is an improper statement of Florida law on the insanity defense and utterly fails to delineate the proper burden of proof on this issue.

IV

Effect Of The Erroneous Jury Instruction On Insanity

The burden of proof in a criminal case always remains with the prosecution and is never shifted on any issue to the defendant. In re Winship, 397 U.S. 358, 90 S. Ct. 469 (1970); United States v. Manetta, 551 F. 2d 1352 (5th Cir. 1977). "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." Speiser v. Randall, 357 U.S. 513, 525, 78 S. Ct. 1332 (1958). At bar, the burden was improperly placed on Petitioner rather than on the prosecution to prove that she was insane. This is contrary to Florida law. And since this allocation of the burden of proof was erroneous, then that constitutes a denial of due process of law as guaranteed by the Fourteenth Amendment.

The Sandstrom Court focused on the language of the instruction which contained the presumption. The one sentence in the Standard Instruction 2.03 concerning reasonable doubt which states that "the defendant is not required to prove anything," refers clearly to the element of the crime. It follows an instruction on how the state overcomes the defendant's presumption of innocence as to each material allegation of the information. This one sentence reference in the middle of the reasonable doubt instruction could not possibly clarify or rectify the extreme deficiencies in the standard jury instruction on insanity.

Petitioner acknowledges that this Honorable Court adopted the Florida Standard Jury Instruction in Criminal Cases (2d Ed.). However, this Honorable Court in its opinion authorizing the use of the instructions, In The Matter Of The Use By The Trial Courts of the Standard Jury Instruction in Criminal Cases, 431 So. 2d 594, 598 (Fla. 1981) noted the following:

> The court recognizes that the initial determination of the applicable substance of law in each case should be made by the trial judge. Similarly, the court recognizes that no approval of these instructions by the court could relieve the trial judge of his responsibility under the law to charge the jury properly and correctly in each case as it comes before him."

Petitioner contends that the Standard Jury Instruction on insanity 3.04(b) and the jury instructions viewed in its entirety did not properly and correctly charge the jury on Florida law on the insanity defense. At a minimum, this Honorable Court should hold that a reasonable juror could interpret the jury instructions, taken as a whole, in a matter that does not correctly state Florida law which was extremely prejudicial to Petitioner at bar.

The Florida Standard Jury Instruction on Insanity misstates Florida law and utterly fails to delineate the burden of proof as to the insanity defense. The concept of sanity and insanity at the time an individual commits a criminal offense is an extremely difficult concept for a lay jury to apply to a given situation. The jurors are routinely called upon to resolve

diametrically opposed opinions of the experts. The citizens of our state who are called on to serve on juries need clarity not an obscure crypogram. These jurors must be provided clear, concise and thorough instructions on the issue of insanity and the burden of proof in order to accomplish their difficult task. What is to be gained by confusion, obscurity and ambiguity? The jurors, at bar, expressly questioned the trial judge on the issue of the burden of proof on insanity. T 468-472. Petitioner's requests for special instructions on insanity (T 467) clearly delineates the proper burden of proof as a correct statement of Florida law. All Petitioner sought was a correct statement of Florida law. She deserves no less. The trial judge's failure to instruct the jury on the proper burden of proof in applying the insanity defense resulted in substantial prejudice to Petitioner and resulted in reversible error. Petitioner requests this Honorable Court to reverse the decision of the Fourth District Court of Appeal and remand the cause for new trial.

CONCLUSION

Petitioner respectfully requests this Honorable Court to reverse the decision of the Fourth District Court of Appeal and remand the cause for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Russell Bohn, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida 33401, by Courier, this 13th day of August, 1984.

Of Counsel