IN THE FLORIDA SUPREME COURT

JOHN WILLIAM FERRY, JR., :

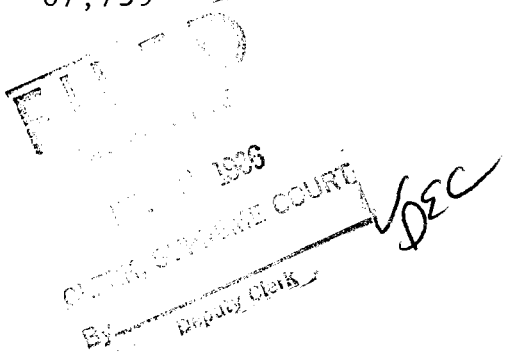
Appellant, :

vs. : Case No. 67,759

STATE OF FLORIDA, :

Appellee. :

:



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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

	PAGE NO.
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENTS	18
ARGUMENT	
ISSUE I. FERRY'S ABSENCE FROM THE JURY SELECTION AND IMPANELING PROCESS VIOLATED HIS SIXTH AMENDMENT RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF HIS TRIAL.	21
ISSUE II. THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL WHEN A PSYCHOLOGIST, TESTIFYING FOR THE STATE IN REBUTTAL TO EVIDENCE OF AN INSANITY DEFENSE, COMMENTED ON FERRY'S POST-ARREST, POST-MIRANDA SILENCE AND ASSERTION OF HIS RIGHT TO COUNSEL DURING A PSYCHIATRIC INTERVIEW.	25
ISSUE III. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO IMPEACH A DEFENSE PSYCHIATRIST BY ASSERTING THAT HE HAD VIOLATED THE LAW IN EVALUATING FERRY'S MENTAL CONDITION BECAUSE HE WAS NOT LICENSED TO PRACTICE MEDICINE IN FLORIDA.	29
ISSUE IV. THE TRIAL COURT ERRED IN DENYING FERRY'S REQUEST TO PRESENT EVIDENCE IN SURREBUTTAL TO EVIDENCE OF NEW ISSUES PRESENTED IN THE STATE'S REBUTTAL TESTIMONY.	33
ISSUE V. THE TRIAL COURT ERRED IN ALLOWING A STATE WITNESS, DETECTIVE CRIBB, TO REMAIN IN THE COURTROOM DURING THE TRIAL AFTER THE RULE OF WITNESS SEQUESTRATION HAD BEEN INVOKED.	36
ISSUE VI. THE TRIAL COURT ERRED IN REFUSING TO ALLOW INDIVIDUAL SEQUESTERED VOIR DIRE AND IN REFUSING	

TABLE OF CONTENTS (Cont'd) PAGE NO.

TO DISCHARGE THE VENIRE WHEN CERTAIN PROSPECTIVE JURORS EXPRESSED OPINIONS CONCERNING FERRY'S GUILT DURING QUESTIONING. 38

ISSUE VII. THE TRIAL COURT ERRED IN SENTENCING FERRY TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT BECAUSE THE FACTS SUGGESTING DEATH AS THE APPROPRIATE SENTENCE WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER. 40

CONCLUSION 46

APPENDIX

1. Sentence A1

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

CASES CITED	PAGE NO.
Aaron v. State 345 So.2d 641 (Fla.1977)	31
Amazon v. State __ So.2d __ (Fla.1986)(Case No. 64,117, opinion filed March 13)	23,40,41
Burch v. State 343 So.2d 831 (Fla.1977)	41
Cannady v. State 427 So.2d 723 (Fla.1983)	40,41,42
Davis v. State 461 So.2d 67 (Fla.1984)	39
Diaz v. United States 223 U.S. 442 (1912)	24
Donaldson v. State 369 So.2d 691 (Fla.1st DCA 1979)	35
Francis v. State 413 So.2d 1175 (Fla.1982)	21,22,24
Fulton v. State 335 So.2d 280 (Fla.1976)	31
Greenfield v. State 337 So.2d 1021 (Fla.2d DCA 1976)	25,26
Hall v. Wainwright 733 F.2d 766 (11th Cir. 1984)	24
Hawkins v. State 436 So.2d 44 (Fla.1983)	40
Henninger v. State 251 So.2d 862 (Fla.1971)	39
Herring v. State 446 So.2d 1049 (Fla.1984)	42
Hill v. State 422 So.2d 816 (Fla.1982)	42
Hopt v. Utah 110 U.S. 574 (1884)	24
Illinois v. Allen 397 U.S. 337 (1970)	21

TABLE OF CITATIONS (Cont'd) PAGE NO.

Jent v. State
408 So.2d 1024 (Fla.1981) 42

Jones v. State
332 So.2d 615 (Fla.1976) 41

King v. State
390 So.2d 315 (Fla.1980) 43

Mason v. State
438 So.2d 374 (Fla.1983) 42

Michael v. State
437 So.2d 138 (Fla.1983) 42

Miller v. State
373 So.2d 882 (Fla.1979) 41

Mills v. State
476 So.2d 172 (Fla.1985) 45

Peede v. State
474 So.2d 808 (Fla.1985) 24

Pope v. State
441 So.2d 1073 (Fla.1983) 43

Proffitt v. Wainwright
685 F.2d 1227 (11th Cir. 1982) 24

Randolph v. State
463 So.2d 186 (Fla.1984) 36

Riley v. State
366 So.2d 19 (Fla.1978) 44

Rivers v. State
458 So.2d 762 (Fla.1984) 40

Shue v. State
366 So.2d 387 (Fla.1978) 41

Spaziano v. Florida
468 U.S. 447 (1984) 40

State v. Burwick
442 So.2d 944 (Fla.1983) 25,26,28

State v. Dixon
283 So.2d 1 (1973) 44

TABLE OF CITATIONS (Cont'd) PAGE NO.

State v. Melendez
244 So.2d 137 (Fla.1971) 21

Stone v. State
378 So.2d 765 (Fla.1979) 39

Tedder v. State
322 So.2d 908 (Fla.1975) 40

Teffeteller v. State
439 So.2d 840 (Fla.1983) 45

Thomas v. State
372 So.2d 997 (Fla.4th DCA 1979) 37

Wainwright v. Greenfield
474 U.S. __, 88 L.Ed.2d 623 (1986) 26

Walsh v. State
418 So.2d 1000 (Fla.1982) 40

Williamson v. State
92 Fla. 980, 111 So. 124 (1926) 35

OTHER AUTHORITIES:

§90.609, Fla.Stat. 31
§90.610, Fla.Stat. 31
§921.141(5), Fla.Stat. 44
§921.141(5)(i), Fla.Stat. 42
§921.141(6)(a), Fla.Stat. 43
§921.141(6)(b), Fla.Stat. 41
§921.141(6)(f), Fla.Stat. 41

Fla.R.Crim.P. 3.216 31

Ch. 458, Fla.Stat. 31

STATEMENT OF THE CASE AND FACTS

1. Procedural Progress Of The Case

John William Ferry was arrested on July 3, 1983 and charged with setting fire to a Winn Dixie store resulting in the death of five people. (R2603) Ten days later, Circuit Judge J. Rogers Padgett declared Ferry incompetent to stand trial and committed him to Florida State Hospital. (R2621-2623) On the same day, a Hillsborough County grand jury indicted Ferry for three counts of first degree murder and one count of arson. (R2617-2620) Later, on September 14, 1983, a new indictment was returned charging five counts of murder and one count of arson. (R2650-2655)

On July 27, 1984 Florida State Hospital discharged Ferry and returned him to the Hillsborough County Jail. (R2677) Circuit Judge Manuel Menendez, Jr., adjudged Ferry competent to stand trial on March 12, 1985. (R2843) Ferry proceeded to a jury trial where he raised the defense of insanity. (R2832-2837) The jury found Ferry guilty as charged. (R3222-3227) After hearing additional evidence during the penalty phase of the trial, the jury recommended life sentences for each of the five murders. (R3235-3239) Judge Menendez delayed sentencing and ordered a presentence investigation report. (R2486-2487)

A sentencing hearing was held on September 27, 1985. (R2540) Over defense objections, relatives of the victims were allowed to testify. (R2549-2566) Ferry also made a statement to the court. (R2573-2575,2578) Judge Menendez adjudged Ferry guilty of all six counts and imposed death for each of

the five murders and thirty years for the arson. (R2577-2595, 3288-3296) In his written findings to support the death sentence (R3343-3354)(A1-12), Judge Menendez found five aggravating circumstances: (1) previous conviction for a violent felony; (2) knowingly creating a great risk of death to many persons; (3) during the commission of an arson; (4) the homicides were heinous, atrocious or cruel; (5) the homicides were cold, calculated and premeditated without any pretense of moral or legal justification. (R3343-3348)(A1-6) The court found two mitigating circumstances: (1) Ferry was under the influence of an extreme mental or emotional disturbance; (2) Ferry's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R3349-3351)(A7-9)

Ferry filed his notice of appeal to this Court on October 7, 1985. (R3336)

2. Facts--Guilt Phase

John William Ferry was known as one of the "street people" in the Palm River Road area of Hillsborough County. (R725,748,813-818) He actually lived in a tent in some nearby woods. (R1534) Employees in the local Winn Dixie store and convenience stores knew him since he made purchases at their respective stores, perhaps a can of sardines or an RC cola. (R725,746-748,773,785,915-916,1430-1434,1449-1450) He was sometimes known as "Feather Billy" because on one occasion he walked through a convenience store scattering feathers out of a paper bag he carried. (R774,791) He typically wore black rubber boots

and carried a large box or a bag with his food and other belongings inside. (R1259,1321, 1470-1471,1717) He was dirty, unkept and usually smelled. (R916,992,1259,1299,1309,1321-1322, 1395,1421,1437,1563) The local police had had several incident reports involving Ferry's strange behaviors. (R1472-1478,1523-1524)

On July 2, 1983 Billy Ferry walked to the Shop and Go store he frequented which was just across the street from the Winn Dixie. (R766-767,782-783) He purchased approximately four gallons of unleaded gasoline and placed it in a regulation red and yellow gasoline can. (R768-772,782-789) Carrying the can and a box on top of his head, he walked away. (R770,782-789) Less than one hour later, Ferry walked into the Winn Dixie store through the exit doors, which opened automatically, carrying a black bucket filled with gasoline. (R749) He stopped just inside, threw the gasoline toward the check-out counters, dousing employees and customers, lit the trail of gasoline he left on the floor with a Bic cigarette lighter and then fled through the still open exit doors. (R749-751,795,808-810,825-828,960-961) A fire ball erupted inside the store. (R913,937, 942-945) Several people were burned and five--Leigh Carter, Martha Vance, Jennifer Vance, Misty McCullough and Melody Darlington--ultimately died. (R1075-1099) Ferry, running away in his black rubber boots, looked back, laughed loudly and said "That will show those crazy bastards." (R817-819,1106-1108,1110)

Employees and other witnesses had no difficulty recognizing Ferry since he wore no disguise and had been in the store earlier that day. (R719,752,800,818-819,830) He was ar-

rested the following day. (R2603) Ten days later, Circuit Judge J. Rogers Padgett declared Ferry incompetent to stand trial and committed him to Florida State Hospital. (R2621-2623)

On March 12, 1985 the trial court adjudged Ferry competent to stand trial. (R2843) At the time of this determination, he was being medicated with psychotropic drugs. (R1672, 1691-1692) A jury trial commenced on August 12, 1985 with Ferry asserting an insanity defense. (R1,2832-2837)

During its case-in-chief, the State presented evidence to support the theory that Ferry knew what he was doing and had planned the fire. The State asserted that Ferry started the fire because he had once bought some bad cream cheese from the store. (R1281-1289,1605,3424) Over one year before the fire, Ferry had apparently purchased some bad cream cheese, and with the aid of his sister, he mailed a complaint to the store. (R1281-1289,1605,3424) Also, because Ferry managed to start the fire without injuring himself, the prosecution urged this as evidence of his ability to understand his actions. (R2197) Ferry had been a seaman on a tug boat trained to handle flammable materials. (R1520-1521)

The State also presented evidence foreshadowing Ferry's actions. Early in the afternoon on the day of the fire, Ferry made a purchase in the Winn Dixie. (R720-721) At that time, he commented to the cashier, Denise Young, that he had seen a cashier in the store on another day who had been doused with gasoline and burned up. (R721-724) Young recognized Ferry as one of the "street people" who made purchases at the store.

(R725-726) However, in the past, Ferry had not clearly spoken to her--he merely mumbled or talked to himself. (R726-727) A second incident occurred a few days before the fire in a food stamp office. (R873-906) Ferry was sitting next to Ronald Ruben. (R874) Ferry had a red and yellow gasoline can which appeared to be empty. (R874,897-898) He complained to Ruben about the food stamp office personnel and threatened to blow things up. (R876-877,897-902) Ruben assumed Ferry was referring to the food stamp office, and he reported the threat to the personnel there. (R898) Their response was to tell Ferry to sit down and be quiet. (R903) Finally, on a wall by the road leading into the neighborhood where Ferry's parents lived, several witnesses saw spray painted on the wall the words, "Fire, fire, fire. Billy can't take it no more." (R802,1268-1269,1402-1404)

Two psychiatrists testified that Ferry was insane at the time of the offense. (R1122,1611) Dr. Manuel Tanay examined Ferry; reviewed medical records, jail records and police reports; and interviewed family members in reaching his conclusion that Ferry was insane at the time of the offense. (R1145-1154,1180-1182) He diagnosed Ferry as having a severe case of paranoid schizophrenia. (R1154-1155) According to Tanay, the disease is characterized by the person's loss of touch with reality. (R1155) Schizophrenics suffer delusions and hallucinations and cannot differentiate these fantasies from reality. (R1156) This impairment usually affects only one area of their thinking (R1155), and they retain normal reasoning functions for technical aspects of living such as buying food. (R1155,

1167-1169) Intellectual capacity is not lost. (R1167) However, Tanay stated that the schizophrenic's hallucinations and delusions leave them functioning like a child in a dream world. (R1161)

Ferry's dream world left him with the belief that he was being persecuted by his wife, mother, sister, various people in the community and certain stores. (R1182) He particularly identified those wearing black or red as part of the conspiracy. (R1182) The conspiracy was to chemically castrate him through the food or water. (R1182) Ferry believed he had to defend himself from the community. This belief was consistent with many of his bizarre behaviors such as spreading fiberglass around the community thinking it was radioactive and would protect him. (R1182-1183) Tanay explained that threats to blow up the world are consistent with schizophrenia as are Ferry's laughing after the homicide and his comments that the fire "will show those crazy bastards." (R1187)

Dr. Walter Afield also diagnosed Ferry as a textbook case of paranoid schizophrenia. (R1630-1639) Afield had examined Ferry shortly after his arrest, and at that time, Ferry was totally incompetent. (R1641) He was hallucinating and was delusional. (R1641) Part of Ferry's delusional system was that the Russians were poisoning all the food and water, particularly at the Winn Dixie store. (R1644) Afield testified that the setting of the fire at the Winn Dixie was the product of Ferry's paranoid delusions. (R1641-1644) Ferry was legally insane at the time of the fire. (R1641-1650)

Several of Ferry's relatives and friends testified about the significant behavioral changes which occurred in Ferry when he was a young adult. This testimony corroborated the diagnosis of paranoid schizophrenia. Ferry had a normal childhood and teenage years, but his behavior changed in 1976. (R1248-1251,1291-1292,1297-1301,1305-1307,1314-1318,1392-1398, 1465-1467,1549-1553,1709-1713) He bacame withdrawn and quite bizarre in his behavior. He became suspicious of his relatives. (R1252,1261,1322,1560-1563) He talked about Superman and the Russians. (R1252,1258,1264-1268,1296,1319,1396,1712-1714) He explained that the Russians were conspiring to take over the United States by poisoning the food supply with a chemical which would render all males impotent. This would then stop reproduction, and eventually, the Russians could take over the country. (R1266,1319,1585,1724) He told his sister that the Winn Dixie store had a bomb shelter in it, and it served as a network for the Russians. (R1266) Ferry soon suspected that his mother and sister were part of the plot. (R1252-1253) He refused to eat any food or drink from inside his parent's home. (R1320,1387) He accused his mother of poisoning his brother. (R1252) He even stopped entering the residence. (R1322) He lived in dumpsters, culverts or in the woods. (R1322) Using a plastic bleach bottle, Ferry obtained his drinking water from either a drainage ditch, the river, or a fishpond. (R1261,1320, 1717) Anyone wearing red frightened him. (R1410,1425,1569-1570) He thought wearing red identified a person with the Russians and the conspiracy. (R1410,1425,1732) Ferry's sister-in-law once wore red shorts in his presence, and Ferry accused

her of being infested with the Russians. (R1425)

Eventually, Ferry's unusual behaviors took the form of action against the Russian conspiracy and those whom he believed were involved in it. Once he poured acid on his mother's car and his sister's car. (R1336-1337,1399-1400,1580-1581) On several occasions, Ferry spread little pieces of fiberglass all over the neighborhood and other areas of the community. (R1263, 1409,1417,1579) He said it was radioactive asbestos dust and would keep him safe from the Russians. (R1263,1409,1579) At that time, he referred to himself as "Dustbuster" and wore a cap with that name written on it. (R1263) He also frequently wore a white, dust respirator mask over his mouth. (R1308,1400-1401,1450) Once he poured ammonia on the floor in a Seven-Eleven convenience store. (R1436-1439) In January 1983, Ferry was observed pouring three different types of flammable liquid on the floor of the automotive section at K-Mart. (R1440-1447) Also, a Tampa police officer found Ferry apparently pouring ammonia into the river. (R1522-1525)

Ferry's family recognized his need for mental health treatment, but their efforts to obtain it for him were in vain. His parents and sister went to the mental health center in Tampa for assistance in February 1980. (R1269-1272,1322-1327, 1410-1412,1574) However, at that time they were unsure of where Ferry was living. (R1269-1270) The last place they knew he had been living at that time was a campsite owned by his parents near Ocala. (R1576-1577) Part of the time he lived in a small camping trailer there and part of the time he lived in a hole in the ground out in the woods. (R1253-1256) As a result, the

personnel at the mental health center referred the family to the Marion County mental health services. (R1270,1577) On another occasion, Billy Ferry's father, mother, brother and sister actually convinced Ferry to go with them to the mental health facility in Tampa. (R1322-1326,1411-1412,1571,1734) A counselor interviewed him but did not begin Baker Act proceedings immediately. Instead, the counselor told Ferry he could return the following morning since he said he had a job interview. (R1326) Ferry's father told the counselor that he would never return. (R1326) He did not, and his family did not see him again for six months to a year. (R1326,1412) Family members also called the police for help on several occasions as a result of Ferry's unusual and sometimes threatening behavior. (R1581-1583,1738-1740) The officers would file a report but tell the family that they could not help. (R1581-1583,1738-1740) They even sought help from the State Attorney's Office without success. (R1271,1741-1743)

In addition to family members, others in the community and local police officers reported Ferry's strange behaviors. (R1430-1435,1440-1479) A Presto Food Store employee saw Ferry almost every afternoon. (R1449) He would buy a sandwich and remain at the store to eat it. (R1450) His behavior was bizarre. (R1450) He wore a mask and would chase cats and dogs around with a stick. (R1450) And, the night before the Winn Dixie fire, the employee heard Ferry say he was going to blow up the world. (R1450) A Tampa police officer once found Ferry in the parking lot of the Tampa Stadium at 10:30 p.m. running short distances, back and forth. (R1473) The officer stopped him

(R1473) and recognized that he was mentally disturbed. (R1474) Because Ferry was not breaking the law, the officer did not infere with his activity. (R1474) Finally, a deputy sheriff who patrolled the area of the Presto Food Store had witnessed Ferry's unusual behaviors so often that he no longer filed incident reports on him. (R1475-1479) No law enforcement officer ever sought mental health treatment for Ferry.

Ferry testified during the guilt phase of his trial. (R1483-1520) He described how the country had organizations filled with men wearing white hats and red hats all fighting for technology. (R1485-1486) He said that he became aware of these organizations and their motives. (R1487) One company he worked for began poisoning him. (R1485) Ferry fought back by staging an accident and suing the company. (R1485) He then decided to do something for the world by researching, trying to catch up with the organizations' technology. (R1486) They started using a thought wave machine to read his mind in order to steal his research. (R1487) They tortured him, beat him, neutered his wife and castrated his son. (R1487) The organizations began poisoning the food and water which, according to Ferry, tranquilized his libido. (R1487) The organizations have the anitdote, and Ferry wanted it. (R1490) The poison finally stopped effecting him because his body evolved. (R1490) He could drink milk and Coke again. (R1490) He managed to get rolls of radioactive asbestos dust and began spreading it all over Hillsborough County. (R1490-1494) He stated that the fighting continued, and after five years, he started "cracking up." (R1495) Unpoisoned water could not be found unless you

had the technology and the antidote. (R1499) Spreading the asbestos dust was Ferry's hope to gain time to develop the cure. (R1499) Finally, when he could not take it anymore, Ferry firebombed the Winn Dixie. (R1500) Ferry told the jury that "War is hell" (R1502), but he dealt a blow the Russians would not forget. (R1499)

On rebuttal, the State presented several witnesses who had had contact with Ferry in various capacities. A nurse who treated him in the Marion County Jail testified to a hysterical conversion reaction Ferry suffered while incarcerated. (R1780-1797) This manifested itself in Ferry's inability to move. (R1781-1782) He urinated and defecated in his pants. (R1783) Upon his release, however, he walked away. (R1781) An employee at a convenience store, who had reported Ferry for an incident at the store, testified to receiving a telephone call from someone, apparently Ferry, impersonating a police officer. (R1982-1988) A supervisor from the food stamp office testified to his dealing with Ferry when he appealed regarding his food stamp alotment. (R1989-2011) And, a Tampa police officer testified about a disorderly conduct charge he placed against Ferry when protested his being stopped. (R2012-2025)

Two psychiatrists and a psychologist testified for the State on rebuttal. (R1805,1847,2035) All three concluded that Ferry suffered from a severe, long-term psychosis--paranoid schizophrenia. (R1833,1864,2075) However, they also concluded that Ferry was not legally insane at the time of the offense. (R1818,1860-1861,2058-2059) Dr. Robert Coffer reached his conclusion on sanity at the time of the offense only to a degree

of medical probability; he could not testify to a degree of medical certainty that Ferry was sane at the time. (R1822) Each of the three experts admitted that there was certain background information and details surrounding the fire about which they had no knowledge at the time they reached their conclusions. (R1841-1847,1878-1892,2064-2082)

3. Legal Questions--Guilt Phase

The trial court denied Ferry's request for individual sequestered voir dire. (R6-14,2862-2865) Counsel had especially asked for sequestered voir dire on the issues of pretrial publicity and the insanity defense. (R8-9,2862-2865) In denying the motion, the judge assured counsel that if any comments tainting the panel of jurors occurred, a new panel would be obtained. (R320) One prospective juror said,

> A. I just don't believe that he didn't know right from wrong. Because to me if he didn't know right from wrong why didn't he just use water?

(R471) Defense counsel moved to strike the panel, but the court denied the motion. (R471-472)

In selecting the jury, all prospective jurors were questioned before any peremptory or cause challenges were exercised. (R13-21,564-638) After voir dire, the prospective jurors were excused from the courtroom before counsel began to exercise challenges. (R564) At the same time, Ferry was also removed under the supervision of the bailiffs. (R564) The judge directed counsel's attention to this fact. (R564) Acknowledging Ferry's absence, defense counsel then said,

Mr. Alldredge: Yes. That is acceptable with us. Waive his presence at this stage.

(R564) Ferry never spoke to the issue of waiving his presence. (R564) Counsel proceeded to exercise challenges, reexamine certain jurors and finally impanel a jury to try the case. (R564-638)

The rule of witness sequestration was invoked during trial. However, at the beginning of the trial, the State moved for an exception to the rule for Detective Cribb alleging that his presence was needed to assist the prosecutor. (R653-654) In the motion, the State asserted that Cribb's testimony would concern only the handling of physical evidence and chain of custody. (R654) The court granted the motion over objection. (R655-657) Cribb testified three times. (R1008,1532,1893) His testimony primarily dealt with the collection of physical evidence, but he also testified to statements Ferry made upon his arrest (R1532-1536), that a can found contained gasoline (R1012-1014) and about the flame adjustment on the cigarette lighter found on Ferry at his arrest. (R1019)

Dr. Emanuel Tanay, one of Ferry's experts, is a professor of psychiatry at Wayne State University. (R1125-1126) He is licensed to practice medicine in Michigan, Ohio and Georgia. (R1126) The prosecutor attempted to impeach him by asserting that he had violated Florida's medical licensing law when he examined and evaluated Ferry. (R1129) Defense counsel objected to the inquiry. (R1130) The court overruled the objection (R1130), and the prosecutor continued the same method of impeachment. (R1129-1131)

Dr. Gerald Mussenden, a clinical psychologist, testified for the State on rebuttal. (R2035) On direct examination, the prosecutor asked Mussenden if Ferry made any statements which were helpful in reaching the conclusion that Ferry was sane at the time of the offense. (R2045) Mussenden responded that Ferry said he did not want to talk to him because he was not his attorney or doctor. (R2046) Defense counsel objected and moved for a mistrial which was denied. (R2046-2049) Shortly thereafter, Mussenden again stated that Ferry told him that he was not his attorney or doctor and that he did not need to speak to him. (R2050-2051) Defense counsel's second motion for mistrial was also denied. (R2051-2055)

During the State's rebuttal testimony, issues concerning Ferry's mental condition were raised for the first time. One concerned malingering and whether he faked being mentally ill. (R2084-2085) The second was Mussenden's statement that Ferry's actions were the product of a sadistic personality. (R2085-2088) A third was testimony of a hysterical conversion reaction Ferry exhibited while in the Marion County Jail. (R1780-1782) Defense counsel asked to present surrebuttal on these issues. (R2099) The court denied the request. (R2104)

4. Penalty Phase And Sentencing

The State presented two witnesses during penalty phase. (R2309,2318) Detective Steven Cribb testified to the burned condition of the one victim who was dead at the scene of the fire. (R2309-2314) Susan Gammino, a nurse at the burn unit at Tampa General Hospital, testified to the condition of the

surviving victims and the treatment they received prior to their deaths. (R2318-2375) Gammino testified over defense objections as to relevancy. (R2326-2328) Her testimony included extensive descriptions of medical procedures, photographs of those procedures, suffering of the victims and statements victims made while in the hospital. (R2322-2375) She also related the special problems in treating the child victim, Jennifer Vance, because she kept pulling the tubes from her body. (R2344-2346) Gammino made the statement that the child was actually trying to kill herself. (R2344) This comment prompted a defense motion for mistrial which was denied. (R2344-2345)

Drs. Walter Afield, Robert Berland and Emanuel Tanay testified for the defense regarding Ferry's mental condition as it related to the statutory mitigating circumstances. (R1192-1200,2387,2406) All three stated that Ferry was seriously mentally ill and that the statutory mitigating factors applied. (R1192-1200,2391-2395,2432-2436) Berland, who was the psychologist who treated Ferry for over a year at Florida State Hospital, said that when properly medicated Ferry was not a management problem. (R2430-2431) At the hospital, Ferry was cooperative and responsive to instructions. (R2430-2431) He spent much of his day sleeping under a pool table. (R2431) Afield reiterated that the crime would not have occurred but for Ferry's mental illness. (R2392) He also agreed with Berland that with medication Ferry was not a management problem. (R2397)

A videotaped statement made by Ferry's nine year old son was also played for the jury. (R2439,4895-4897) He said that his father was as good to him as he could be. (R4895)

When asked what he meant by that statement, he replied, "Since he is so sick." (R4897) He also told the jury that he wanted to be able to visit his father. (R4895)

Ferry also testified. (R2399-2407) He told the jury that the Russians were trying to kill them with poison which caused stomach cancer. (R2400-2401) He said they had made the biggest mistake of their lives, but he knew they were helpless. (R2404) He knew the Russians were controlling them with electronics. (R2405-2406)

The jury recommended life sentences for Ferry. (R2479-2484) Sentencing was held sometime later after a presentence investigation report had been prepared. (R2486-2487,2543) During the delay, the court received a great deal of correspondence expressing opinions on the case.[1/] (R2546-2547) Judge Menendez said he would not consider the comments contained in the letters at sentencing. (R2546) However, relatives of the victim's were allowed to testify at sentencing. (R2549-2566) They expressed their grief and asked that Ferry be put to death. (R2549-2566) Similar statements and letters from relatives appeared in the PSI comments which the trial judge reviewed. (R4877-4892,4899-4916) During argument, the prosecutor also referred to a petition with 1300 signatures calling for Ferry's death. (R2563)

[1/] This correspondence was made part of the record in the trial court. Appellate counsel asked this Court for leave to supplement the record with these items, but this Court denied the request.

Ferry made a statement to the court at sentencing. (R2573) He advised the court that Reagan was elected as a communist and that he was poisoning the country with stomach cancer. (R2573-2574) The Presto Food Stores are hyponotizing the United States. (R2574) Ferry said he tried to stop them. (R2574) He said all the beer is poison and causes brain damage. (R2574) He then told the court that all thoughts were monitored. (R2577) After the court began to impose sentence, (R2577-2578), Ferry interrupted to say that the Russians were coming on strong in a different color--blue. (R2578)

SUMMARY OF ARGUMENTS

1. A criminal defendant has the constitutional right to be present at every critical stage of his trial. The jury selection process where challenges to prospective jurors are exercised is such a critical stage. Ferry was absent during this portion of his trial. And, although counsel purported to waive his presence in Ferry's absence, Ferry never personally waived his presence or even spoke to the issue of waiver. The error mandates a reversal for a new trial.

2. During an interview with a State psychologist, Ferry refused to speak to the psychologist because he was not his lawyer or doctor. Testifying on rebuttal to the defense of insanity, the psychologist, over objection, related Ferry's response as one indicia of his sanity. This evidence directly violates the rule this Court announced in State v. Burwick, 442 So.2d 944 (Fla.1983) which prohibits the use of post-arrest silence and assertion of right to counsel as evidence of sanity.

3. The prosecutor attempted to impeach a defense psychiatrist by asserting that he had violated the law in evaluating Ferry because he was not licensed to practice medicine in Florida. The witness is an expert in forensic psychiatry and is licensed in three other states. This impeachment technique was an unsupported character attack, and even if supported, was at best improper impeachment by showing prior bad conduct. Fulton v. State, 335 So.2d 280 (Fla.1976).

4. On rebuttal, the State presented evidence raising two new issues concerning Ferry's mental condition. The defense

requested to present surrebuttal testimony directed solely to these new points. In denying the request, the court abused its discretion. These matters directly affected the critical contested issue of Ferry's sanity.

5. Prior to trial, the State asked for an exception to the rule of witness sequestration for Detective Cribb. The prosecutor asserted that Cribb's testimony pertained to the collection of physical evidence. In fact, Cribb testified three times about other matters including a statement Ferry made when arrested. Consequently, the trial court erred in exempting Cribb from the rule.

6. Ferry's lawyers asked for individual sequestered voir dire on the issues of publicity and the insanity defense. The court denied the request. During voir dire, a juror expressed opinions on Ferry's guilt. Nevertheless, the court refused to dismiss the tainted jury venire as counsel requested. Ferry was entitled to a new venire which had not been poisoned by the improper and avoidable expressions of opinion.

7. Ferry should not have been sentenced to death. The trial court lacked a sufficient basis to override the jury's recommendation of a life sentence in this case. Every expert who examined Ferry agreed that he suffered from chronic paranoid schizophrenia. Substantial evidence proved that the setting of the fire was the product of Ferry's mental illness. This was a reasonable basis for the jury's recommendation. Moreover, the court improperly evaluated and weighed the aggravating and mitigating circumstances which further skewed its sentencing decision. Finally, the jury's recommendation of life is even

more compelling since it was rendered in spite of the court's permitting the introduction of irrelevant and inflammatory evidence in aggravation.

ARGUMENT

ISSUE I.

FERRY'S ABSENCE FROM THE JURY SELECTION AND IMPANELING PROCESS VIOLATED HIS SIXTH AMENDMENT RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF HIS TRIAL.

The Sixth and Fourteenth Amendments to the United States Constitution gives a criminal defendant the right to be present at every stage of his trial. As the Supreme Court said in Illinois v. Allen, 397 U.S. 337 (1970),

> One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial. Lewis v. United States, 146 U.S. 370, 36 L.Ed. 1011, 13 S.Ct. 136 (1892).

Ibid. at 338. This Court has acknowledged that a defendant "has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence" and that "the challenging of jurors [is] one of the essential stages of a criminal trial where a defendant's presence is mandated." Francis v. State, 413 So.2d 1175,1177 (Fla. 1982). Ferry was not present for the challenging and impaneling of jurors in his trial. (R564-638) He did not personally make a knowing, intelligent and voluntary waiver of his presence as required, ibid. nor did he ratify the actions of counsel taken in his absence. State v. Melendez, 244 So.2d 137 (Fla.1971). His Sixth Amendment rights have been violated requiring a reversal of his conviction for a new trial.

The trial judge employed a jury selection procedure which involved the voir dire examination of all prospective

jurors followed by the exercise of all challenges and the impaneling of the jury. (R13-21,564-638) After voir dire, the prospective jurors were excused from the courtroom for counsel to begin the exercise of challenges. (R564) At that time, Ferry was also removed from the courtroom under the supervision of bailiffs. (R564) Noticing that Ferry was leaving the courtroom, the trial judge brought this fact to the attention of defense counsel. (R564) Counsel acknowledged Ferry's absence and said that he waived Ferry's presence. (R564) The entire exchange proceeded as follows:

> The Court: Counsel, I note that your client is being escorted into the alternate jury room. Is that with your permission?
>
> Mr. Alldredge: Yes. That is acceptable with us. Waive his presence at this stage.

(R564) However, Ferry never personally waived his presence. He never spoke a single word regarding a waiver of his presence. Neither the court nor counsel asked any questions of Ferry on the subject. Moreover, Ferry never ratified the jury selection process conducted in his absence. This process included the exercise of numerous cause and peremptory challenges, the re-examination of certain jurors, and the complete impaneling of the jury. (R564-638)

In Francis v. State, 413 So.2d 1175, this Court faced an identical issue. Francis voluntarily absented himself from jury selection in order to use the restroom. When asked by the court, defense counsel waived Francis' presence. Jury selection continued in the courtroom and then was moved, at counsel's request, to the jury room. Francis returned but was left in the

courtroom. The jury was selected in his absence. This Court reversed for a new trial holding that counsel's waiver was insufficient and that Francis' silence did not constitute a waiver. The record failed to demonstrate that Francis knowingly waived his right to be present or ratified his counsel's actions taken in his absence. Ibid. The same constitutional violation has occurred in this case, and Ferry, like Francis, is entitled to a new trial.

This case is distinguishable from this Court's recent decision in Amazon v. State, __So.2d__ (Fla.1986)(Case No. 64,117, opinion filed March 13). Amazon was absent from a jury view of the crime scene. Prior to the view, defense counsel represented to the court that he had consulted with Amazon and that Amazon authorized him to waive his presence. No inquiry was made of Amazon on this subject on the record. Amazon appealed asserting that he had not knowingly, intelligently and voluntarily waived his right to be present. This Court relinquished jurisdiction for the purpose of conducting an evidentiary hearing on the circumstances surrounding any waiver. The trial court and this Court concluded on the evidence presented that Amazon's counsel had adequately consulted and advised him on his rights and that Amazon's authorization was a knowing, intelligent and voluntary waiver of his right to be present. Ibid., slip opinion at 3-4. Unlike Amazon, there is no evidence in this case that defense counsel ever consulted Ferry about waiving his presence. There is no indication that counsel ever sought, much less acquired, an authorization of any kind from Ferry to waive his presence. (R564) This is not the voluntary,

knowing and intelligent waiver the Sixth Amendment requires. Francis, 413 So.2d 1175.

Finally, assuming for argument that this Court concludes a valid waiver occurred, Ferry asks this Court to recede from Peede v. State, 474 So.2d 808 (Fla.1985) and hold that a capital defendant cannot waive his presence at any crucial stage of his trial. Such a holding would conform to the United States Supreme Court decisions on the subject, Diaz v. United States, 223 U.S. 442 (1912); Hopt v. Utah, 110 U.S. 574 (1884), as well as the Eleventh Circuit Court of Appeals' interpretation. Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984), cert. den., 85 L.Ed.2d 862 (1985); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified, 706 F.2d 311 (11th Cir. 1983), cert.den., 464 U.S. 1003 (1983).

The record fails to demonstrate that Ferry voluntarily, knowingly and intelligently waived his presence at jury selection. Just as in Francis v. State, 413 So.2d 1175,1178, the record is silent, and a valid waiver cannot be presumed. Furthermore, the error is not harmless, ibid. at 1178-1179, and the Sixth Amendment compels a reversal of Ferry's conviction.

ISSUE II.

THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL WHEN A PSYCHOLOGIST, TESTIFYING FOR THE STATE IN REBUTTAL TO EVIDENCE OF AN INSANITY DEFENSE, COMMENTED ON FERRY'S POST-ARREST, POST-MIRANDA SILENCE AND ASSERTION OF HIS RIGHT TO COUNSEL DURING A PSYCHIATRIC INTERVIEW.

Since this Court's decision in State v. Burwick, 442 So.2d 944 (Fla.1983), the law has been clear that evidence of a defendant's post-arrest silence and assertion of his right to counsel cannot be introduced to rebut evidence of insanity at the time of the offense. Expressly disapproving of a Second District Court opinion to the contrary, Greenfield v. State, 337 So.2d 1021 (Fla.2d DCA 1976), this Court said

> The Greenfield decision permits the state to rebut the defense of insanity with evidence, taken during custodial interrogation, of a defendant's desire to remain silent and his request for an attorney. That decision is based largely on the unfounded assumption that post-arrest, post-Miranda silence is probative of sanity. Inasmuch as this position cannot be reconciled with the principles of law announced in United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975), and Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.E.d2d 91 (1976), we disagree.
>
> * * *
>
> Regardless of the nature of the defense raised, the evidentiary doctrine in Hale remains intact. Post-arrest, post-Miranda silence is deemed to have dubious probative value by reason of the many and ambiguous explanations for such silence. 422 U.S. at 180, 95 S.Ct. at 2138. Contrary to what Greenfield intimates, these ambiguities attendant to post-Miranda silence do not suddenly disappear when an arrestee's mental condition is brought into issue. The same

> evidentiary problems addressed by the Supreme Court in Hale are present in the case before us. For example, one could reasonably conclude that custodial interrogation might intimidate a mentally unstable person into silence. Likewise, an emotionally disturbed person could be reasonably thought to rely on the assurances given during a Miranda warning and thereafter choose to remain silent. In sum, just what induces post-arrest, post-Miranda silence remains as much a mystery today as it did at the time of the Hale decision. Silence in the face of accusation is an enigma and should not be determinative of one's mental condition just as it is not determinative of one's guilt. Accordingly, the state should not be permitted to confirm Burwick's mental state with evidence of his post-Miranda silence.

Burwick, at 947-948. In 1986, United States Supreme Court concurred with this Court's ruling in Burwick and disapproved Greenfield. Wainwright v. Greenfield, 474 U.S. __, 88 L.Ed.2d 623 (1986).

In spite of the Burwick decision, which was supplied to him during argument (R2053), the trial judge denied two motions for mistrial when State rebuttal witness, Dr. Gerald Mussenden, commented on Ferry's post-arrest silence and assertion of his right to counsel. (R2046-2049,2051-2055) Not only were the motions denied, but the court also refused to admonish the witness to refrain from further such comments. (R2055) Ferry's rights under the Fifth and Fourteenth Amendments have been violated. This Court must reverse this case for a new trial.

The first offending comment occurred while Mussenden was describing his visit with Ferry on July 6, 1983. (R2045-2046) At the time of the visit, Ferry had been arrested for

murder, had been to his first appearance hearing, had been advised of his Miranda rights and was represented by counsel. The testimony at trial proceeded as follows:

> A. Yes, we did. I spoke with him on July 6th for 40 minutes.
>
> Q. And during that 40 minute conversation did Mr. Ferry make any statements to you that you felt were significant in helping you come to an understanding of his mental state at the time of the offense?
>
> A. Well, counselor, it becomes difficult for me to tell you almost exactly what he told me on the first interview. Since I have a lot of the data together. I do note from the very beginning he very adamantly denied being involved in the offense as he did on the first time I saw him. Indicated that this was murder, he did that on the first visit, he indicated it was prosecutable by the electric chair or that would be the penalty, you can get life in prison, and thus he told he he did not no it. And also told me he did not want to discuss it with me, told me I was not his attorney, I was not his doctor, and did not want to discuss it.
> We did discuss other areas of his life but he made that repeated type of statement over the different visits that I had with him.

(R2045-2046)(Emphasis added.) Defense counsel objected and made his first unsuccessful motion for mistrial. (R2046-2049) Shortly after the first comment, the second occurred:

> Q. During these meetings with Mr. Ferry in July of 1983 did you specifically ask him if he had done the firebombing of the Winn Dixie?
>
> A. Yes, I did.
>
> Q. And what was his response to that?
>
> A. He gave me a number of responses. One of which was that his attorney--he didn't need to speak with me about it. Another one was I was not his Doctor.

(R2050-2051)(Emphasis added.) Again, defense counsel unsuccessfully moved for a mistrial. (R2051-2055) These remarks fall

squarely within the type of evidence Burwick prohibits.

Ferry's rights under the Fifth and Fourteenth Amendments have been violated. He urges this Court to correct these violations by reversing his case for a new trial.

ISSUE III.

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO IMPEACH A DEFENSE PSYCHIATRIST BY ASSERTING THAT HE HAD VIOLATED THE LAW IN EVALUATING FERRY'S MENTAL CONDITION BECAUSE HE WAS NOT LICENSED TO PRACTICE MEDICINE IN FLORIDA.

Dr. Emanuel Tanay testified for the defense. (R1122) He is Professor of Psychiatry at Wayne State University in Michigan and an expert in forensic psychiatry. (R1125-1126) He is the author of several books and articles, many dealing with homicide in particular. (R1125-1126) He has also served as a consultant for several hospitals and groups, including the American Bar Association Criminal Law Section. (R1126) He is licensed to practice medicine in Michigan, Ohio and Georgia. (R1126) He has been qualified and testified as an expert in many areas of the country, including Florida. (R1127) The trial court in this case also qualified him as an expert witness. (R1141)

While examining Tanay regarding his qualifications, the prosecutor attempted to impeach Tanay by asserting that he had practiced medicine without a Florida license when he evaluated Ferry. (R1129) The court overruled defense counsel's objection to the inquiry. (R1130) This allowed the prosecutor to continue the same line of questioning. The exchange proceeded as follows:

> Q. Thank you. When you examined Mr. Ferry in this case you were not consulting with a Florida State licensed psychiatrist at the time on this case were you?
>
> A. I have not discussed the case with anyone other than his attorneys.

Q. And when you examined Mr. Ferry for the purpose of rendering a diagnosis in this case you had not, in fact, obtained the consent or leave of the Florida Board of Medical Examiners to practice medicine in the State of Florida, had you, Doctor?

A. I have testified on many occasions in Florida. I have never heard that that was a requirement. That is news to me.

Q. Your Honor, I'd ask that you request that the witness be responsive. The question was: Did he have the legal authority to practice medicine in the State of Florida.

THE COURT: Just answer that question, Doctor, if you would.

MR. ALLDREDGE: Excuse me, Your Honor, I object. May we approach the bench?

THE COURT: Not at this time.

MR. ALLDREDGE: I preserve my objection for the record, Your Honor. The objection would be as to relevancy.

THE COURT: Overruled.

BY MR. ATKINSON:

Q. And you are not, in fact, licensed to practice medicine in the State of Florida, are you?

A. No, I am not.

Q. Did not find it necessary or have interest to comply with the laws of State of Florida before you, in fact, practiced medicine here in March of 1985, did you?

A. I think it is inaccurate statement that I practiced medicine. I consulted. And in that capacity it is my knowledge from past experience that that was not necessary.

Q. That is your opinion, that it is not necessary?

A. That has been my experience.

Q. Are you familiar with Florida Statute Chapter 458.30(1), et cetera, which sets out

> the definitions of and requirements for practicing medicine in the State of Florida?
>
> A. Sir, I am not a lawyer. If you want to make legal arguments please don't address them to me.
>
> Q. Yes or no? Are you familiar with those provisions?
>
> A. I don't even know what you're talking about.

(R1129-1131) Later, the prosecutor asserted that Tanay was not to be believed because he was not court appointed pursuant to Florida Rule of Criminal Procedure 3.216. (R1135) This inquiry prompted further defense objections and a motion for mistrial. (R1135-1139)

The prosecutor's actions were nothing more than an unsupported character attack on an eminently qualified psychiatrist. Such impeachment techniques cannot be condoned. Tanay was not a treating physician and had not violated any Florida licensing requirements. See, Ch.458, Fla.Stat. Certainly, it is no violation of the law to testify as an expert even though not appointed pursuant to Florida Rule of Criminal Procedure 3.216. Assuming for argument that Tanay had violated the law, the prosecutor was still prohibited from inquiring into such matters since defense witnesses cannot be impeached by prior bad conduct. E.g., Aaron v. State, 345 So.2d 641 (Fla.1977); Fulton v. State, 335 So.2d 280 (Fla.1976). The prosecutor was not attempting to introduce reputation testimony relating to truthfulness, see, §90.609, Fla.Stat., nor was he asserting that Tanay had been convicted of a crime. See, §90.610, Fla. Stat. He was, instead, attempting to discredit by innuendo.

This Court simply cannot allow such a practice to go uncorrected.

This error was not harmless to Ferry's case. Tanay was a primary witness for Ferry's insanity defense. Insanity was the fiercely debated issue in the trial. Every expert who testified agreed that Ferry was severely mentally ill. Only the technical question of his legal insanity at the time of the crime was in issue. And, even one of the State's experts was unwilling to testify to a degree of medical certainty that Ferry was sane at the time. (R1822) The evidence of Ferry's sanity was far from the overwhelming evidence necessary to render this legal error harmless. This Court must reverse the case for a new trial.

ISSUE IV.

THE TRIAL COURT ERRED IN DENYING FERRY'S REQUEST TO PRESENT EVIDENCE IN SURREBUTTAL TO EVIDENCE OF NEW ISSUES PRESENTED IN THE STATE'S REBUTTAL TESTIMONY.

The State's evidence in rebuttal raised two new issues concerning Ferry's mental condition which had not been addressed in the defense's case. One was the question of whether Ferry was malingering and faking his mental illness, and the second was whether Ferry's actions were merely the product of a sadistic personality.

Gerald Mussenden, a clinical psychologist, testified for the State in rebuttal on the issue of Ferry's sanity at the time of the offense. (R2035) During his testimony, he opined that Ferry was malingering and deliberately making his mental illness appear worse. (R2084-2085) Mussenden did not believe that Ferry's actions were the product of his delusional system but were instead merely sadistic acts of a social failure who was enraged with society. (R2085-2088) He characterized the burning of the grocery store as "...Ferry's greatest work of art. The greatest sadistic act that he could put together." (R2087) This testimony was the first suggestion that Ferry had a sadistic personality.

Joan Clark, a nurse at the Marion County Jail, also testified about her contact with Ferry while he was incarcerated. (R1780) She said that he had to be moved in a wheelchair and complained of paralysis. (R1781-1782) Her records indicated that after medical examinations no physical cause for his paral-

ysis was found. (R1793-1794) Ferry's problem was diagnosed as hysterical conversion reaction. (R1783-1784,1794) A psychiatrist saw him in the jail, but he could not be hospitalized for lack of bed space. (R1795) She testified that as soon as the court released Ferry on his Marion County charges, he got out of the wheelchair and walked away. (R1782)

At the conclusion of the State's rebuttal, defense counsel asked the court to allow surrebuttal on the questions of Ferry's alleged malingering, the conversion reaction diagnosis and Ferry's actions being merely sadistic. (R2099) The court denied the request. (R2104) Had the request been granted, the defense could have presented testimony on these issues. During the penalty phase, the defense elicited testimony on each of these points. (R2389-2434) Dr. Walter Afield explained that a conversion reaction is a real mental condition and is not merely evidence of malingering. (R2389-2391) Furthermore, Afield explained that Ferry's acts were completely the product of his delusional system which was part of his severe mental illness. (R2391-2392) Finally, Dr. Robert Berland, who treated Ferry for a year at Florida State Hospital beginning immediately after his arrest, testified that Ferry was not malingering. (R2407-2434) Berland also said that the psychological tests administered to Ferry were not capable of measuring sadism in a personality. (R2434)

All of this testimony was relevant to the new issues presented in the State's rebuttal. The trial court had the discretion to allow this presentation on surrebuttal. See,

Williamson v. State, 92 Fla. 980, 111 So. 124,126 (1926); Donaldson v. State, 369 So.2d 691,695 (Fla.1st DCA 1979). That discretion was abused in this case. Ferry urges this Court to reverse his case for a new trial.

ISSUE V.

THE TRIAL COURT ERRED IN ALLOWING A STATE WITNESS, DETECTIVE CRIBB, TO REMAIN IN THE COURTROOM DURING THE TRIAL AFTER THE RULE OF WITNESS SEQUESTRATION HAD BEEN INVOKED.

At the beginning of the trial, the State moved the court to grant an exception to the rule of witness sequestration to permit Detective Cribb to remain in the courtroom. (R653-655) The State alleged that Cribb was needed to assist the prosecutor during the trial. (R3141-3145,653-655) Furthermore the State asserted that Cribb's testimony would concern only the handling of certain items of physical evidence and chain of custody. (R654) The defense objected strenuously to any exception to the rule. (R655-656) However, the trial court granted the State's motion and excluded Detective Cribb from the rule. (R657) Contrary to the State's representation, Cribb's testimony was not confined strictly to the handling of physical evidence and chain of custody. (R1008,1532,1893) Prejudice accrued to the defense, and Ferry is entitled to a new trial.

Although the rule of witness sequestration is not absolute, Randolph v. State, 463 So.2d 186,191 (Fla.1984), exceptions to the rule are not favored.

> ...a trial court should not, as a matter of course, permit a witness to remain in the courtroom during the trial when he or she is not on the stand, unless it is shown that it is necessary for the witness to assist counsel in trial and that no prejudice will result to the accused.

Ibid. at 191-192. Moreover, when an objection is made to the

requested exception, the court must conduct a hearing and make a finding that no real prejudice would result. Ibid., at 191, citing with approval, Thomas v. State, 372 So.2d 997 (Fla.4th DCA 1979). The court conducted an inadequate hearing in this case and made no finding regarding prejudice. (R653-656)

Cribb's testimony demonstrated prejudice. He testified on three separate occasions. (R1008,1532,1893) While his testimony was primarily limited to the collection of physical evidence, he also testified about some statements Ferry made to him (R1532-1536), about the contents of a can containing gasoline found in a wooded area (R1012-1014), and about the flame adjustment of a cigarette lighter found on Ferry at his arrest. (R1019) The contents of the can and the flame adjustment on the lighter tended to corroborate the State's theory that Ferry was sane at the time of the offense because he was capable of using techniques to avoid injury when starting the fire. Cribb's testimony was material to substantive issues, not merely to procedural matters as the prosecutor claimed.

Detective Cribb should not have been excluded from the rule of witness sequestration. The trial court failed to conduct a proper hearing before granting the exception and failed to make a finding that no prejudice would result. Actual prejudice occurred. Ferry has been denied his due process right to a fair trial.

ISSUE VI.

THE TRIAL COURT ERRED IN REFUSING TO ALLOW INDIVIDUAL SEQUESTERED VOIR DIRE AND IN REFUSING TO DISCHARGE THE VENIRE WHEN CERTAIN PROSPECTIVE JURORS EXPRESSED OPINIONS CONCERNING FERRY'S GUILT DURING QUESTIONING.

Defense counsel asked for individual sequestered voir dire. (R6-13,2862-2865) Counsel particularly wanted sequestered voir dire on issues of pretrial publicity and the insanity defense. (R8-9,2862-2865) This case was heavily publicized and had engendered a great deal of community interest. The insanity defense itself was, to an extent, on trial. In spite of this background, the trial judge denied the request for sequestered voir dire. (R13-14) However, in so doing, he assured counsel that if any taint to the panel occurred, he would dismiss the venire and begin the selection process anew. (R320) A taint occurred. (R471-472) The court refused to dismiss the venire and did not thereafter allow sequestered voir dire. (R472)

During inquiry on the insanity defense issue, a prospective juror said,

> A. I just don't believe that he didn't know right from wrong. Becuse to me if he didn't know right from wrong why didn't he just use water?

(R471) Defense counsel immediately moved to strike the jury panel on the ground that this comment poisoned the entire venire. (R471-472) This was precisely the type of remark counsel feared. (R320) The court denied the motion. (R472) Voir dire continued with several other jurors expressing their views on the insanity question. (R473-558)

A trial judge has the discretion to grant individual sequestered voir dire in order to insure the selection of a fair and impartial jury. Davis v. State, 461 So.2d 67 (Fla. 1984); Stone v. State, 378 So.2d 765 (Fla.1979). Abuse of that discretion or the partiality of the jury as a result of voir dire in the presence of the entire venire constitutes grounds for reversal. Ibid. The trial judge abused his discretion in this case. Sequestered voir dire should have been granted. The prospective juror expressed an opinion on an ultimate issue in the trial thereby tainting the remaining potential jurors. It was an opinion justifying an excusal of that juror for cause. See, Henninger v. State, 251 So.2d 862 (Fla.1971). Furthermore, the remarks impacted the other jurors. The next two jurors to be questioned mirrored the same opinion. (R473-475)

Ferry has been denied his Sixth Amendment right to a fair and impartial jury. The trial court should have allowed individual sequestered voir dire to avoid the contamination of the panel which did occur. This Court must reverse this case for a new trial.

ISSUE VII.

THE TRIAL COURT ERRED IN SENTENCING FERRY TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT BECAUSE THE FACTS SUGGESTING DEATH AS THE APPROPRIATE SENTENCE WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

A jury's recommendation of life imprisonment must be given great weight, and

> In order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So.2d 908,910 (Fla.1975). This Court has consistently and repeatedly held that a life sentence must be imposed if a reasonable basis for the jury's recommendation of life exists. E.g., Amazon v. State, __So.2d__ (Fla.1986)(Case No. 64,117, opinion filed March 13); Hawkins v. State, 436 So. 2d 44 (Fla.1983); Cannady v. State, 427 So.2d 723 (Fla.1983); Walsh v. State, 418 So.2d 1000 (Fla.1982). The fact that the sentencing judge disagrees is not determinative. Rivers v. State, 458 So.2d 762,765 (Fla.1984). It is this Court's consistent application of this standard in life recommendation cases which has preserved the constitutionality of Florida's death penalty sentencing procedures. Spaziano v. Florida, 468 U.S. 447 (1984). A reasonable basis for the jury's recommendation of life exists in this case. The sentencing judge's decision to override the recommendation was wrong. Billy Ferry's death sentence must be reversed.

Four psychiatrists and two psychologists testified in this trial. (R1122,1611,1805,1847,2035,2406) All agreed that Ferry is a chronic paranoid schizophrenic. (R1154-1155, 1630-1639,1833,1864,2075,2426) Three of these experts testified during the penalty phase. (R1192-1200,2387,2406) Their unrefuted opinions were that Ferry's mental illness caused the crimes and that his condition satisfied the requirements for the statutory mitigating circumstances concerning mental impairment. (R1192-1200,2391-2395,2432-2436) §921.141(6)(b) and (f), Fla.Stat. The sentencing judge found these circumstances to exist. (R3350-3351)(A8-9) Ferry's extreme mental or emotional disturbance and his impaired capacity was certainly a reasonable, and the probable, basis for the jury's life recommendation. The sentencing judge was legally compelled to follow the recommendation. E.g., Amazon v. State, __So.2d__ (Fla. 1986)(Case No. 64,117, opinion filed March 13); Cannady v. State, 427 So.2d 723; Shue v. State, 366 So.2d 387 (Fla.1978); Burch v. State, 343 So.2d 831 (Fla.1977).

The jury could have easily concluded that the mental mitigating circumstances outweighed the heinous, atrocious or cruel aggravating circumstance. (R3345-3347)(A3-5) This Court has acknowledged the causal relationship between the perpetrator's mental state and the manner of death. Miller v. State, 373 So.2d 882 (Fla.1979); Burch v. State, 343 So.2d 821 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla.1976). Frequently, the more impaired the perpetrator, the more egregious is the manner of the homicide. Ibid. And, although this Court has

held that mental state of the perpetrator will not negate the heinous, atrocious or cruel factor, Michael v. State, 437 So. 2d 138 (Fla.1983) the factor is entitled to little or no weight when the mental mitigators are present and cause the homicides. The bizarre nature of the homicides in this case cries out as the act of a madman. Opinions of the experts on Ferry's mental state merely confirmed the common sense deduction flowing from the circumstances of the crime. Evidence that Ferry's mental illness caused the homicides was overwhelming. Consequently, the fact that the homicides were heinous, atrocious or cruel carries no weight.

Contrary to the judge's findings (R3347-3348)(A5-6), these homicides were not committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. See, §921.141(5)(i), Fla.Stat.; Herring v. State, 446 So.2d 1049 (Fla.1984); Jent v. State, 408 So.2d 1024 (Fla. 1981). Unlike the heinous, atrocious or cruel circumstance, the premeditation aggravating factor must evaluate the mental state of the perpetrator. Mason v. State, 438 So.2d 374 (Fla. 1983); Hill v. State, 422 So.2d 816 (Fla.1982). Ferry was laboring under a paranoid delusional system at the time of the crime. He believed he was fighting Russians who were poisoning the food and water. The Winn Dixie store was the headquarters for the Russian conspiracy. Ferry believed he was at war. Evaluating the circumstances from his mental perspective as the law requires, he certainly acted with at least the pretense of a moral justification. Cannady v. State, 427 So.2d 723,730

(Fla.1983). The trial judge's finding merely concluded that Ferry acted deliberately. (R3347-3348)(A5-6) Deliberate acts are not necessarily cold, calculated and premeditated acts without any pretense of moral or legal justification. Even though the trial judge did not, the jury could have realized this in reaching its life recommendation.

Ferry's record did not compel finding and weighing the aggrevating circumstance of a previous conviction for a violent felony. The sentencing judge relied upon the contemporaneous convictions for the arson and other murders to support his finding. (R3343)(A1) While decisions from this Court permit the sentencing judge's conclusion, Pope v. State, 441 So.2d 1073 (Fla.1983); King v. State, 390 So.2d 315 (Fla.1980), the jury was not required to reach the same one. Regardless of the propriety of the finding, the jury could give the circumstance little weight. The homicides and arson upon which the judge made his finding, were the product of Ferry's mental illness. This circumstance must be weighed in that light. Moreover, the minor criminal record Ferry had prior to the homicides were also the product of his mental state. Except for one charge, the beginning of his criminal history coincides with the onset of his mental illness. (R1251,1318,1715,2426,4881)

The causal link between Ferry's mental illness and his criminal behavior also provides a basis for finding the mitigating circumstance of no significant history of prior criminal activity. §921.141(6)(a), Fla.Stat. In rejecting this factor, the trial judge failed to acknowledge the relationship. Ferry's mental illness became apparent around 1976.

(R1251,1318,1715,2426) But for the one burglary charge in 1972, the remainder of his offenses occurred after the beginning of his illness. (R4881) This cannot be ignored in evaluating this mitigating circumstance. It is one more instance demonstrating the reasonableness of the jury's recommendation.

Irrelevant factors tainted the sentencing judge's decision to override the jury's recommendation. First, the judge allowed relatives of the victim's to testify at the sentencing hearing about their grief and desire that Ferry be executed. (R2549-2566) Second, the court also considered a presentence investigation report which contained similar comments in attached letters. (R4877-4892,4899-4916) Third, people in the community sent letters asking for Ferry's death. (R2546-2547) Finally, the prosecutor advised the judge of the existence of a petition with 1300 signatures asking for Ferry's execution. (R2563) None of this information was remotely related to the statutory aggravating circumstances. §921.141(5), Fla.Stat.; State v. Dixon, 283 So.2d 1,9-10 (1973). Impact of the crime on relatives or the community is not pertinent to the sentencing decision. See, Riley v. State, 366 So.2d 19 (Fla. 1978). Certainly, public opinion cannot be considered. The judge's sentencing decision, after being exposed to this prejudicial and irrelevant material, is a tainted product. The jury's recommendation of life is not.

The jury's recommendation of life is entitled to even more weight than the law requires. It was returned in spite of the introduction of irrelevant, inflammatory evidence and after

improper prosecutorial argument. Susan Gammino's extensive testimony and the introduction of photographs about the medical treatment given the victim's before their deaths were not relevant to any aggravating circumstance. (R2315-2375) Victim suffering as a direct result of the method of death chosen by the perpetrator may be relevant to the heinous atrocious or cruel factor, but suffering as the result of prolonged medical treatment is not. Mills v. State, 476 So.2d 172 (Fla.1985); Teffeteller v. State, 439 So.2d 840 (Fla.1983). Testimony about the child victim who pulled tubes from her body during treatment and the nurse's editorial comment about the child's trying to kill herself was likewise irrelevant and inflammatory. (R2344-2345) Ibid. Finally, during argument, the prosecutor asked the jury to recommend death to give solace to the victim's family and to vindicate the victim's deaths. (R2444-2445,2450-2451) The fact that the jury resisted these emotional pleas and returned a life recommendation evidences the strength of the jurors' conviction on this issue.

The jury's sentencing recommendation was reasonable. It was the trial judge, not the jury, who incorrectly evaluated the circumstances. It was the trial judge, not the jury, who was pressured by public opinion and family's emotions. It was the trial judge, not the jury, who reached the wrong sentencing decision. This Court must reverse Ferry's death sentence.

CONCLUSION

Upon the foregoing reasons and authorities, John William Ferry asks this Court to reverse his convictions for a new trial, or alternatively to reduce his death sentence to a sentence of life imprisonment.

Respectfully submitted,

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