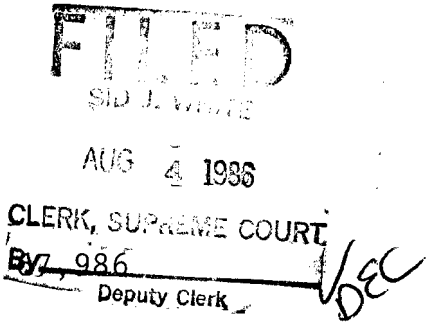
IN THE FLORIDA SUPREME COURT



JOSEPH HENRY GARRON, :

Appellant, :

vs. : Case No.

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The Grand Jurors of Pasco County returned an indictment January 17, 1983 charging Joseph Garron, Appellant, with two counts of first-degree murder in the shooting deaths of his wife, Le thi Garron, and stepdaughter, Tina Garron. (R1862-1863) Garron was found incompetent to stand trial on April 28, 1983 (R1937) and ordered committed to H.R.S. for mental treatment. (R1939-1940) He was returned from Florida State Hospital, Chattahoochee on December 16, 1983 as competent, but eventually was found incompetent again and recommitted to H.R.S. on October 10, 1984. (R2112-2113)

In response to the State's notice of intent to introduce Williams Rule Evidence (R1943), defense counsel moved in limine to exclude this evidence. (R2091-2092) The motion was heard before the Honorable Edward H. Bergstrom, Jr. on April 27, 1984 (R1831-1848) and subsequently denied. (R2094)

Again returned from Florida State Hospital, Garron was found competent to stand trial at a competency hearing held July 26, 1985. (R2116,2149) The case proceeded to trial before the Honorable Lawrence E. Keough and a jury on August 27 through 30 and September 3, 1985.

Following jury verdicts of guilty as charged on both counts (R2344-2345), a penalty phase hearing was held September 5, 1985. The jury returned advisory sentences of death on both counts. (R2336-2337)

At sentencing, held October 4, 1985, Judge Keough followed the jury recommendation on Count I and imposed a sentence

of death. (R2347-2350) On Count II, the court imposed a sentence of life imprisonment without eligibility for parole before twenty-five years. (R2351)

In support of the death sentence, the court entered a written order, "Findings, Count I," on October 10, 1985. (R2353-2356,see Appendix) The statutory aggravating circumstances of Section 921.141(5), Florida Statutes (1983), subsections (b), (e), (h) and (i) were deemed applicable. (R2353-2355) The court found the statutory mitigating circumstances of Section 921.141(6), Florida Statutes (1983), subsections (b) and (f) present as well as the nonstatutory mitigating factor that "the defendant has been a model prisoner." (R2355-2356) The mitigating circumstances were held insufficient to outweigh the aggravating circumstances. (R2356)

Garron filed a timely notice of appeal on October 11, 1985. (R2359) The Public Defenders for the Sixth and Tenth Judicial Circuits were appointed as appellate counsel. (R2364)

Pursuant to Article V, Section 3 (b)(1) of the Florida Constitution and Fla.R.App.P. 9.030(a)(1)(A)(i), Garron now takes appeal to this Court.

STATEMENT OF THE FACTS

A. State's Evidence, Guilt Phase

Linda Garron, Appellant's stepdaughter, was the chief prosecution witness at trial and the sole eyewitness to the killings. She and her sister, Tina, had come with their mother from Vietnam to Florida in 1975. (R53) About a year later, her mother, Le thi, married Joseph Garron. (R53)

On November 11, 1982, Linda Garron was in 9th grade at the Sunshine Christian Academy; Tina was in 7th grade. (R55) That evening while her mother was grocery shopping, Linda Garron was watching t.v. with her stepfather, the Appellant. (R57) Appellant had drunk some wine. (R58) Then he began denouncing God. (R59) Linda Garron testified that Joseph Garron had become extremely religious within the prior few years and would read the scriptures and preach to the family. (R106-107) He was strict with his stepdaughters and forced them to go to a Christian school. (R106-107) This was the first time she had ever heard Appellant attack God. (R113)

Next, Appellant made an obscene remark to his stepdaughter, said "God can't help you now," and touched the side of her thigh. (R59-61) At that point, Appellant's wife, Le thi Garron, drove in the driveway and Linda Garron rushed out to the car to inform her of what happened. (R61,77)

Over defense objection (R62), Linda Garron was allowed to testify to prior incidents where Appellant had touched her with possible sexual overtones. (R69-70) A pretrial motion in limine which sought to exclude this testimony of prior bad

conduct as Williams Rule evidence had previously been heard and denied. (R1831-1848,2094) The witness was permitted to testify that when she was in the 7th grade, Appellant told her he would give her dog away unless she allowed him to climb in bed with her and rub her back. (R69) Between two and five times, Appellant had come into her bedroom and rubbed her backside. (R69-70,103) He never touched her breasts or put his hand between her legs, however. (R101)

Over defense objection (R70), Linda Garron was also permitted to testify that once she had seen her stepfather, dressed in his underwear, on top of her sister Tina in his bed. (R74-75)

Returning to the events of November 11, 1982, Linda Garron testified that after she told her mother about the obscene remark, her mother told her and Tina to pack their clothes. (R77) They would go to their grandfather's house. (R77) Appellant and his wife were arguing about the incident; he seemed more calm than she did. (R77-80) The argument continued inside the trailer and the witness saw Appellant holding a gun while standing in front of his bedroom. (R81) She saw him walk into the living room and put a towel over the gun. (R82) She told her mother that Appellant had a gun, but he denied it. (R82-83) Linda Garron ran into her sister's bedroom saying "he is going to shoot us." (R83) Then she saw Le thi Garron backing into the bathroom with Appellant holding a gun pointed at her. (R83) Linda Garron heard two shots and saw Le thi Garron collapse in the bedroom with a chest wound. (R85-86)

Linda Garron ran to the back porch and saw her sister run to the telephone. (R86) The witness testified that she heard Tina talking to the operator and requesting the police. (R87) She said that she saw Appellant enter the kitchen, hold the pistol with both hands and shoot at Tina. (R88) She heard other shots as she fled the house and ran to a neighbor's residence. (R88) As she ran, she heard Appellant go to the front porch and fire a shot which she thought was aimed at her. (R89-92)

On cross-examination, Linda Garron admitted that she resented her stepfather's preaching to her and his strictness. (R107-108) Her mother and stepfather argued frequently about "every little thing." (R113) When Appellant started denouncing God, she thought it was odd and she probably told her mother that he was crazy. (R116) She didn't recall if she had told the neighbor, Mrs. Lombardi, that Appellant was crazy, following the shootings. (R117)

She described Appellant's face as expressionless during the shootings. (R125-126) Although she knew that her stepfather had taken medication in the past, she didn't remember him taking any for a month prior to the incident. (R126)

Following the testimony of Linda Garron, defense counsel moved for a mistrial or to strike the testimony concerned with prior bad acts, specifically possible sexual advances towards Linda Garron and her sister. (R140) The Court denied the motion. (R145)

According to Dr. Joan Wood, the medical examiner, Le thi Garron was killed by a single gunshot wound to the chest.

(R162) Tina Garron was shot four times; two of the wounds would have been fatal. (R153,160) The witness said Tina was alive when all four of the shots were fired and lived "perhaps a minute, two minutes" longer. (R161)

Pasco County Deputy Sheriff Clinton Vaughn was dispatched to the scene around 9 or 10 p.m. (R184) He heard a noise in the back yard of the residence and saw Appellant lying on the ground "raising Cain." (R185-186) Appellant told Deputy Vaughn that he had shot himself and the people in the trailer. (R186) The deputy advised Garron of his Miranda rights and asked if he understood them. (R188-189) In reply to the prosecutor's question, Deputy Vaughn said that Garron indicated that he understood the Miranda warnings. (R189) Defense counsel moved for a mistrial (R189) which was denied. (R192)

Several other witnesses connected with the Pasco County Sheriff's Office corroborated Deputy Vaughn's account. Physical evidence including two pistols and a speed loader was seized at the scene. (R233,288)

B. Defense Case, Guilt Phase

Virginia Pleak, Garron's halfsister, gave the jury an account of Garron's background as it related to his mental condition. (R309-463) Appellant was born when the witness was six years old. (R325) They shared the same mother, but had different fathers. (R324) At an early age, their mother abandoned the children and various individuals had custody before the mother eventually reclaimed custody. (R325) The Court sustained the State's relevancy objections and would not permit

Pleak to testify regarding Appellant's relationship with his mother. (R326-329,335-336)

Garron was described as a normal teenager who did average work in school. (R338) When Appellant was 17, he was in an auto accident which left him comatose in a hospital for over two months. (R338-342) This accident left Garron with a speech impediment, inability to walk normally, and with brain damage. (R343-350) He was hospitalized in several institutions including Lafayette Clinic, a mental illness research facility. (R345-350)

Then Garron returned to live in his mother's home for about three years. (R350-352) He was only able to work for about two months. (R352) During this period, Garron attempted suicide by swallowing a bottle of aspirin. (R353-356)

When Appellant was around 21, his stepfather got him employment as a deckhand with the Maritime Union. (R357) He worked on boats in the Great Lakes and later went around the world as a seaman. (R357) He started drinking heavily and displayed uncontrollable anger when he was drinking. (R357-359) Although the witness and Garron had a very close brother-sister relationship, she barred him from her house unless he was sober. (R360)

Garron was later employed with Chrysler Corporation as a factory hand for about six months. (R361) In 1967, he drove his car off a freeway ramp and was hospitalized with a broken back for about three weeks. (R363) He was also hospitalized in Newberry Mental Health Institution for allegedly threatening his mother and another sister. (R363)

About 1974, Appellant moved from Michigan to New Port Richey, Florida where he resided with his mother and her latest husband. (R363-366) The witness, Virginia Pleak, continued to reside in Michigan and had regular telephone contact with Garron but visited him only once, in 1981. (R366-368) When Garron moved to Florida, he was not married, nor was he working. (R364) The witness heard of Garron's marriage and assisted him financially in adopting his new wife's children. (R367)

In 1981, Virginia Pleak visited her brother and his family in Florida. (R368) Garron had become deeply involved with a religious sect and religion preoccupied his thinking. (R368-369) The witness said that on this visit, Garron's demeanor was more angry and argumentative than previously. (R371) She described Garron's relationship with his wife as distant but said he loved his daughters very much. (R373) He was an affectionate father and while Tina returned the affection, Linda was sullen and uncommunicative. (R373-376) When the daughters visited her in Michigan, Linda complained that her father was too strict and wouldn't let her wear makeup. (R381-382) Virginia Pleak concluded that from her personal observation, Garron's mental condition had greatly deteriorated over the years. (R383)

On cross-examination, Virginia Pleak was asked if she was concerned that Garron would not inherit from his wife's estate if he were found guilty of first-degree murder. (R387) Defense counsel objected and moved for a mistrial. (R388) The court allowed the inquiry based upon the State's representation that it showed bias and motive for the witness's testimony.

(R388-389) The witness was further asked if she was aware that Florida law would allow Garron to inherit if he was found not guilty by reason of insanity and she replied that she had "no idea." (R392) The witness then said in response to the State's question that she had not sent a letter to William Miller, the sixth husband of her mother on February 17, 1983. (R393)

Defense counsel objected that the State had failed to disclose this letter in discovery. (R393) A Richardson hearing was held and the Court found that the letter should have been disclosed, but the failure to disclose was inadvertent. (R397-404) Defense counsel argued that the defense was prejudiced because the witness hadn't had an opportunity to refresh her recollection before taking the stand and denying having written the letter. (R406) The Court ruled that the letter would be admissible but that defense counsel could discuss the contents of the letter with the witness before proceeding. (R410)

The State then complained that defense counsel had admitted receiving correspondence from the witness, Virginia Pleak, which had not been disclosed to the State. (R412-413) Over defense objection that this correspondence was work product and was not to be used in the trial (R415), the court viewed the letters in camera and ordered copies furnished to the State. (R914) Eventually, the State decided not to use this correspondence until penalty phase. (R987)

In open court, Virginia Pleak was confronted with a letter written to William Miller stating that an attorney had told her about Florida law relating to inheritance if a defendant is found not guilty by reason of insanity. (R415) She ad-

mitted writing the letter. (R415) She also said she was aware that Garron had been accused of sexually molesting his daughters but that she believed his denials. (R422)

Defense witness, Dr. Stewart Bernstein, a psychiatrist, testified that he treated Garron at the Lafayette Clinic in Detroit back in 1961. (R463-464) He had no independent recollection of Garron as a patient, but reviewed medical records signed by him in order to testify. (R464) Garron was referred to the Clinic because of severe temper outbursts which started following an auto accident seven or eight months previously. (R465)

Dr. Bernstein noted that Garron had considerable difficulty in talking. (R473) Neurological examination revealed poor coordination and disturbance of motor aphasia. (R474) An electroencephalogram showed generalized brain damage. (R474) His IQ was rated at 71 with presence of severe organic impairment. (R474)

Prior to the accident, Garron had a personality disorder evidenced by numerous visits to the Child Guidance Clinic. (R475) He had been to juvenile court on three occasions. (R468) As a result of the brain damage, Garron became unable to control his aggressive impulses. (R475) His behavior in the hospital was periodically hostile towards both the staff and other patients. (R475) Dr. Bernstein's final diagnosis was chronic brain syndrome, post-traumatic type with behavioral disturbance and neurological deficits. (R476,480)

Dr. Bernstein said that it is common for people who have prior behavior problems to have these problems accentuated

following a head injury. (R482) Garron was not however, psychotic when Dr. Bernstein saw him in 1961. (R484)

The State indicated that it would retain Dr. Bernstein as a witness in rebuttal. (R492) Dr. Bernstein complained to the trial judge, saying he was trying to be helpful but he had only seen the defendant twenty-five years ago. (R492-493) "I really feel misused," said the witness. (R493)

The State then proffered the testimony to be elicited from Dr. Bernstein in rebuttal. (R495-507) Dr. Bernstein gave his opinion that psychiatrists should not speak in legal terms, but only in psychiatric medical terms. (R497) He said that testifying whether someone knew right from wrong is not within a psychiatrist's area of expertise. (R497) Dr. Bernstein looked at a position statement of the American Psychiatric Association and agreed that their position was similar to his regarding the ability of psychiatrists to render opinions on legal sanity. (R499)

Over defense counsel's objection that the testimony was not relevant to the issue of Garron's sanity or to impeachment, the court permitted the witness to testify to his opinions in the State's rebuttal case. (R510) As a convenience to the witness, he was allowed to testify out-of-order before the defense presented its psychiatric testimony. (R512)

Dr. Subhash Tiwari, a psychiatrist, saw Garron after he was admitted to Bayonet Point Hospital on November 12, 1982. (R521) He was assigned based on the fact that Garron had a self-inflicted gunshot wound. (R521) Dr. Tiwari conducted only

a limited psychiatric evaluation and saw no signs of psychotic behavior. (R523-526) However, Garron indicated that Dr. Tiwari could contact his wife at home and said he had no recollection of events from the previous evening. (R525) Dr. Tiwari's conclusion was that he did not interview Garron long enough to be able to tell whether he was psychotic. (R536) The doctor did prescribe Haldol, a psychotropic medication, to be administered if Garron became agitated. (R542)

Weyman Meadows, an intake counselor for H.R.S., investigated a complaint regarding Linda Garron around March 1981. (R555-557) Linda Garron had alleged that her stepfather was going to get rid of her dog unless she engaged in sexual activity with him. (R557) Meadows interviewed Linda Garron at school in the presence of a school counselor (R558,569) and also conducted an extensive interview in the home. (R570-571) Appellant said that he had rubbed his daughter's back, that she did not object, and that he would never think of touching the daughters in a sexual manner. (R571) Regarding his daughter's dog, Garron said that neighbors were complaining about its barking at night and he would have to decide about keeping it. (R617) Meadows concluded from the interviews and observations in the home that there was no indication of sexual abuse. (R576-577,620)

Dr. James A. Fesler conducted a psychiatric examination of Garron as a court-appointed expert on March 30, 1983. (R625) He reviewed records concerning previous medical and psychiatric treatment, then interviewed Garron for approximately

one hour. (R626-628) Dr. Fesler observed the aftermath of a significant head injury and found that Garron had organic brain damage. (R632-633) Noting that Garron had personality problems prior to the accident, the doctor said the head injury complicated by alcohol abuse compounded Garron's difficulty in controlling his behavior. (R631-632)

In his psychiatric evaluation, Dr. Fesler noted that Garron talked of hearing the voice of Jesus speaking to him and also voices of evil spirits. (R637) Dr. Fesler indicated that he believed these were delusional thoughts rather than normal religious experience. (R638) Garron told Dr. Fesler that he didn't remember the events of November 11, 1982 and believed that his wife and daughter were still alive. (R639) Dr. Fesler felt that at the time of the interview, Garron was psychotic. (R643)

Dr. Fesler concluded that Garron's head injury resulted in organic brain syndrome. (R644) Garron was briefly psychotic in 1974; he then became and remained psychotic again early in the 1980's. (R644) Dr. Fesler testified that most people with significant head injuries tolerate alcohol very poorly. (R647) Alcohol could aggravate a psychotic response and Garron's blood alcohol test from the Bayonet Point Hospital indicated he had probably several glasses of wine. (R648) Although Garron probably knew what he was doing at the time of the shootings, Dr. Fesler concluded that he was unable to distinguish right from wrong. (R649-650)

On cross-examination, Dr. Fesler was asked if he remembered receiving a telephone call from William Webb in April

1983 during which Webb had propounded a hypothetical based upon the State's view of the facts of the incident. (R659-660) Dr. Fesler said he didn't have firsthand recall of the details of the hypothetical and said his response to Webb was not a definite opinion but rather an offhand comment made without review of his records. (R664-666) Dr. Fesler was further asked whether he was aware of the "American Psychiatric Association's position on the insanity defense" (R688) and that "their position is you can't do what you said you have been doing." (R696) Defense counsel's motion for mistrial was denied. (R697-698)

Dr. Radha Majumdar, a psychiatrist, also conducted a psychiatric evaluation of Garron on March 30, 1983 as a court-appointed expert. (R734) Dr. Majumdar said Garron was agitated, delusional and actively psychotic at the time of the interview. (R736,739) The doctor confirmed the diagnosis of organic brain syndrome. (R738) She determined that he was mildly retarded. (R739) She also diagnosed temporal lobe epilepsy which can cause a person to act automatically, without control, and have no recollection of what has happened. (R741) Dr. Majumdar concluded that Garron did not know right from wrong at the time of shooting. (R746)

On cross-examination, the prosecutor showed Dr. Majumdar a bill charging $520 for one hour's deposition. (R749-750) The doctor acknowledged sending the bill and that she was being "paid by the taxpayers." (R748-750) Dr. Majumdar's report indicated that Garron had a sporadic work history. (R771) Over defense objection, the prosecutor was permitted to ask if

the doctor would change her opinion on sanity if she knew that Garron had worked in one job for five years and another for six years. (R771-772) Dr. Majumdar said that wouldn't change her evaluation. (R773) After hearing the prosecutor's recitation of a hypothetical scenario based upon testimony at trial, Dr. Majumdar stated that if Garron had a temporal lobe type seizure, he could not know right from wrong. (R788) The doctor noted that Garron had a lesion in the temporal lobe disclosed by CAT scans, showing that he was capable of having seizures. (R788)

Carol Medders, a counter girl at Suncoast Donuts, testified that Garron was a daily customer at the shop from December, 1977 until the shootings. (R795-796) He would come each morning when the shop opened to drink coffee and talk. (R796) Garron never talked about religion until a year and a half before the incident. (R798) Then he became religious and underwent a definite personality change. (R802-805) He talked about needing only God and that he did not need medication or medical treatment. (R802) However, she never heard him say anything she would classify as psychotic. (R813-814)

Mary Lombardi lived down the street from the Garron family on November 11, 1982. (R816-817) On that date, Linda Garron came running to her house and banged on the windows. (R817) The witness let Linda inside the house where she said that her father was chasing her with a gun, trying to kill her. (R816) Linda said that Joseph Garron had shot her mother and that she was afraid for her sister. (R819) Linda Garron didn't say that she saw her sister shot. (R819) She said that the in-

cident started when her father had been drinking wine and they got into an argument about God. (R820) Linda told the witness that every time her father drank any alcohol, it made him crazy. (R822)

On cross-examination, Mrs. Lombardi said that she remembered coming to the State Attorney's Office a day or two after the shooting. (R824) She denied that Linda Garron had told her that Appellant had shot her sister. (R825) The witness said she didn't remember Bill Webb asking her if she knew anything to indicate that Appellant might be insane. (R825) She testified that Linda Garron never mentioned any sexual advances being made. (R826)

Dr. Thomas Thieman, a psychiatrist, was originally appointed as an expert witness for the defense. (R831-834) He conducted a psychiatric evaluation of Garron on September 5, 1984. (R833) Dr. Thieman diagnosed a variety of mental problems in Garron. (R839) These included organic brain syndrome, chronic alcohol dependency and temporal lobe epilepsy, probably resulting from a stroke. (R839-841) Garron told Dr. Thieman that he had no personal recollection of the shootings and that his account of the events was gathered from newspaper articles and what other people told him. (R844)

Dr. Thieman thought it was important that Garron was disclaiming God before the incident because, given Garron's strong religious persuasion, it tended to show he was psychotic. (R845,890) When the doctor interviewed Garron, he found him to be religiously preoccupied to the point of delusion. (R849)

Within a reasonable degree of medical certainty, Dr. Thieman gave his opinion that Garron was insane when he shot his wife and daughter. (R850)

In response to the State's hypothetical rendition of facts, Dr. Thieman said he would still have to find Appellant insane at the time of the offense and noted that a brief psychotic reaction might last only a few minutes to a few hours. (R885)

C. State's Rebuttal

William Webb, a former assistant state attorney who originally had primary responsibility for the Garron prosecution, testified in rebuttal. (R938-986) On November 12, 1982, he conducted a State Attorney Investigation which took sworn testimony from the witness Mrs. Mary Lombardi. (R939-940)

Defense counsel objected to testimony of statements made by the witness Lombardi on the basis that the witness was never confronted with the statements she allegedly made and given a chance to admit or deny them. (R942-944) The Court overruled this objection and also the objection that the testimony was substantive in nature and not proper rebuttal. (R944)

William Webb was permitted to testify that Mary Lombardi told him that Linda Garron told her that her father had just shot both her mother and sister. (R945) Also, over objection of hearsay, Webb testified that in response to his question asking Lombardi if she knew of bizarre or unusual conduct on the part of Appellant, she replied that Garron carried a handgun in a holster around his property and viciously beat his dogs. (R947-948)

Webb further testified that he was present at Garron's first appearance hearing. Over defense objection, Webb described Garron's conduct at the hearing and specifically noted that Garron indicated he would retain his own attorney. (R952-953) Over objection, Webb was permitted to render a lay opinion on Garron's sanity--"that he was certainly sane under the definition of Florida law." (R966)

The former prosecutor, Webb, went on to testify that he telephoned Dr. Fesler on April 25, 1983 and recited a lengthy hypothetical based upon information obtained in the State Attorney's investigation. (R967-975) Webb asked Dr. Fesler if these additional facts would change his opinion regarding Appellant's sanity at the time of the offense. (R975-976) Dr. Fesler replied yes. (R976)

William Scott Phillips, who was a detective with the Pasco County Sheriff's Department at the time of the incident, testified that he saw Appellant in his hospital room around 11 p.m. the night of the shooting and gave him Miranda warnings. (R1002-1006) Appellant and Detective Phillips recognized each other from previous contact at a local coffee shop. (R1005) Detective Phillips was also present at the advisory hearing held the next morning. (R1006) Over objection, Detective Phillips was permitted to give an opinion that Garron appeared to be sane. (R1009-1010)

Detective Phillips also testified that he interviewed Mary Lombardi at the hospital on the night of the shooting. (R1010-1011) According to Phillips, Mrs. Lombardi told him that Linda Garron had told her "My mother's been shot. My sis-

ter's been shot. He is killing everybody." (R1013) Also, Mrs. Lombardi said that Linda had reported some sexual advances and innuendos preceded the shootings. (R1014)

Deputy Ross Greco was recalled. (R1024) He testified that he rode in the ambulance with Garron from the shooting scene to the hospital. (R1024-1025) Then he was assigned to guard Garron at the hospital for two or three days. (R1025) During this time, they engaged in a certain amount of "small talk." (R1025) Over defense objection, Deputy Greco was allowed to give an opinion that Appellant was "perfectly sane" and "knew the difference between right and wrong." (R1027) Deputy Greco also related that Garron had asked him why he was in the hospital and what had happened. (R1028-1029)

Deputy Sheriff Donn Gallahue testified that in 1981 he was present at the Garron home when H.R.S. counselor Weyman Meadows interviewed Appellant. (R1031-1032) He observed Garron for about one-half hour at this time and saw no bizarre conduct. (R1032) From May 1983 to May 1984, Deputy Gallahue was a supervisor at the county jail and had almost daily contact with Garron. (R1033) Over objection, Deputy Gallahue was permitted to state his opinion that Garron was sane both in 1981 and when he was being detained at the jail. (R1036-1037)

Over objection, Don Venedan, the transport officer for the trial, was permitted to testify that he overheard a courtroom conversation between Garron and Dr. Bernstein. (R1040-1044) Dr. Bernstein said, "I'm sorry, I don't remember you." Garron replied, "I remember you." (R1045)

The State moved to have a social security application signed by Garron introduced into evidence. (R1046) The Court overruled defense counsel's hearsay objection and admitted it as a declaration against interest and showing Appellant's state of mind. (R1046-1050) The application alleged a work history of six years each on two different jobs. (R1047,2382)

Linda Garron was recalled to give an opinion as to whether her stepfather knew right from wrong on November 11, 1982. (R1051-1057) Over objection, she testified that he was sane. (R1058) On cross-examination, Linda Garron admitted that she didn't know anyone who was insane and her idea of insane behavior was "a man going around laughing and slashing everybody in the street." (R1066-1069)

D. Prosecutor's Closing Arguments

The prosecutor attempted to discredit the defense psychiatric testimony. He pointed to Dr. Majumdar's bill "to show you folks her interest in testifying." (R1110) Noting that she charged $520 for a one hour deposition, the prosecutor asked the jury to decide "is she worth that much?" (R1111) Dr. Thieman was also accused of having a substantial interest in the case. (R1119) Characterizing the testimony as "hogwash from the psychiatrists," the prosecutor asked the jury to regard psychiatry as "pure science fiction." (R1119)

Further, the prosecutor mentioned Dr. Bernstein's testimony and told the jury that the testifying doctors were violating the American Psychiatric Association's position on the insanity defense. (R1121) Referring to psychiatrists, the

prosecutor derisively said, "I call these people the out-to-lunch bunch." (R1122) Finally, the prosecutor gave the jury his definition of psychiatry--"a blind man in a dark room looking at a black cat that doesn't exist." (R1208)

Defense counsel's job was also defined as "trying to confuse you folks so that you don't have a clear understanding." (R1197) An objection to this comment was sustained and a curative instruction given. (R1198)

E. Penalty Phase

Over defense objection, the Court received the medical examiner's reports on the victims Le thi and Tina Garron into evidence. (R1286-1290) Sharon Denning, a supervisor with the Pasco County Clerk of Circuit Court was called to offer records indicating that in 1974 Garron pled nolo contendere to a charge of aggravated assault. (R1292-1297) Adjudication of guilt was withheld and he was placed on probation for a period of five years. (R1297)

The State then offered psychiatric reports prepared by Drs. Helman and Freison in 1974. (R1298) Defense counsel objected because the reports were hearsay and Appellant could not rebut them because both doctors had since died. (R1298-1299) Defense counsel further noted a confrontation problem violative of the Sixth Amendment. (R1302) The Court ruled the reports admissible and they were received in evidence as #32 and #33. (R1305-1306,2388-2389)

Dr. Timothy Fjordbak, a clinical psychologist employed at Chattahoochee State Hospital, testified as a defense witness.

(R1308-1351) Dr. Fjordbak said Garron was actively psychotic when he arrived at Chattahoochee in December 1984. (R1316) The doctor conducted a group therapy session each week at Chattahoochee which Garron attended and he also had informal contact with Garron on the ward. (R1313-1316) A series of neuropsychological tests left "absolutely no doubt that this man had a severe injury to the brain." (R1317) Dr. Fjordbak said Garron exhibited a psychotic disorder characterized by paranoid thinking and unrealistic beliefs. (R1315) He said it was likely that Garron had diminished capacity to conform his behavior because of the brain injury and the psychosis. (R1319) The doctor also said it was likely that Garron was suffering from extreme mental or emotional disturbance at the time of the homicides. (R1322)

Dr. Fjordbak said that people with conditions like Garron's benefit from highly structured environments. (R1322) The doctor said that if Garron was treated with medication and retained in a structured environment, there was a good possibility that he would not become violent again. (R1323)

On cross-examination, the prosecutor remarked:

> Doctor, the bottom line is, you don't know if the defendant was released from jail whether or not he would kill again; do you? (R1343)

Over defense objection, which the court overruled, the witness said Garron would have a higher likelihood than the average individual. (R1344) The prosecutor continued:

> If the defendant was allowed out of jail in 25 years and drinking, wasn't taking his medication and got into an argument and had a gun, what do you expect would happen? (R1344)

Defense counsel objected and moved for a mistrial. (R1344) The court ruled that defense counsel had raised the question of Garron's propensity for violence in the future. (R1345) However, the court did sustain the objection on the basis that Garron would have to serve mandatory sentences of at least 50 years. (R1346)

Prior to Virginia Pleak's taking the stand, defense counsel moved in limine to prevent the prosecutor from mentioning a disclosure contained in one of Virginia Pleak's letters to defense counsel which the court had ordered discoverable by the State. (R1351) Mrs. Pleak wrote that Appellant told her he killed a man in Turkey or Greece while he was on an around-the-world tour of duty with the Maritime Union. (R1351) Defense counsel argued that it was not admissible because it was probably not true and would be used as a highly prejudicial non-statutory aggravating factor. (R1352) The prosecutor said that the statement would be used to test the bias and credibility of the witness. (R1352) Accordingly, after Virginia Pleak had recounted Garron's family background with emphasis upon the erratic and emotionally dependent relationship Appellant had with his mother, the prosecutor was permitted to "test the witness' credibility" by cross-examination concerning the killing in Greece or Turkey. (R1361-1362)

The prosecutor recited a litany of Appellant's prior bad acts throughout his life, each followed by the question "You love your brother, isn't that correct?" (R1362-1364) The final question was:

> Mrs. Pleak, even after the defendant told you, your brother told you that he killed a man in Turkey or Greece, you still love him; isn't that correct? (R1366)

Then, over defense counsel's objection that it was beyond the scope of direct examination, the witness was asked:

> Isn't it true that there is absolutely no doubt in your mind that the defendant would be violent again either to himself or to someone else? (R1367-1368)

Defense counsel requested 48 special jury instructions be given by the court. (R1372,2248-2333) All 48 were considered and denied. (R1372-1389)

During the prosecutor's closing penalty phase argument, defense counsel's objections to inflammatory comments and misstatements of law were sustained on five occasions and four curative instructions were given by the court. (R1416-1417,1430, 1431,1432,1433) Additionally, defense counsel's objections to arguing the good character of the victims as an aggravating factor were overruled. (R1418-1420) At the conclusion, defense counsel moved for a mistrial based upon the cumulative effect of the improper comments. (R1434) The motion for mistrial was denied. (R1434)

The jury returned advisory sentences of death for both killings. (R1452)

SUMMARY OF ARGUMENT

The prosecutor introduced as evidence of sanity Appellant's response following the reading of Miranda rights at his arrest. Also highlighted by testimony was Garron's announcement at his first appearance hearing that he would hire an attorney. Closing argument featured reference to Garron's exercise of these constitutional rights as proof of his sanity. The facts at bar fit squarely within previous decisions of this Court and the U.S. Supreme Court which found reference to exercise of constitutional rights as proof of guilt to be reversible error.

William Webb, the former assistant state attorney who had chief responsibility for this prosecution, was allowed to testify regarding his observation of Garron at first appearance hearing and to give his opinion that Garron was sane. While Appellant concedes that a prosecuting attorney may be a witness under certain conditions, it was reversible error to encourage the jury to view Webb as an expert on the insanity defense and to allow him to tell the jury his opinion that Garron was sane, hence guilty.

The trial court also allowed state rebuttal witnesses to give lay opinions that Garron was sane without requiring an adequate foundation for their opinions. Although all of the witnesses had had some personal contact with Garron, only Linda Garron had any type of close relationship which could give probative value to a lay opinion on sanity.

Defense witness Mary Lombardi was improperly impeached when the trial court allowed two state rebuttal witnesses to testify to prior statements of hers which were inconsistent with her trial testimony. Witness Lombardi was never confronted with the prior statements she allegedly made; therefore, she had no opportunity to explain them or deny them.

The trial court improperly allowed the State to present as rebuttal evidence Dr. Bernstein's opinion that psychiatrists should not testify whether a criminal defendant knew right from wrong, but should speak only in medical terms. The prosecutor distorted this testimony into vituperative attacks upon the ethics of the psychiatrists who testified for the defense. The prosecutor's closing argument in this regard was a denial of due process and made Garron's trial fundamentally unfair.

The trial judge also erred by admitting testimony that Garron had previously engaged in what was characterized by the State as sexual molestation of his stepdaughters. This testimony of prior bad acts was not relevant to any fact in issue (Garron's sanity); or, if relevant, its probative value was greatly outweighed by the prejudice.

These foregoing errors in Garron's trial require reversal for a new trial. Other arguments are directed to errors occurring in the penalty phase of the trial.

Psychiatric reports were prepared in 1974 when Garron had been charged with aggravated assault. In violation of Appellant's Sixth Amendment right to confront witnesses, these

reports were admitted into evidence despite the fact that both doctors were dead and therefore unavailable for cross-examination.

The prosecutor was impermissibly allowed to cross-examine penalty phase witnesses regarding the possibility that Garron would kill again if released on parole from a life sentence. Defense counsel's motion for mistrial should have been granted.

The prosecutor was also impermissibly allowed to refer to defense witness Virginia Pleak's correspondence which included a statement that Garron had told her he had previously killed a man in Turkey or Greece. This alleged killing was not admissible as proof of any statutory aggravating circumstance; its admission on the theory that it was probative of the witness' credibility was error.

Finally, the prosecutor's closing argument in penalty phase was highly improper. Defense counsel's motion for mistrial should have been granted because the numerous curative instructions given by the court were unable to cure the prejudice.

In the written findings in support of the death sentence, the sentencing judge improperly found that Garron's nolo contendere plea to aggravated assault (adjudication was withheld) established the prior conviction for violent felony aggravating circumstance. The aggravating circumstance of avoiding arrest was not proved beyond a reasonable doubt. This gunshot homicide was not especially heinous, atrocious or cruel

because there was no evidence that Tina Garron remained conscious for more than moments after the initial shot. Also, there was no showing of the heightened premeditation necessary for application of the cold, calculated and premeditated aggravating circumstance.

Because there were two statutory mitigating circumstances found as well as the non-statutory factor of being a model prisoner, the proper sentence should have been life imprisonment.

ARGUMENTS

ISSUE I.

APPELLANT WAS DENIED DUE PROCESS WHEN THE PROSECUTOR WAS PERMITTED TO COMMENT UPON APPELLANT'S FAILURE TO WAIVE THE RIGHT TO BE SILENT FOLLOWING MIRANDA WARNINGS AND APPELLANT'S ASSERTION OF THE RIGHT TO BE REPRESENTED BY COUNSEL AT HIS FIRST APPEARANCE HEARING AS INDICATING SANITY.

In State v. Burwick, 442 So.2d 944 (Fla.1983), cert. den., 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984), this Court held that it was error to permit the State to rebut an insanity defense by introducing evidence that the defendant exercised his right to silence and requested to speak with an attorney after receiving Miranda warnings. The Burwick decision rests on two independent rationales. First, this Court found that post-Miranda silence has dubious probative value not only as it relates to guilt but also as it relates to mental condition. Secondly, the Burwick court held that the due process clauses of the United States Constitution, Fourteenth Amendment and Article I, Section 9 of the Florida Constitution would not permit the State to benefit by assuring the defendant that he would not be penalized by exercising his Miranda rights and then impeaching his defense with testimony that he invoked these rights. Finally, the Burwick decision notes that the prosecutor could have elicited testimony to show that the defendant carried on a rational and coherent conversation without reference to his assertion of constitutional rights.

The United States Supreme Court has agreed that fundamental fairness guaranteed by the due process clause of the Fourteenth Amendment is violated when the State uses the defendant's exercise of post-Miranda silence to obtain his conviction. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976). In Wainwright v. Greenfield, 474 U.S. __, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986), the Court found the Doyle holding equally applicable where the State introduces exercise of these constitutional rights to rebut an insanity defense. Commenting that the State could prove that the defendant's behavior appeared rational at the time of his arrest without mentioning exercise of his constitutional rights, the Greenfield court barred evidentiary use of an individual's exercise of constitutional rights after the State's assurance that such exercise would not be penalized.

In the case at bar, the trial court erred when the State was permitted to introduce evidence that Garron exercised his constitutional rights, both following Miranda warnings and when he invoked the right to counsel at his first appearance hearing. As Burwick and Greenfield held, evidence of exercise of these rights is not probative of sanity and is further barred by due process considerations.

A.

The State Introduced Evidence Of Garron's Response Following Miranda Warnings And Argued This Response As Evidence Of Guilt.

On direct examination of Deputy Vaughn, the following testimony was elicited:

Q. Did you advise the defendant of his constitutional or his Miranda rights?

A. Yes, sir, I did.

Q. How did you do that?

A. I have a card.

Q. Do you have either that card or an exact duplicate of that card on you?

A. I have another card just like it, yes, sir.

Q. It's an exact duplicate?

A. Yes, sir, it is.

Q. Could you take that card out, if you would, and please tell the members of this jury how you read those Miranda rights or his constitutional rights to the defendant on November 11th?

A. Okay. I looked at the subject. I advised him: You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements.

Q. Did you turn the card over and ask him another question?

A. Yes, sir, I did. I asked him: Do you understand each of these rights that I have explained to you?

Q. When you asked him if he understood his rights that you have just advised him of, did he indicate a yes or no response?

A. Yes, sir, he said yes.

Q. He said yes?

A. Yes, sir. Now, you know, yeah, something like that.

(R188-189)

Defense counsel immediately moved for a mistrial on the ground that the State had commented upon Garron's right to remain silent. (R189) Ruling that the prosecutor had not informed the jury that the defendant refused to talk, the Court denied the motion for mistrial. (R190-192)

Subsequently, in direct examination of Deputy Ferguson, the prosecutor led the witness as follows:

> Q. Do you recall hearing Deputy Vaughn ask the defendant if he understood his rights and this defendant saying yes?
>
> A. Yes.

(R203)

Again in the State's rebuttal case, Garron's "understanding" of the Miranda rights came into focus. In direct examination of Detective Phillips, the following colloquy took place:

> Q. Did you speak to the defendant while he was in the hospital?
>
> A. Yes, sir.
>
> Q. Did he appear coherent to you when you spoke to him?
>
> A. Yes, sir.
>
> Q. Did you advise him of what are commonly known as Miranda rights?
>
> A. Yes, sir, I did.
>
> Q. Did you ask him the question: Knowing these rights or having these rights advised to you, do you understand these rights?
>
> A. Yes, sir.
>
> Q. What did he tell you at that point?

A. He gave a visible, physical indication of yes. He also uttered yes, I do.

Q. So he told you he understood those; is that correct?

A. Yes, sir.

(R1005-1006)

The Fourth District Court of Appeal in reversing a conviction because of direct comment upon the defendant's silence admonished prosecutors:

> If the State is not seeking to introduce a statement of the defendant into evidence, it is unnecessary to show the defendant was properly warned of his constitutional rights, and the attempt to make such a showing courts reversible error. Maness v. State, 341 So.2d 246 at 247 (Fla.4th DCA 1976).

Other District Courts of Appeal have joined the Maness court in expressing disapproval of testimony indicating that a defendant was warned of his Miranda rights unless it serves as a predicate for introducing the defendant's statement. See Thomas v. State, 367 So.2d 260 (Fla.3d DCA 1979); Carter v. State, 435 So.2d 900 at 901 (Fla.1st DCA 1983)(Smith, J., concurring). But these decisions have stopped short of finding reversible error where the testimony relates only to whether the defendant understood the Miranda warnings. See also Holland v. State, 340 So.2d 931 (Fla.4th DCA 1976).

These decisions, however, are readily distinguishable from the case at bar because in none of them did the prosecutor argue to the jury that the defendant's understanding of the Miranda warnings was substantive evidence of his guilt. Here, by contrast, Garron's ability to understand his constitutional

rights was highlighted not only to imply that he exercised these rights but also to serve as proof that he was sane at the time of his arrest.

Thus, the prosecutor included in his hypothetical question to defense psychiatrist Dr. Thomas Thieman facts relating to the defendant's "understanding" of his constitutional rights in relation to whether Garron was sane at the time of the killings.[1/] Significantly, the defense never introduced any claim that Garron's conduct was irrational at the time of his arrest. Nor did Garron testify in his own behalf. Therefore, the prosecutor relied on Garron's "understanding" of his constitutional rights as substantive evidence of sanity rather than impeachment of defense testimony.

Finally, in closing argument, the prosecutor hammered at Garron's response to the reading of his rights:

> That Scott Phillips knew this defendant from that doughnut shop. He went up to the defendant and he didn't need any introduction because the defendant knew who he was. He said: I am going to advise you of your constitutional rights. He asked him: Do you understand those rights? This defendant said: Yes. This is a person who doesn't know right from wrong, who is psychotic, who is insane,...

(R1125)

1/ ...One of the officer [sic] pulls out a Miranda card. Do you know what that is?

A. Yes.

Q. And advises the defendant of his constitutional rights. The last question he asks him: Do you understand the rights I have just read to you? The defendant says: Yes.

(R882)

> ...Well, what did Vaughn tell you? He was maybe five minutes inside the house and he comes back out and advised the defendant of his constitutional rights. He pulls out a card and he says: You've got the right to remain silent. You heard all of it. All you have to do is watch Kojak shows and you know what the rights are. He asked this defendant: Do you understand these rights I just gave you? The defendant says: Yes.

(R1126-1127)

In Trafficante v. State, 92 So.2d 811 (Fla.1957), this Court held that comment on a defendant's failure to testify need not be direct in order to be reversible error. Statements which can be construed as such a comment are prohibited regardless of their susceptibility to a different construction. This rule has been adopted as the appropriate standard for comment on a defendant's right to remain silent at the time of arrest. See e.g. Bain v. State, 440 So.2d 454 (Fla.4th DCA 1983).

At bar, the prosecutor's insistance that Garron replied "yes" to the question of whether he understood his constitutional rights was clearly meant to be interpreted by the jury as indicating that Garron did in fact understand his constitutional rights. The unescapable implication is that Garron revealed his understanding by exercise of the constitutional right to remain silent. Accordingly, the prosecutor's argument falls within the restriction against comment on a defendant's silence in the face of Miranda warnings.

Alternatively, Garron's reply of "yes" is clearly not probative of sanity under this Court's decision in State v. Burwick, supra. Hence it was error for the prosecutor to con-

tend to the jury that Garron was sane because of his response upon being advised of his constitutional rights.

B.

The State Introduced Evidence Of Garron's Exercise Of His Sixth Amendment Right To Counsel At His First Appearance Hearing And Argued This Exercise Of A Constitutional Right As Evidence Of Guilt.

In the State's rebuttal case, William Webb, a former prosecutor who had handled the early stages of this prosecution testified regarding his investigation for the State Attorney's Office. (R938-986) Over defense objections to the relevancy of his testimony (R950,952), Webb was permitted to testify to Garron's conduct and responses at the first appearance hearing held in his hospital room on the day following the shootings. Webb testified:

> A. Well, I recall that there was the typical and customary initial questioning at the advisory hearing where the Court identified himself and identified the other participants in the advisory hearing, including myself. And I specifically recall the exchange between the defendant and the Court when the Court asked him or advised him that he had the right to be represented in regard to the charge, and if he couldn't afford to be represented, then the Public Defender's Office would be appointed for him. I specifically recall that question and the answer to it.
>
> Q. What was his answer?
>
> A. He indicated that he wanted to retain his own attorney.

(R953)

The prosecutor had also included in the hypothetical posed to Dr. Thieman remarks concerning Garron's exercise of his right to counsel:

> Q. --and the Judge comes to the hospital. He comes to the hospital with the State Attorney and an assistant from the Public Defender's office and the arresting officer. That is what usually is done in those type of cases.
>
> The defendant is advised of his constitutional rights and understands them all. The Judge asks him: Do you want me to assign a Public Defender to represent you or do you want to hire your own attorney? The defendant says: I want to hire my own attorney.
>
> Let's assume all that, Doctor. With all that knowledge before you now, are you able to render an opinion as to whether this defendant knew right from wrong back on November 11th of 1982?

(R884)

Then, in closing argument, the prosecutor argued that Garron's announced decision to hire an attorney was proof of his sanity:

> The defendant was asked by Judge Rasmussen: Do you want the Public Defender to represent you or do you want to hire your own attorney? What does the defendant say? I want to hire my own attorney. This is a person who is psychotic. Remember, November 11th he is psychotic. Webb says he didn't appear to be crazy to me.

(R1130)

Although this Court's decision in State v. Burwick dealt only with request for counsel in a post-arrest interrogation setting, there is no reason that any different conclusion should be reached once the Sixth Amendment right to counsel has attached. After all, due process is also being subverted when the defendant is informed by the judge that he has a right to be represented by counsel only to have the State use exercise of this constitutional right as evidence against him. The same fundamental fairness doctrine is implicated.

The 11th Circuit in Greenfield v. Wainwright, 741 F.2d 329 (11th Cir. 1984) particularly noted that a request for counsel was not highly probative of sanity. Not only sane people wish to engage lawyers on their behalf. Specifically, the Eleventh Circuit noted its disagreement with the Seventh Circuit decision of Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982), cert.den., 460 U.S. 1043, 103 S.Ct. 1439, 75 L.Ed.2d 796 (1983). In Sulie, the majority had held that request for a lawyer during custodial interrogation was relevant and admissible as evidence of sanity.

The United States Supreme Court agreed with the Eleventh Circuit's position in Wainwright v. Greenfield, 88 L.Ed.2d at 629. "What is impermissible," said the Court,

> is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized. 88 L.Ed.2d at 632.

Clearly, this holding is equally viable in the Sixth Amendment right to counsel setting presented at bar. Buttressing the conclusion that the Court did intend this interpretation is its reference to People v. Vanda, 111 Ill.App.3d 551, 444 N.Ed.2d 609 (1982), cert.den., 464 U.S. 841, 104 S.Ct. 136, 78 L.Ed.2d 130 (1983) in footnote 14 of the Greenfield opinion. 88 L.Ed. 2d at 632. The facts in Vanda directly correspond to those presented at bar.

Because Garron was denied the due process guarantees of the Fourteenth Amendment, United States Constitution and Article I, Section 9, Florida Constitution when the prosecutor

commented upon his exercise of the constitutional right to be represented by counsel, Garron should be granted a new trial.

ISSUE II.

WILLIAM WEBB, A FORMER ASSISTANT STATE ATTORNEY WHO HAD ORIGINAL RESPONSIBILITY FOR THIS PROSECUTION IMPROPERLY TESTIFIED TO HIS OPINION THAT GARRON WAS SANE (AND THEREFORE GUILTY).

As previously noted in Issue I, William Webb, a former assistant state attorney was permitted over objection to testify to Garron's conduct at his first appearance hearing. After Webb stated that Garron invoked his right to counsel, the prosecutor further solicited an opinion, over defense objection, as to whether Garron seemed to understand what was happening at the advisory hearing. (R953-954) Then after argument, the court ruled that Webb, as a layman, could give an opinion on sanity if the observations upon which the opinion is based were set forth. (R961)

Subsequently, the following questions from the prosecutor and responses from Webb appear in the record:

> Q. On the time you observed the defendant in the advisory hearing, did he do anything during that hearing that would lead you to believe that he was psychotic, acting strange or bizarre?
>
> A. No, quite the contrary.
>
> Q. Mr. Webb, do you know the legal definition of insanity in the State of Florida?
>
> A. Yes, I do.
>
> Q. And what is that?
>
> A. Florida follows the McNaughten Rule, and that is simply that at a given time, a given point in time, the defendant is considered insane if he doesn't know the difference between right and wrong or the nature and quality of his actions. I could go on.

* * *

Q. (By Mr. Miller) Mr. Webb, when you observed him at the advisory hearing, was any of his conduct psychotic, that you observed?

A. No, absolutely not.

Q. Did he do anything that would lead you to believe he could not distinguish right from wrong at the time of that hearing?

A. No. His conduct and his responses and everything about him at the time indicated that it was totally rational and intelligent conduct.

* * *

Q. (By Mr. Miller) Now, Mr. Webb, could you give us an opinion, based on your observation and what you have testified here in court, as to whether or not at the time you saw the defendant he was legally insane?

(R964-965)

Defense counsel objected that while the court had ruled that Webb could give a lay opinion on sanity, Webb was being asked to give an expert opinion on legal insanity. (R965) The court agreed saying "it looks at least to the jury as though he is giving an expert opinion." (R966) Then the following colloquy ensued:

Q. (By Mr. Miller) Mr. Webb, based upon what you observed, can you give the Court an opinion, your opinion, as to whether or not the defendant was sane or not?

A. Yes, I could.

Q. And what is that opinion?

A. My opinion is that he was certainly sane under the definition of Florida law.

MS. GARRETT: Objection, Your Honor, move to strike as not being responsive.

THE COURT: Sustained.

Q. (By Mr. Miller) If you could just state your opinion as to whether or not he was sane.

A. My opinion was that he was sane.

(R966)

Although the question seems to be one of first impression in Florida, case law from other jurisdictions indicates that a prosecuting attorney is not totally forbidden from testifying in criminal proceedings. In a leading case, the Missouri Supreme Court stated:

> ...the general and uniform rule is that the right of a prosecuting attorney to testify in a criminal case "is strictly limited to those instances where his testimony is made necessary by the peculiar and unusual circumstances of the case. State v. Hayes, 473 S.W.2d 688 at 691 (Mo.1971).

In Kansas, where the Code of Professional Responsibility is identical to that of Florida in provisions DR5-101(B) and DR5-102(A), the Kansas Supreme Court has held that the propriety of admission of a prosecutor's testimony must be measured against these disciplinary rules. State v. Washington, 229 Kan. 47, 622 P.2d 986 (1981). The Washington court emphasized that the potential prejudice in allowing a prosecuting attorney to testify results from the danger that a jury will give extraordinary credibility to such testimony as compared to that of the ordinary witness. Therefore, when a prosecuting attorney testifies to an uncontested or formal matter or if he testifies on a collateral issue, there is no reversible error. Reversible prejudice does result, however where the attorney

actively participates in the prosecution and is a primary witness or where the attorney participates in the prosecution and testifies to his opinion as to the guilt of the accused.

By this measure, William Webb's testimony at bar constituted reversible prejudice. Webb had original responsibility for this prosecution and had he not left the State Attorney's Office for private practice, would likely have tried this case. (R938-939,949) Far from treating Webb as an ordinary witness, the prosecutor encouraged the jury to view Webb as a legal expert whose opinion was based on long personal experience with other cases and thorough understanding of Florida law relating to the insanity defense. (R938-939,949,964) By testifying that he believed Garron to be "sane under the definition of Florida law" (R966), Webb was actually giving his opinion that Garron was guilty since insanity was the only defense raised at trial. In substance, Webb was presented to the jury as an expert on legal guilt or innocence whose opinion should be followed--precisely the danger recognized by the Kansas court as reversibly prejudicial when a prosecutor becomes a witness.

In People v. Arends, 155 Cal.App.2d 496, 318 P.2d 532 (1957), a prosecutor first assigned to try a case (but later replaced) was called as a witness and testified on cross-examination that he believed the defendant was guilty. Despite the lack of an objection, the Arends court reversed the conviction because the statement was so fundamentally tainted that no admonition from the court could have cured the prejudice.

Noting that prosecutorial vouching for the evidence is as equally objectionable when the prosecutor is a witness as when the prosecutor argues to the jury, the Ninth Circuit in United States v. McKoy, 771 F.2d 1207 (9th Cir. 1985) reversed where a former government attorney told the jury his opinion that the government had "an extremely strong case." By analogy to the case at bar, Webb's opinion on Garron's sanity was not only a personal opinion, it also implicitly vouched for the credibility of the other lay witnesses who expressed an opinion that Garron was sane.

Under the circumstances presented at bar, William Webb's testimony was improperly admitted by the trial court. His expression of an opinion that Garron was sane (therefore guilty) was so prejudicial that it deprived Garron's trial of the fundamental fairness guaranteed by the United States Constitution, Amends. VI and XIV and the Florida Constitution, Art. I, §§9 and 16. This case should be remanded for a new trial.

ISSUE III.

THE TRIAL COURT ERRED BY ALLOWING STATE REBUTTAL WITNESSES TO GIVE LAY OPINIONS ON GARRON'S SANITY WITHOUT REQUIRING AN ADEQUATE FOUNDATION TO SUPPORT THE OPINIONS.

At trial, the State presented five rebuttal witnesses who were allowed over objection to give lay opinions that Garron was sane at the time of the shootings. Of the five, only Linda Garron was an eyewitness to the shootings and only Linda Garron had an extensive personal relationship with the Appellant. The others, Detective Phillips, Deputy Greco, Deputy Gallahue and William Webb had varying amounts of personal contact with Garron. Webb had the least amount of time to observe Garron; he testified that the first appearance hearing "took perhaps as long as 20 minutes." (R963) On the basis that this limited amount of contact occurring a day after the event was an inadequate foundation, defense counsel objected to allowing Webb to render an opinion on Garron's sanity. (R955-957) The trial judge overruled the objection and permitted Webb to state an opinion that Garron was sane. (R966)

The authority cited by the prosecutor in the trial court to support admission of Webb's opinion was this Court's decision in Rivers v. State, 458 So.2d 762 (Fla.1984). On its face, the Rivers opinion seems to countenance any lay opinion on sanity provided it has some basis in personal knowledge or observation. Taken to an absurdity, every individual that a defendant has ever encountered in public could be competent to

express an opinion regarding the defendant's sanity. But this would be a misreading of Rivers. The Rivers opinion simply does not set forth the extent of the detective's personal contact with the accused.

Other case authority from Florida cited by defense counsel at trial indicates that only a layman having substantial personal contact with a defendant or adequate opportunity to observe the defendant in close proximity to the events is competent to give an opinion on sanity. Thus, in Butler v. State, 261 So.2d 508 (Fla.1st DCA 1972), the court found a lay opinion on sanity permissible where the witness was the sister of the defendant and had observed him over a long period of time. Similarly, an eyewitness who had observed the defendant during the actual framework of events leading up to, during and subsequent to an assault had an adequate foundation to express a layman's opinion that the defendant was sane. Byrd v. State, 178 So.2d 886 (Fla.2d DCA 1965).

Other jurisdictions have also recognized the need for an adequate foundation before admitting a layman's opinion regarding the defendant's sanity. In State v. Overton, 114 Ariz. 553, 562 P.2d 726 (1977), the Supreme Court of Arizona sitting in banc announced a standard applicable to lay witness opinions on sanity. The Overton court wrote:

> The support for a lay witness' opinion must arise out of facts which show that the defendant knew the nature and quality of his act and that he knew that what he was doing was wrong. Terminology such as he seemed "rational," or "normal," or that during a conversation he was "not talking about something way out in left

> field," does not contradict the positive testimony that defendant did not know what he did was wrong and, therefore, the testimony of the State's witnesses does not fall within the perimeters of the M'Naghten Rule.
>
> * * *
>
> ...there must have existed an intimacy between the witness and the defendant of such a character and duration that the witness' testimony is of probative value to establish that defendant knew the nature and quality of his act and that he knew it was wrong.

562 P.2d at 729.

Viewed from this perspective, none of the State rebuttal witnesses (with the exception of Linda Garron[2/]) had a sufficient foundation to render a lay opinion on Garron's sanity. Even Deputy Ross Greco who had the best opportunity to observe Garron for an extended period of time subsequent to the shooting could not testify that Garron knew the nature and quality of his act and that it was wrong. On the contrary, Deputy Greco related that during the two or three days he was assigned to guard Garron during his recuperation at Bayonet Point hospital from the self-inflicted gunshot wound, Garron asked him why he was in the hospital and what had happened. (R1028-1029)

2/ Linda Garron's opinion is however subject to attack on the basis that she had insufficient maturity to render a lay opinion on sanity. Linda Garron didn't know anyone she believed was insane and thought of insanity as "a man going around laughing and slashing everybody in the street." (R1066-1069)

Other courts have required a similar foundation before a lay witness can render an opinion regarding the defendant's sanity. As stated by the Michigan Supreme Court in People v. Cole, 382 Mich. 695, 172 N.W. 2d 354 (1969):

> The foundation to be laid in such case must indicate that the conclusions of the witness bear directly upon the issue of sanity and not merely conclusions of fact as to defendant's conduct.

172 N.W.2d at 361. The Cole court went on to hold all of the lay opinions on sanity introduced by the State at trial incompetent. This included the opinion of one Detective Trier whose observation of the defendant for approximately one hour directly following the homicide was termed not "ample." 172 N.W.2d at 363.

Other authorities in accord with the above include People v. Murphy, 416 Mich. 453, 331 N.W.2d 152 (1982) and Pyburn v. State, 539 S.W.2d 835 (Tenn.Crim.App. 1976). Since the basis of personal observation supporting the lay opinion on sanity rendered at bar by William Webb was a scant 20 minutes, it was reversible error to admit it. While the Pasco County Sheriff's deputies who testified had longer contact with Garron, their opinions were still incompetent because their observations were not probative regarding whether Garron knew right from wrong at the time of the shootings. A witness who merely states that he observed no bizarre conduct on the part of a defendant lacks a sufficient foundation to give an opinion on the defendant's sanity. This case should be remanded for a new trial.

ISSUE IV.

THE TRIAL COURT ERRED BY ALLOWING STATE REBUTTAL WITNESSES TO IMPEACH DEFENSE WITNESS MARY LOMBARDI BY PRIOR INCONSISTENT STATEMENTS WHERE NO PREDICATE WAS LAID FOR INTRODUCTION OF THESE STATEMENTS ATTRIBUTED TO HER.

On cross-examination, the prosecutor questioned defense witness Mary Lombardi as follows:

> Q. Do you remember talking with Bill Webb and him saying to you: I'm really concerned because the only defense in this case is insanity, so I want you to tell me everything that would help him, Bill Webb, find out if there was any indication of craziness on the part of the defendant; do you remember him asking you that inquiry?
>
> A. No.
>
> Q. You don't?
>
> A. No.
>
> Q. Would it be fair to say that you, that your memory about what occurred, what Linda told you, and everything else was better a day or two after this incident than it was months later?
>
> A. No.
>
> Q. Your memory is as good as it was on November 12?
>
> A. I wouldn't say right to the word, no.
>
> Q. Now, you spoke about Linda Garron telling you a story. Did she ever tell you that the defendant made sexual advances towards her?
>
> A. No.

(R825-826) The prosecutor did not pursue further inquiry into whether the witness Lombardi had made any statements to Webb in regard to Garron's sanity or to anyone in regard to sexual

advances reported by Linda Garron to her. In the State's rebuttal case however, William Webb and Scott Phillips were permitted over objection to recount statements allegedly made to them by Mary Lombardi.

Because defense witness Lombardi was never directed to the alleged statements she made on prior occasions, she had no opportunity to deny them or to explain the inconsistencies. Admission of the inconsistent statements accordingly deviated from the provisions of Florida Evidence Code §90.614(2) (1981) which provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is afforded an opportunity to interrogate him on it, or the interests of justice otherwise require. If a witness denies making or does not distinctly admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. This subsection is not applicable to admissions of a party-opponent as defined in s.90.-803(18).

Admission of prior inconsistent statements without the proper predicate has been held reversible error. Hutchinson v. State, 397 So.2d 1001 (Fla.1st DCA 1981). See also Fleming v. State, 457 So.2d 499 (Fla.2d DCA 1984), rev.den., 467 So.2d 1000 (Fla. 1985); Studstill v. State, 394 So.2d 1040 (Fla.5th DCA 1981).

A. Rebuttal Testimony of William Webb, former Assistant State Attorney

Rebuttal witness William Webb testified that he interviewed Mary Lombardi on November 12, 1982 in the course of a State Attorney investigation. (R940,944) Excerpts from the

transcript show:

> Q. And what did Mrs. Lombardi tell you occurred the night before?
>
> MS. GARRETT: Objection. Hearsay. Not proper impeachment.

(R940)

> MR. MILLER: There are large portions of what Mrs. Lombardi said that are different than what she told Mr. Webb in the investigation, and I think all of those areas are subject to impeachment at this point, prior statements that are inconsistent.
>
> MS. GARRETT: It is my understanding that the law concerning impeachment by extrinsic testimony other than the witness's admission or denials in court, it has to be before extrinsic testimony, that is testimony of other witnesses that she made a statement on a prior occasion can be offered against a witness, not a defendant. It has to be offered to the witness and an opportunity given to the witness to admit or deny it. Then if she admits it, that testimony is not relevant. If she denies it, then the extrinsic testimony can be introduced. The only thing that she says, she doesn't recall him asking her about if she seen anything else or if she was told anything else that indicated insanity. And she said no, she did not recall that question.

(R941)

> MR. HALKITIS: Judge, I have authority that says it is. If the witness either admits it, then there is no impeachment, but if she denies it or does not recall, then you can use impeachment.

(R943)

> THE COURT: Is that reference to case law or just what Mr. Gard --
>
> MR. HALKITIS: This is Mr. Gard, where he cites case law 2004.

> THE COURT: Mr. Gard sounds pretty good to me. Okay. Then your objection in that respect is going to be overruled.

(R944)

The trial court's ruling was error brought about by the prosecutor's incomplete citation from Gard's treatise, Florida Evidence. Actually, Gard's Rule 20.04 is a verbatim quotation of Florida Evidence Code §90.614. Gard, Florida Evidence, 2d ed., vol.2, p.254-255. It specifically notes that evidence of a prior inconsistent statement "is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement." Id. (e.s.).

The transcript continues:

> Q. (By Mr. Miller) Now, when you questioned Mrs. Lombardi, did you say anything--did you question her about what she knew of the defendant's mental state?
>
> A. Yes, I did.
>
> Q. And how did you do that?
>
> A. I asked Mrs. Lombardi if she had either seen anything, since she was his neighbor, had either seen anything or heard anything either firsthand, directly or indirectly from any other source or any other person, anything about Mr. Garron, the defendant, of either a bizarre nature or unusual actions on his part.

(R945-946) Defense counsel objected that it would not be proper impeachment to testify to the answer allegedly given by Mrs. Lombardi when her testimony simply said that she didn't recall the question. (R946) Counsel also noted that prejudicial and inadmissible hearsay would come into evidence. (R946-947) The court overruled the objection (R947) and Webb's testimony continued:

> A. Yes. I asked her if there was anything she saw, heard, either directly, herself, or indirectly through other people as to any bizarre or unusual conduct on the part of the defendant since they were neighbors and had been neighbors. She said, no, the only thing in that, you know, remotely relating to that question was that she saw the defendant wear a sidearm, a handgun, a firearm, in a holster about his property and that he had dogs, which I knew from the investigation, and that he viciously beat the dogs, but nothing in regards to unusual, irrational, bizarre conduct on the part of Mr. Garron.

(R947-948)

Because Mary Lombardi was never asked whether she had told Webb that Garron carried a handgun around his property and "viciously beat the dogs," she was not given a proper opportunity to admit, deny or explain this statement. As defense counsel correctly contended, this was inadmissible hearsay; not impeachment by inconsistent statement. It was also extremely prejudicial to Garron because this testimony had the effect of implying that Mary Lombardi considered Garron to be a sane but mean-tempered man who was cruel to animals.

B. Rebuttal Testimony of William Scott Phillips, Former Detective, Pasco County Sheriff's Office

As a state rebuttal witness, Scott Phillips testified that he had spoken with Mary Lombardi at Bayonet Point Hospital on the night of the shootings. The transcript of the direct examination shows:

> Q. When you spoke to Mrs. Lombardi, did you ask her whether or not Linda had made any statements to her?

A. Yes, sir.

Q. And what did she tell you Linda told her when she came to her house?

MS. GARRETT: Objection, Your Honor. Hearsay.

THE COURT: Step forward.

(BENCH CONFERENCE)

THE COURT: Impeachment?

MR. HALKITIS: Yes, sir.

THE COURT: Overruled.

MS. GARRETT: Everything that she said was not impeachment, otherwise they're going to be able to substantiate testimony that is all--it's rank hearsay, and they can ask her areas that are proper impeachment. They just can't introduce everything they said. That is what the question calls for, what did she say.

(R1011-1012) The testimony continued:

Q. What did Ms. Lombardi tell you that Linda had spoken to her about and related to her about who was at home with the defendant?

A. ...Apparently, the girl was able to give her a very good chronological order, as far as we had an argument, it involved some sexual advances and so forth. I gave this information to my mother. The fight began and he began to shoot and so forth.

(R1012-1013)

Q. What did Mrs. Lombardi report to you about her knowledge of sexual advances as reported to her by Linda?

A. Just what Linda said, involving that there was some sexual advances as well as sexual innuendoes in statement form, that type of thing.

(R1014)

This testimony of Scott Phillips was offered to impeach Mary Lombardi's negative response to the prosecutor's question whether Linda Garron had told her (Lombardi) about Appellant making sexual advances. (R826) However, Mary Lombardi was never presented with her alleged statements to Phillips; in fact she was never even asked if she had conversed with Phillips. Thus, a second element of the predicate required before introducing a prior inconsistent statement was lacking here--the witness was not told of the circumstances of her alleged prior statement such as time, place and person who heard the statement. Cf, Ford v. State, 374 So.2d 496 (Fla.1979), cert.den., 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

It might be contended that defense counsel's hearsay objection was insufficiently specific to preserve the court's ruling for appeal. This Court has already entertained this identical argument in Andrews v. State, 261 So.2d 497 (Fla. 1972). The Andrews court held a hearsay objection sufficient because the "failure to lay a proper predicate converts otherwise admissible testimony into hearsay." 261 So.2d at 498.

The facts of the Andrews case as reported on remand to the First District are strikingly similar to those at bar. See Andrews v. State, 263 So.2d 846 (Fla.1st DCA 1972). Without questioning a defense witness as to whether she had made a statement following a shooting incident, the State called a police officer to testify to a statement made to him by this witness immediately after the shooting. Holding it was error to admit this impeachment testimony the First District reversed.

C. Summation

The State failed to lay a proper predicate for introduction of statements attributed to Mary Lombardi which were inconsistent with her trial testimony. The statements allegedly made to William Webb and Detective Phillips were never presented to the witness. Thus, she had no opportunity to deny them or explain them as mandated by Section 90.614(2) (Florida Evidence Code). Because the impeachment testimony was prejudicial hearsay (under the circumstances), reversal for a new trial is required.

ISSUE V.

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO PRESENT THE OPINIONS OF DR. BERNSTEIN REGARDING PSYCHIATRIC TESTIMONY IN LEGAL PROCEEDINGS AS REBUTTAL TESTIMONY AND ALLOWING THE PROSECUTOR TO IMPUGN THE ETHICS OF THE TESTIFYING PSYCHIATRISTS IN IMPROPER CROSS-EXAMINATION AND CLOSING ARGUMENT.

Initially, it should be noted that Dr. Bernstein was not a willing witness for the State. After he had completed testimony as a defense expert witness, the prosecutor announced that Dr. Bernstein would not be released from his subpoena and would be called as a rebuttal witness. (R492-493) The doctor complained to the trial judge that he felt "misused" and noted that his only contact with Appellant was 25 years ago. (R493)

The prosecutor's use of Dr. Bernstein in rebuttal was totally unrelated to any opinion regarding Garron's mental condition. In fact, not a single question was directed to him regarding Garron during his testimony. (R512-519) Rather the prosecutor was solely interested in Dr. Bernstein's opinion on whether psychiatrists should testify in legal proceedings on the question whether a defendant was able to distinguish right from wrong.

After proffer of Dr. Bernstein's testimony, defense counsel objected to the relevance of the testimony (R504) and argued that it was not proper impeachment or rebuttal because Dr. Bernstein merely advocated a change in the law relative to the insanity defense. (R505) The testimony simply was putting "the viability of the insanity defense and the viability of

psychiatric testimony" before the jury. (R505-506)

The prosecutor contended that he was using Dr. Bernstein and the American Psychiatric Association position paper to impeach defense experts by recognized authority in their field. (R506-507) The court ruled that Dr. Bernstein could testify "relative to his opinion about the ability to form an opinion as to whether a person knew right from wrong." (R510)

Accordingly Dr. Bernstein testified over objection (R515):

> A. It is my personal and professional opinion that psychiatrists should testify in medical terms and not in legal terms, thus should not direct themselves to the ultimate question of being able to distinguish between right and wrong.
>
> Q. And could you tell us why you formed that opinion?
>
> A. Well, I formed it based on my own experience as well as the position paper of the American Psychiatric Association.

A. Florida Law and Procedure When a Criminal Defendant Raises a Defense of Not Guilty By Reason of Insanity.

This Court has continuously adhered to the McNaughton test for insanity as a defense to a criminal charge. As explained in Gurganus v. State, 451 So.2d 817 (Fla.1984):

> Under McNaughton the only issues are: 1) the individual's ability at the time of the incident to distinguish right from wrong; and 2) his ability to understand the wrongness of the act committed.

451 So.2d at 820. The McNaughton test has been severely criticized both within medical circles and in the courts and legisla-

tures of some other jurisdictions. One of the criticisms frequently expressed is that the test is based on outmoded psychological concepts which have been rejected by modern medical science. See e.g., State v. Johnson, 399 A.2d 469 (R.I. 1979) (Abandoning McNaughton test and adopting A.L.I.'s Model Penal Code standard for insanity defense). Psychiatrists are trained to diagnosis and treat mental illness but the opinion called for by the McNaughton test (whether the defendant knew right from wrong) is more ethical or moral in nature than medical. Therefore, Dr. Bernstein's opinion that psychiatrists should testify in medical terms rather than giving opinions on ability to know right from wrong has gained some acceptance in the scientific and legal communities.

The prosecutor at bar however, was not urging the court to adopt a test for insanity other than McNaughton. He asked William Webb if Garron's behavior suggested "he could not distinguish right from wrong." (R965) He asked Scott Phillips whether he felt "the defendant knew right from wrong." (R1009) Also, Ross Greco (R1027) and Linda Garron (R1057) were asked if Appellant knew right from wrong. Indeed the prosecutor found it proper for everyone except psychiatrists to give an opinion on the ability to know right from wrong.

Within this context, Dr. Bernstein's testimony was irrelevant as to any issue to be decided by the jury. It could only confuse the jury and encourage them to regard the psychiatrists who testified as unethical. This Court has held analogous opinion testimony inadmissible on previous occasions. See Shriner v. State, 386 So.2d 525 (Fla.1980), cert.den., 449 U.S.

1103, 101 S.Ct. 899, 66 L.Ed.2d 829 (1981)(excluding testimony of priest who had witnessed an execution); Delap v. State, 440 So.2d 1242 (Fla.1983), cert.den., __U.S.__, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984)(excluding polygraph results); Scott v. State, 411 So.2d 866 (Fla.1982)(excluding testimony of death penalty opponent).

B. The Prosecutor Improperly Impeached Defense Psychiatrists on Cross-Examination

It bears mentioning at the outset that all three psychiatrists who testified for the defense were court-appointed. Drs. Fesler and Majumdar were appointed to examine Garron as experts to evaluate the mental condition of a defendant. (R1931-1933) This procedure is authorized by Section 916.11 (1)(a), Florida Statutes (1983). These experts are allowed reasonable fees for service as witnesses by subsection (2) of the same statute. Dr. Thieman was appointed as a defense expert pursuant to Fla.R.Cr.P. 3.216(a). (R2105-2106)

On cross-examination, the prosecutor questioned Dr. Radha Majumdar:

> Q. Doctor, by the way, you're being paid by the taxpayers for being on the list and for examining this defendant, correct?
>
> A. Yes.
>
> Q. And could you tell the jurors how much you get paid?
>
> A. A hundred dollars an hour.
>
> Q. A hundred dollars an hour?
>
> A. Uh-huh.

(R748-749)

* * *

> Q. (By Mr. Halkitis) Doctor, I am going to show you what has been marked as Double P. Maybe this will refresh your recollection. Is this the bill you sent for one hour's deposition on August 12, 1985, and does it reflect $520?
>
> A. It does.
>
> Q. And that is the county who is going to pick that fee up, right?
>
> A. Right.

(R750)

Although not objected to, this cross-examination was improper because it was irrelevant to the validity of Dr. Majumdar's opinion regarding Garron's sanity. Whether or not Dr. Majumdar was overpaid by the taxpayers should not be considered by the jury in reaching their verdict in a capital case. As will be shown later on, this "impeachment" set up an inflammatory and misleading closing argument.

On cross-examination of Dr. Fesler, the prosecutor asked:

> Q. Doctor, are you aware of the American Psychiatric Association's position on the insanity defense?

(R688) Defense counsel objected on the basis that the witness was never asked whether he recognized the APA's position paper as being authoritative in the field. (R689) Further objection was made on the ground of relevancy. (R689) The trial judge ruled that the prosecutor could proceed if the doctor recognized the publication as authoritative. (R693)

The prosecutor proceeded:

You said that there is committees that are appointed to take certain positions of the American Psychiatric Association, correct?

A. To formulate an opinion, yes.

Q. And are you aware that that has been done concerning whether a psychiatrist should render an opinion as to whether a defendant is sane or insane at the time of the commission of the crime?

A. I would have to say that I am probably aware in reading the literature that they put out. I can't remember a specific article.

Q. But you are aware of that committee's position?

A. I can't recall firsthand what their position is.

Q. Well, would it help to refresh your recollection if I told you that their position is you can't do what you said you have been doing?

(R695-696) Defense counsel objected and moved for a mistrial on the basis that the prosecutor's remark was untrue and undercut the jury's ability to evaluate the expert witnesses. (R696-698) The court denied the motion for mistrial but instructed the jury to disregard the prosecutor's question. (R698)

The prosecutor proceeded:

Q. (By Mr. Halkitis) Let me see if this refreshes your recollection as to the APA's current position on the insanity defense, that the law could prevent psychiatrists from testifying in a conclusionary fashion, whether the defendant lacks substantial capacity to conform his behavior, lacks substantial capacity to appreciate the criminality of his act; was not able to distinguish right from wrong at the time of the act and so forth. The American Psychiatric Association is not opposed to legisature [sic] restricting psychiatric

> testimony about the aforementioned ultimate legal issues concerning the sanity defense. Does tht refresh your recollection as the American Psychiatric Association's position on the insanity defense?

(R698)

Defense counsel again objected on the grounds that legislative recommendations of the APA were not relevant to the doctor's ability to testify, that it was improper impeachment and highly prejudicial. (R699) The trial court overruled the objection. (R700)

Having introduced this confusing and irrelevant material, the prosecutor finished this line of inquiry without ever soliciting Dr. Fesler's opinion on whether the publication was authoritative:

> Q. (By Mr. Halkitis) Doctor, my last question was: Does that refresh your recollection?
>
> A. I don't remember entirely what you read. Somewhat, yes.

(R700)

The trial court erred by not sustaining defense objections to this cross-examination. Furthermore, the motion for mistrial was well-founded and should have been granted. Cf. Walsh v. State, 418 So.2d 1000 (Fla.1982)(Manifest necessity for mistrial where defendant commented on an inadmissible polygraph because it might influence jury verdict).

C. The Prosecutor's Closing Arugment Was Highly Improper.

In closing argument, the prosecutor referred back to his cross-examination of Dr. Majumdar:

> You heard me question her about a bill, remember the bill? I was trying to show you folks her interest in testifying, because the Court is going to tell you you can consider any interest a witness has in testifying, their motives, their biases, their interest, whatever. Use your common sense, the Court is going to tell you, when you evaluate witnesses.
>
> Remember, I asked her: Well, how much are you getting paid for this? She said: Gee, I think a hundred dollars an hour. I said: Remember giving me this deposition where I questioned you for an hour and you sent us a bill for $520? She said: Well, I don't know. Let me see the bill. I showed her the bill. It was marked. She said: Yeah, I guess I did, $520 for that hour deposition. Is that a motive? Is that an interest to take the stand, that nice $520? It takes people two weeks to make that much. She did it in a one-hour depo. Is she worth that much? Ladies and gentlemen, what do you think her opinions were, as you sit here now and evaluate this entire case and listen to things that Dr. Majumdar never knew about. What do you think her opinions were worth, $520? Well, maybe two cents.

(R1010-1011)

This argument was misleading because it insinuated that Dr. Majumdar had a financial motive to testify for the defense which she would not have had if she were testifying for the State. Of course Section 916.11(2), Florida Statutes (1985) allows witness fees to court-appointed expert witnesses regardless of which side they testify for.

The prosecutor went on:

> You heard that Dr. Thieman, that was the confidential expert, he was the person appointed by the Court to assist the defense in the preparation of their case. He told you he had done that before. He did it with Fredrick Dauer, another murderer who

> he felt was insane. That was his--either his first or his second involvement with McClure's office.
>
> * * *
>
> Think of his interest, ladies and gentlemen, in this case. Think of the cross-examination. Ask yourself as you sit here and listen to all that hogwash from the psychiatrists, ask yourself, is it possible, is it credible, ask yourselves what I know about psychiatry, what heard in this courtroom, is it a science, is it an art, or is it just pure science fiction?

(R1116-1119)

Then turning to Dr. Bernstein, the prosecutor stated:

> I asked him about his opinion. Forensic psychiatry, what is your opinion. Can you interview a person a month later, a week later, two months later, two years later and render an opinion as to whether they knew right from wrong? He said: No, I can't do that. Did you do it in the past? Yeah, I did, but I can't do it. What does he say? What does he say about the American Psychiatric Association? Remember, every psychiatrist that took this stand, every one of them got up there and started telling you they went to medical school. They told you they were a member of the American Psychiatric Association. Remember when I asked them, remember Dr. Bernstein, what is the American Psychiatric Association's position on the insanity defense? What does he tell us? You shouldn't do it. How can you go back two months before and tell us what this defendant was thinking in his head without being there? It's common sense, ladies and gentlemen.

(R1120-1121)

This is a gross distortion of Dr. Bernstein's testimony and the American Psychiatric Association's position on

the insanity defense.[3/] Dr. Bernstein had testified that he believed psychiatrists should testify only in medical terms and should not "direct themselves to the ultimate question of being able to distinguish between right and wrong." (R515)

The prosecutor continued:

> Remember the cross-examination of these psychiatrists, that is one thing that they didn't have in their files when they evaluated this defendant. They rendered an opinion, and that was something that I provided them with, two reports, Dr. Frieson and Dr. Helman. What did those reports indicate?
>
> * * *
>
> These reports indicated that in 1974 this defendant was examined by two psychiatrists to determine if he knew right from wrong on a prior date and time. They evaluated him and they say, yes, he knew right from wrong in 1974.

(R1121-1122)

These reports were not in evidence in the guilt phase of the trial (although they were introduced at penalty phase). A similar reference in closing argument to prejudicial facts not in evidence was held reversible error in Duque v. State, 460 So.2d 416 (Fla.2d DCA 1984), rev.den., 467 So.2d 1000 (Fla. 1985).

Other uncalled-for pejorative references to psychiatrists occurred in the prosecutor's argument:

[3/] The APA position paper was not introduced into evidence. No witness said that the APA endorsed this view of forensic psychiatry. Moreover, court-appointed psychiatrists are directed by Fla.R.Cr.P. 3.216(d) to determine sanity at the time of the offense.

> The only evidence that counsel is showing you is three psychiatrists who get on the stand and say, well, that is my opinion. It kind of reminds me of the definition of psychiatry, a blind man in a dark room looking at a black cat that doesn't exist.

(R1208)

> You know, folks, sometimes I call these people the out-to-lunch bunch because as long as it takes you folks to eat lunch today, that is as long as they evaluated this defendant.

(R1122)

None of the above prosecutorial comments were objected to at trial. Accordingly, these remarks are grounds for reversal only if they reach the level of fundamental error. Bassett v. State, 449 So.2d 803 (Fla.1984). The "fundamental error" standard is of course not capable of precise definition but, because of this Court's supervisory powers, need not be as stringent as the federal constitutional standard regarding prosecutorial comment in a state court which requires egregious misconduct amounting to a denial of constitutional due process. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L. Ed.2d 431 (1974).

Recently, the United States Supreme Court reaffirmed the DeChristoforo standard applicable to prosecutorial argument in Darden v. Wainwright, Case No. 85-5319 (June 23, 1986)[39 Cr.L.Rptr. 3169]. In holding that the prosecutor's improper comments did not deny Darden a fair trial, the majority opinion noted:

> The prosecutor's argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the ac-

> cused such as the right to counsel or the right to remain silent. 39 Cr.L.Rptr. at 3173.

At bar, the prosecutor's inexcusable closing argument did all of these forbidden acts.[4/] Accordingly, Garron was denied his constitutional rights to a fair trial and due process of law. Fla.Const., Art.I, §§9 and 16; U.S. Const., Amends. VI and XIV.

[4/] Comment upon the right to counsel and the right to remain silent was previously discussed in Issue I. See also Issue VI for another comment misstating the evidence.

ISSUE VI.

THE TRIAL COURT ERRED BY ADMITTING TESTIMONY BY LINDA GARRON THAT APPELLANT HAD PREVIOUSLY ENGAGED IN CONDUCT CHARACTERIZED AS SEXUAL MOLESTATION WITH HIS STEPDAUGHTERS.

The State filed a notice of intent to introduce Williams Rule evidence at trial. (R1943) Pre-trial, defense counsel moved in limine to exclude this evidence. (R2091-2092) After hearing before Judge Bergstrom on April 27, 1984, the motion in limine was denied. (R1831-1848,2094)

At trial, defense counsel objected when the State sought to introduce the prior bad acts of Appellant into evidence. (R62) The Court overruled the relevancy objection. (R68) An additional relevancy objection was lodged and denied prior to Linda Garron's testimony regarding an incident she witnessed between her stepfather and her sister Tina. (R70-74) Following the testimony of Linda Garron, defense counsel moved for mistrial, or alternatively, to strike the testimony relating to possible sexual abuse. (R140) The trial court denied the motions. (R145)

The testimony of Linda Garron indicated that when she was in the 7th grade, Appellant threatened to give her dog away unless she allowed him to get in bed with her and rub her back. (R69) Appellant had previously come into her bedroom in the morning and rubbed her backside on somewhere between two and five occasions. (R69-70,103) Once, she had seen her stepfather, clad in his underwear, on top of her sister Tina, who was wearing a nightgown. (R74-75)

Obviously, this testimony was prejudicial to Appellant and could tend to inflame a jury. It was admitted under Section 90.404(2)(a) of the Florida Evidence Code (also called Williams Rule after Williams v. State, 110 So.2d 654 (Fla.), cert.den., 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959)) which provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

The State's theory of the case was that Garron shot his wife because she had been told of his remark to Linda and was going to leave the house with the daughters. (R62) The prosecutor contended that the prior incidents of possible sexual abuse were relevant to show a continuing behavior of improper touching, intent, and Appellant's state of mind. (R62) Defense counsel argued that there was insufficient factual similarity between the incidents and the prior incidents were remote in time. (R63-64) Defense counsel also contended that the prior acts did not establish motive or intent for the shooting, were irrelevant, and highly prejudicial because of the alleged sexual misbehavior between a father and a child. (R63-64,143) The court admitted the testimony, finding it relevant. (R68)

The incident with Tina was further objected to on the basis that there was no showing that it was known by Appellant's wife and was not therefore relevant to motive for killing her. (R73-74) Objection was overruled. (R74)

At the outset, it must be remembered that Appellant was not on trial for any sexual misbehavior; he was on trial for first-degree murder. The case authority urged by the prosecutor in the trial court, Rossi v. State, 416 So.2d 1166 (Fla.4th DCA 1982), presents an entirely different factual and legal question.

In Rossi, the defendant entered an insanity plea to charges of kidnapping an injured woman under pretext of taking her to a hospital and committing sexual battery upon her. Ten years previously, he had kidnapped another injured woman under pretext of taking her to a doctor and sexually attacked her. This common modus operandi is the factor which made evidence of the prior crime admissible and evidence of the defendant's mental state during the earlier attack relevant.

At bar, by contrast, there is no common modus operandi between committing two shooting deaths and the prior acts. Even the alleged motivating incident, an obscene remark coupled with touching Linda Garron's thigh, does not demonstrate identifiable points of similarity with the previous rubbings. Thus, such decisions as Potts v. State, 427 So.2d 822 (Fla.2d DCA), rev.den., 434 So.2d 888 (Fla.1983) are not on point here.

The only possible theory that Garron's prior acts were not solely relevant as evidence of bad character would be if they were relevant to show state of mind. In the context of an insanity defense, this Court has said:

> Evidence which does not go toward proving or disproving an individual's ability to distinguish right from wrong at the time of an incident is irrelevant under the McNaughton Rule. Gurganus v. State, 451 So.2d 817 at 821 (Fla.1984).

In this regard, the alleged prior misconduct occurred two years prior to the killings for which Appellant was tried. Although mental state both prior and subsequent to commission of an offense has some relevance to sanity at the time of the offense, when the time between incidents is two years, the probative value is slight. More importantly, evidence that Garron rubbed his stepdaughter's backside, made threats to give her dog away if she refused to allow him to rub her back, and was seen pinning her sister Tina to the bed does not either prove or disprove Appellant's state of mind at that time. Since state of mind is the only material fact in question, this evidence is not relevant, Section 90.401, Florida Evidence Code (1981), and thus inadmissible.

Even if this Court should find some marginal relevance to the testimony of prior bad acts, its probative value must be weighed against the danger of unfair prejudice. Section 90.403, Florida Evidence Code (1981); State v. Vazquez, 419 So.2d 1088 (Fla.1982). This test has been found likewise applicable to cases where an insanity defense is raised in other jurisdictions. See Sanders v. State, 604 S.W.2d 108 (Tex.Cr.App. 1980)(Evidence that defendant was found not guilty by reason of insanity for prior homicide).

In Pilkington v. State, 248 So.2d 755 (Ala.Cr.App.) cert.den., 248 So.2d 757 (Ala.1971), the court quoted from an article dealing with this subject written by an Alabama judge:

> ***Though it is impossible to avoid the conclusion that, in a broad sense, every act of a person's life is relevant to the issue of his mental capacity at any time of his life, it is also possible that evidence of the act

> of a party at a particular time may have but a glimmer of probative value on the issue of his mental capacity at another time, and yet be likely to stimulate excessive emotion or prejudice against him and thus to dominate the mind of the trier of fact and prevent a rational determination of the truth. In a situation of that sort, it would seem that evidence of the act ought to be excluded***

248 So.2d at 757. On this rationale, the Pilkington court held that evidence on an assault and robbery committed two months prior to the capital homicide for which the defendant was being tried should have been excluded.

Similar reasoning should be applied to the case at bar. Evidence of prior acts characterized as sexual molestation of his stepdaughters was so prejudicial that any probative value this evidence could possibly have on the issue of sanity was significantly outweighed by the prejudice. The "Williams Rule" evidence should have been excluded by the trial court.

One further matter needs to be addressed. In final summation, the prosecutor, referring to Linda Garron's testimony, told the jury:

> What did she tell you about Tina? She told you she saw the defendant on top of Tina in the bedroom and her mother wasn't home, that is all she saw. Well, counsel is going to suggest, did suggest to you there is nothing wrong with it or that maybe it was something that we don't attribute to sexual molestation. Come one, ladies and gentlemen, use your common sense. The man's on top of his 12 year old daughter in a nightgown. He is wearing his underwear and her nightgown is up to her chest. [Emphasis supplied]

(R1206)

The trial judge overruled defense counsel's objection to this inflammatory argument. (R1206) This was error because

the prosecutor made a material exaggeration of the facts in evidence. Linda Garron had actually testified:

> I saw that she was pinned down on the bed in his bedroom and he was on top of her with his underwear and her nightgown slightly lifted up from her, from her knees. [Emphasis supplied.]

(R74-75)

The total effect of Linda Garron's testimony enhanced by the prosecutor's misstating of the facts was so prejudicial to Appellant that a new trial is required.

ISSUE VII.

THE TRIAL COURT ERRED BY ALLOWING INTO PENALTY PHASE EVIDENCE THE PSYCHIATRIC REPORTS PREPARED IN 1974 BY DOCTORS FRIERSON AND HELLMAN BECAUSE THESE DOCTORS WERE UNAVAILABLE FOR CROSS-EXAMINATION.

In penalty phase, the State offered reports of psychiatric evaluations conducted in 1974 by Dr. Frierson and Dr. Hellman. (R1298) The prosecutor admitted that both doctors had since died. (R1300) Defense counsel objected to admission of the reports because they were hearsay. (R1298) Counsel further argued that the 6th Amendment, U.S. Constitution, made these reports inadmissible since the doctors could not be confronted. (R1302) The prosecutor contended that the reports were not being offered to show the prior psychiatric evaluation of sanity, but to show that Appellant was the identical Garron who pled no contest to aggravated assault in 1974. (R1302-1304) Particularly, the prosecutor noted that the reports contain "admissions by the defendant which circumstantially link him to that crime back in '74." (R1303) The trial judge overruled the objection and admitted the reports into evidence subject to the underlinings and emphasis marks being deleted. (R1305-1306) The reports were filed in evidence as exhibits 32 and 33. (R2388-2389)[5/]

[5/] Exhibit 32 (Report of Dr. Frierson) is marked as record page 2388 although it is actually 3 pages long. Exhibit 33 (Report of Dr. Hellman) is designated record page 2389; it is also 3 pages long.

Fla.R.Cr.P. 3.780(a) contemplates that in capital sentencing proceedings, both the state and the defendant may present evidence under the guarantee that "[e]ach side will be permitted to cross-examine the witnesses presented by the other side." In Engle v. State, 438 So.2d 803 (Fla.1983), cert.den., 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984), this Court held that the Sixth Amendment right of confrontation protected by cross-examination is applicable to the capital sentencing process. The due process requirements of a capital sentencing proceeding are those afforded by Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). Engle.

Although the State indicated that the reports were being introduced solely to establish "identity," it is clear that the jury was supposed to draw damaging analogies between a contemplated plea of insanity to criminal charges in 1974 and the current trial. Moreover, the prosecutor specifically noted the "admissions by the defendant" which were contained in the reports. (R1303)

Defense counsel correctly objected to the hearsay nature of the reports. The prosecutor's contention that "the defendant can take the stand...and say, well, I didn't make those statements to the psychiatrist" (R1304) simply is not the "fair opportunity to rebut any hearsay statements" provided by Section 921.141(1), Florida Statutes (1981).

In Walton v. State, 481 So.2d 1197 (Fla.1985), this Court recently reaffirmed that the accused's sixth amendment right to confront witnesses against him is a fundamental right

applicable to penalty phase. Admission of two psychiatric reports containing the alleged admissions of the Appellant at bar is as equally violative of this sixth amendment right as the admission of codefendant confessions held error in Engle, supra and Walton, supra. Accordingly, a new penalty phase trial is required.

ISSUE VIII.

THE TRIAL COURT ERRED BY FAILING TO GRANT A MISTRIAL IN PENALTY PHASE WHERE THE PROSECUTOR'S INFLAMMATORY REMARKS ON CROSS-EXAMINATION OF DR. FJORDBAK MAY HAVE CONTRIBUTED TO THE DEATH RECOMMENDATION.

In Teffeteller v. State, 439 So.2d 840 (Fla.1983), cert.den., 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984), the prosecutor argued:

> What you have to be concerned with is this, this Defendant, if you folks recommend mercy and that is the sentence that is imposed, will be eligible for parole in twenty-five years. He's 27 now. He's 52 when he gets out or when he is considered for parole. And you better believe that he will be considered for parole, given the condition of the parole releases in this State.
>
> You look at that. This Defendant released on parole. What do you think is going to happen? He's going to kill again. You better believe he's going to kill again.

439 So.2d at 844. This Court held it was reversible error to deny Teffeteller's motion for mistrial and remanded the case for a new sentencing trial. The Teffeteller court noted that this type of prosecutorial misconduct had been previously condemned and stated:

> There is no place in our system of jurisprudence for this argument.

439 So.2d at 845.

At bar, the prosecutor cross-examined defense witness Dr. Timothy Fjordbak in penalty phase as follows:

> Q. (By Mr. Miller) Doctor, the bottom line is, you don't know if the defendant was released from jail whether or not he would kill again; do you?

MS. GARRETT: Objection, your Honor, relevancy.

THE COURT: Overruled.

THE WITNESS: Again, I would say there is a higher likelihood that Mr. Garron might commit a violent offense than the average individual, but I could not predict exactly if he would do that.

Q. (By Mr. Miller) Well, let me ask you one final question. If the defendant was allowed out of jail in 25 years and drinking, wasn't taking his medication and got into an argument and had a gun, what do you expect would happen?

(R1343-1344)

Defense counsel objected on relevancy grounds and further moved for a mistrial because the remarks were merely designed to inflame the jury. (R1344) The trial judge ruled that defense counsel's questions to the witness regarding Garron's propensity for future violence if he were maintained on medication invited the response. (R1345) However, defense counsel noted that he never implied that Garron could be released from a structured environment (see R1323) and also noted that Garron's two first-degree murder convictions would result in mandatory sentences of fifty years. (R1344-1345) The court sustained the objection on this basis. (R1346)

This Court has held that a defendant's potential for rehabilitation and ability to behave in a prison environment are proper considerations for the jury in penalty phase proceedings. See McCampbell v. State, 421 So.2d 1072 (Fla.1982). Predictions of whether or not a defendant might be violent again if released on parole are however not relevant in

penalty phase because such considerations inject a non-statutory aggravating factor into the jury's recommendation. As was said by this Court in Miller v. State, 373 So.2d 882 (Fla. 1979):

> The trial judge's use of the defendant's mental illness, and his resulting propensity to commit violent acts, as an aggravating factor favoring the imposition of the death penalty appears contrary to the legislative intent as set forth in the statute. The legislature has not authorized consideration of the probability of recurring violent acts by the defendant if he is released on parole in the distant future. To the contrary, a large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of a mental illness, uncontrolled emotional state of mind, or drug abuse.

373 So.2d at 886.

The fact that the prosecutor at bar injected his improper remarks on cross-examination rather than in closing argument is no reason for distinguishing this case from Teffeteller. In either case, the inappropriate non-statutory aggravating consideration has been placed before the jury. Neither can improprieties which might have affected the jury's advisory recommendation be ignored. Teffeteller, supra, 439 So.2d at 845, fn. 2. See also Grant v. State, 194 So.2d 612 (Fla.1967). The trial judge should have granted the requested mistrial.

As it was, the error became enhanced by the prosecutor's further remarks in the same vein. The prosecutor engaged in the following colloquy with Virginia Pleak on recross-examination:

> Q. Mrs. Pleak, you have indicated that you don't think he should die, but in fact there is no doubt in your mind the defendant would be violent again either to himself or someone else if he was released; isn't that correct?
>
> MS. GARRETT: Objection, beyond the scope.
>
> THE COURT: Overruled.
>
> Q. (By Mr. Miller) Isn't it true that there is absolutely no doubt in your mind that the defendant would be violent again either to himself or to someone else?
>
> A. My personal feelings would indicate that he could be, but I am not an expert in that field.

(R1367-1368)

Defense counsel had not asked Virginia Pleak any questions related to predictions of future conduct. Therefore, the objection of "beyond the scope" was a proper objection. The prosecutor's solicitation of testimony to establish a non-statutory aggravating circumstance was improper. Clearly this was what the prosecutor had in mind when he later argued to the jury:

> She even stated that she has absolutely no doubt in her mind that the defendant will be violent again either to himself or to others.

(R1430)

The aggravating circumstances specified by statute are exclusive, no others may be relied upon to support a sentence of death. Purdy v. State, 343 So.2d 4 (Fla.), cert.den., 434 U.S. 847, 98 S.Ct. 153, 54 L.Ed.2d 114 (1977). Because the prosecutor urged the jury to recommend death on the basis of considerations of future dangerousness, Garron's penalty phase trial was unfair.

These prosecutorial comments also require reversal under the U.S. Constitution, Amends. VIII and XIV. The Eighth Amendment requirement for heightened reliability in the determination that death is an appropriate punishment for a specific offender is incompatible with prosecutorial conduct which injects inflammatory and irrelevant considerations into the proceedings. See generally, Caldwell v. Mississippi, __U.S.__, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). At bar, the prosecutor's remarks present an intolerable danger that the jury was led to recommend a sentence of death on impermissible considerations of future dangerousness.

ISSUE IX.

THE TRIAL COURT ERRED BY ALLOWING THE JURY TO HEAR IN PENALTY PHASE A STATEMENT THAT GARRON HAD PREVIOUSLY KILLED A MAN IN TURKEY OR GREECE.

During the guilt phase of Appellant's trial, the prosecutor became aware of correspondence between Virginia Pleak and the Public Defenders Office which had helped the defense in case preparation. (R412-413) The prosecutor demanded copies of the correspondence (R413), and over defense objection that the material was work product (R415), the trial viewed the letters in camera and ordered copies furnished to the prosecutor. (R914)

In this correspondence was a letter from Virginia Pleak in which she was recounting a history of Garron's life. On one page, she wrote:

> Joe slipped out for an around the world stint. He told me later that he killed a man in either Turkey or Greece.

(R2210)

In penalty phase, prior to calling Virginia Pleak as a witness, defense counsel moved in limine to prevent the prosecutor from referring to this alleged killing. (R1351) Counsel argued that there was no further substantiation that any killing took place and bringing this before the jury would be highly prejudicial. (R1351-1352) The prosecutor argued that the alleged killing was relevant to test the bias and credibility of the witness. (R1352-1353,1361) Over further objection that this testimony would be irrelevant and improper

impeachment, the trial court permitted the prosecutor to introduce it. (R1362,1365)

Accordingly, the prosecutor inquired:

> Q. (By Mr. Miller) Mrs. Pleak, even after the defendant told you, your brother told you that he killed a man in Turkey or Greece, you still love him; isn't that correct?
>
> A. I didn't believe him.
>
> Q. You still love him; isn't that correct?
>
> A. Yes.

(R1366)

In Robinson v. State, 487 So.2d 1040 (Fla.1986) this Court rejected the State's identical argument that evidence of other crimes with which the defendant had not even been charged could be paraded before the jury to attack a witness' credibility. The Robinson court wrote:

> Arguing that giving such information to the jury by attacking a witness' credibility is permissible is a very fine distinction. A distinction we find to be meaningless because it improperly lets the state do by one method something which it cannot do by another. Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the state went too far in this instance.

487 So.2d at 1042.

Because Garron's alleged killing of a man in Turkey or Greece would not be admissible evidence to prove the aggravating factor previous conviction of violent felony, Section 921.141(5)(b), Florida Statutes (1983), allowing the prosecutor's cross-examination was error at bar, just as in Robinson, supra. Garron should be afforded a new penalty phase trial.

ISSUE X.

THE PROSECUTOR'S IMPROPER REMARKS TO THE JURY IN THE CLOSING ARGUMENT OF PENALTY PHASE WERE SO CUMULATIVELY PREJUDICIAL THAT THE TRIAL COURT WAS REQUIRED TO DECLARE A MISTRIAL DESPITE THE SEVERAL CURATIVE INSTRUCTIONS.

In closing argument, penalty phase, the prosecutor commenced:

> I don't enjoy standing before you today and urging you that death is an appropriate penalty when a person points a gun at an individual, in this case at two individuals, and kills two law-abiding women, but the people of the State of Florida, ladies and gentlemen, have determined that in order to deter others from walking the streets and gunning down--

(R1416) Defense counsel's objection that deterrence of others was not an appropriate ground to impose a death sentence was sustained by the trial court. (R1417) The trial judge also instructed the jury to disregard the comment. (R1417) The prosecutor continued:

> This is the part of the trial that it concerned with Tina and Le Thi Garron.

(R1418)

Defense counsel objected on the basis that sympathy for the victims was an improper basis to urge the death penalty. (R1419) The trial court overruled the objection (R1419) and the prosecutor continued:

> MR. MILLER: As I just have stated, ladies and gentlemen, this is the part of the trial where we are concerned with Tina and Le Thi Garron. The emphasis has been on the defend- and for an entire week now, almost seven days of testimony and evidence. You have given the defendant his day in court. He has had

> two competent counsel representing him and protecting his rights, but it is my turn at this point, ladies and gentlemen, to speak on behalf of Tina and Le Thi Garron.
>
> What do we know about Le Thi and Tina? We know that they're refugees from Vietnam.

(R1419-1420)

Defense counsel's objection to irrelevant and improper argument was overruled. (R1420) The prosecutor continued:

> MR. MILLER: We know that Le Thi was a caring mother, a mother who sent her child to the Christian school, Suncoast Christian School. You heard that Le Thi was an individual who was a hard worker, a person who worked day in and day out, a person that helped support the family by working in a nursing home, working hours early morning and until late in the afternoon. You heard that the defendant, during this time was at the Suncoast Doughnut Shop and that he was sexually abusing both Tina and his second daughter, Linda. You heard that Tina cared for the defendant. She was a loving daughter, a person who was responsive to the defendant, and you heard that she cared for him, notwithstanding the actions of the defendant towards her.
>
> Based upon what you have heard during the course of this testimony and during the course of the trial, is that in short, that these two individuals are human; that they had a right to live. They had a right to life and they had a right to expect to live a long, natural and healthy life.

(R1420)

* * *

> The State can't argue with that fact, ladies and gentlemen, because there is nothing that can be done to bring Le Thi and Tina back. But you can do something at this point. You can, in your deliber-

> ations, determine what is an appropriate punishment in a case such as this.

(R1421)

This eliciting of sympathy for the victims and urging the jury to avenge their deaths is improper argument. Section 921.141, Florida Statutes lists the sole factors which may be presented to the jury when the prosecutor solicits a death recommendation. Character of the victims coupled with appeals to the jury for sympathy and revenge is irrelevant to any of the factors listed.[6/]

Moreover, the penalty phase of a capital trial requires consideration of the character of the offender and the circumstances of his offense under the U.S. Constitution, Eighth Amendment. Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982). This Court said in Elledge v. State, 346 So.2d 998 (Fla.1977):

> We believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. 346 So.2d at 1001.

To announce to the jury that the penalty proceeding is "the part of the trial" concerned with the victims is misleading at the least.

6/ The prosecution contention that sympathy for the victims is relevant to the HAC aggravating circumstance (R1419) is an issue currently before this Court in Jackson v. State, Case No. 66,510.

The prosecutor went on to misstate the evidence and invite the jury to imagine the anguish and pain suffered by the victims:

> You also heard that, through the testimony of Dr. Wood, that it took Tina five minutes to die as a result of these wounds and three minutes to lose consciousness, [7] and, ladies and gentlemen, with these types of wounds and the way that leg was bent, you can just imagine the pain that this young girl was going through as she was laying there on the ground dying after having just seen her mother killed and seeing her mother's life seeped from her body as she lay in the arms of Linda Garron. Imagine the anguish and the pain that Le Thi Garron felt as she was shot in the chest and drug herself from the bathroom into the bedroom where she expired.

(R1424)

Although not objected to in the trial court, this is the identical "variation on the proscribed Golden Rule argument" which this Court held improper in Bertolotti v. State, 476 So.2d 130 at 133 (Fla.1985).

Further misstatements of the law followed:

> Ladies and gentlemen, the law of the State of Florida for a reason says that if you kill under circumstances such as this, then you should die. The people of the State of Florida, the people of Pasco County have to draw the line to animalistic behavior such as was noted by the defendant on November 12. We have to stop behavior such as this. The law is such that when the ag-

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[7] Actually, Dr. Wood testified when asked how long it would have taken Tina to die:

> A. Well, she was alive when all four of the shots were fired, and it is difficult to say exactly, but perhaps a minute, two minutes, something like that between the time the fourth shot was fired and her death.

(R161)

> gravating factors outnumber the mitigating factors, then death is an appropriate penalty.

(R1430) Defense counsel's objection was sustained. (R1430)

> If Le Thi were here, she would probably argue the defendant should be punished for what he did. I would say on behalf of Tina Garron that her death was more aggravated than Le Thi. I think it is fair to understand there were more factors that are aggravating as to Tina's death, her age, the aggravating factors I have listed, the fact she was calling for help, the number of wounds that were inflicted--

(R1430-1431) Defense counsel's objection was sustained and the court instructed the jury to disregard the prosecutor's remark. (R1431)

> Lastly, ladies and gentlemen, I would like to speak on behalf of Linda Garron. Linda Garron, at the time of this offense, as you heard, was 14-years of age, a young girl who lost her sister and her mother as a result of the actions of the defendant. A girl who had her mother die in her arms after she had been shot. A young girl who tried to run away from the defendant after he attempted to sexually molest her and had the defendant fire a round in what she believed was her direction. A young girl who once before told others that she had been molested and was not believed and was not removed from the defendant's home. No one would listen to Linda Garron in the past.
>
> Ladies and gentlemen, I believe at this point, I would hope at this point, that the jurors will listen to her screams and to her desires for punishment for the defendant and ask that you bring back a recommendation that will tell the people of Florida, that will deter people from permitting--

(R1431-1432) Defense counsel's objection was sustained and the court instructed the jury to disregard this remark. (R1432) A less inflammatory prosecutorial appeal for sympathy and revenge

on the part of the survivors was previously termed improper and irrelevant argument in Bush v. State, 461 So.2d 936 at 942 (Fla.1984)(concurring opinion of Justice Ehrlich).

The prosecutor continued:

> When you go back and deliberate, I am going to ask you to ask yourselves four questions: Was this crime committed in a cruel, heinous, atrocious manner? Was the crime committed in the cold, calculated, premeditated manner? Was the defendant previously convicted of a violent felony? Did the defendant kill to prevent his arrest? The State is going to submit to you that if your answer to those four questions is yes, then the appropriate punishment in this case is death. If your answer is yes, it is your sworn duty as you came in and became jurors to come back with a determination that the defendant should die for his actions.

(R1433) Defense counsel's objection to this misstatement of the law was again sustained and an instruction to disregard the comment given by the court. (R1433)

At the conclusion of the prosecutor's argument, defense counsel moved for a mistrial based upon the cumulative effect of the improper comments. (R1434) The trial judge denied the motion for mistrial. (R1434)

Prejudicial remarks should be considered cumulatively to determine whether their prejudicial effect require reversal. See Thompson v. State, 235 So.2d 354 at 357, fn. 1 (Fla.3d DCA), cert.den., 239 So.2d 828 (Fla.1970). Reversal is required when the cumulative prejudicial effect was not cured by instruction from the bench. Id. However, this Court has said that prosecutorial comment must be "a clear abuse" or "a denial of fundamental fairness" in order to be automatically reversible.

Bush v. State, 461 So.2d 936 at 942 (Fla.1984), cert.den., __U.S.__, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986). In Bertolotti v. State, 476 So.2d 130 (Fla.1985), this Court further declared:

> In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty-phase trial.

476 So.2d at 133.

Recognizing this formidable test, Appellant maintains that the prosecutorial argument at bar requires reversal. First, when the improper remarks at bar are compared to those found objectionable (but not reversible) in Bush, supra and Bertolotti, supra, it is clear that the misconduct at bar was more extensive. Not only were there more improper remarks, the tenor of the remarks was more blatantly prejudicial.

Secondly, under the facts at bar, the importance of the jury penalty recommendation cannot be slighted. Where the jury recommends life but the trial judge imposes a sentence of death, this Court will reverse unless "the facts suggesting a sentence of death" are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908 at 910 (Fla.1975). Where there is any chance that the prosecutor's improper remarks may have tainted the jury recommendation, reversal should be required unless the reviewing court can determine that the sentence of death would have been upheld even if the trial judge had overridden a jury life recommendation. That is not the case here.

Finally, this Court's opinions in Bush, supra and Bertolotti, supra were already published when the case at bar was tried. Evidently, deploring prosecutorial misconduct does not get some prosecutors' attention. "A ritualistic verbal spanking"[8/] is unlikely to impel such prosecutors into cleaning up their act. This Court should reverse.

8/ See Judge Frank's dissenting opinion in United States v. Antonelli Fireworks Co., 155 F.2d 631 at 661-662 (2d Cir. 1946).

ISSUE XI.

THE TRIAL COURT ERRED BY IMPOSING A SENTENCE OF DEATH BECAUSE THE AGGRAVATING CIRCUMSTANCES RELIED UPON IN THE FINDINGS WERE NOT ADEQUATELY SUPPORTED.

The trial court set forth written findings, as required, when imposing the death sentence on Garron for the murder of Tina Garron. (R2353-2356,see Appendix) The aggravating circumstances §921.141(5)(b), Fla.Stat. (previous conviction for violent felony), §921.141(5)(e), Fla.Stat. (to avoid a lawful arrest), §921.141(5)(h), Fla.Stat. (especially heinous, atrocious or cruel) and §921.141(5)(i), Fla.Stat. (cold, calculated and premeditated) were found applicable to this homicide. The court's finding on each of these aggravating circumstances will be contested.

A. The Court's Finding That Garron Was Previously Convicted Of A Felony Involving The Threat Of Violence To The Person.

To support this finding, the court relied upon Garron's 1974 plea of nolo contendere to a charge of aggravated assault which resulted in a withholding of adjudication. (R2385-2386,1396-1397) Appellant satisfactorily completed the term of probation. (R1307-1308,2366)

Apparently, the trial court relied upon this Court's opinion in McCrae v. State, 395 So.2d 1145 (Fla.1980), cert. den., 454 U.S. 1037, 102 S.Ct. 583, 70 L.Ed.2d 486 (1981). McCrae had pled guilty to assault with intent to murder but had not been adjudicated guilty prior to his commission of a capital felony. This Court held that a plea of guilty is it-

self a conviction; accordingly:

> The word "convicted" as used in section 921.141(5)(b) means a valid guilty plea or jury verdict of guilty for a violent felony; an adjudication of guilt is not necessary....395 So.2d at 1154.

At bar, the question is whether a nolo contendere plea without adjudication of guilt also establishes a conviction for purposes of the 921.141(5)(b) aggravating circumstance.

In Vinson v. State, 345 So.2d 711 (Fla.1977), this Court undertook a thorough analysis of the plea of nolo contendere. The Vinson court concluded that a plea of nolo contendere "does not admit the allegations of the charge in a technical sense but only says that the defendant does not choose to defend." 345 So.2d at 715. The plea "is in the nature of a compromise between the State and the accused." 345 So.2d at 715. Thus, it is evident that a plea of nolo contendere is only equivalent to a guilty plea in that it allows the court to proceed to impose punishment.

In Wyche v. Florida Unemployment Appeals Commission, 469 So.2d 184 (Fla.3d DCA 1985), the unemployment claimant had pled no contest to a charge of battery on her supervisor. The Third District held that this plea was insufficient evidence to establish "misconduct in employment" or "violation of a criminal law." 469 So.2d at 186. It seems hardly fair that a plea of nolo contendere could be a good enough reason to send someone to the electric chair but not good enough to deny them unemployment benefits.

Appellant is aware of this Court's decision in Maselli v. State, 446 So.2d 1079 (Fla.1984) which held that a

judgment of guilt following a nolo contendere plea was a sufficient basis to sustain a revocation of probation. Maselli can be distinguished by the fact that a judgment of guilt was entered; the Maselli court specifically cites the "conviction" rather than the plea as the sufficient basis for revocation.

Probably the more vital difference between Maselli and the case at bar is the standard of proof required. In capital proceedings, aggravating circumstances must be proved beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980). In probation revocation proceedings, the burden of proof is significantly lower. Russ v. State, 313 So.2d 758 (Fla.), cert.den., 423 U.S. 924, 96 S.Ct. 267, 46 L.Ed.2d 250 (1975).

Accordingly, the sentencing judge should not have used Garron's 1974 nolo contendere plea to aggravated assault to establish the aggravating circumstance of §921.141(5)(b), Fla.Stat.

B. The Court's Finding That The Capital Felony Was Committed To Avoid Arrest.

When the victim of the murder is not a police officer, the proof of the intent to avoid arrest and detection by murdering a possible witness must be very strong before such murder can be considered to be an aggravating circumstance. Riley v. State, 366 So.2d 19,22 (Fla.1978), cert.den., 459 U.S. 981, 103 S.Ct. 317, 74 L.Ed.2d 294 (1982). The proof must show that the dominant motive for murder was the elimination of a witness. White v. State, 403 So.2d 331,338 (Fla.1981), cert. den., 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983).

At bar, there was evidence to show that Tina Garron was shot while she was on the telephone attempting to notify the police of her mother's shooting. While this indicates that Appellant may have shot Tina to prevent notification of the police and his arrest, there are other plausible hypotheses.

One is that Garron, having killed his wife, was merely continuing a shooting rampage with the intention of wiping out his family and himself. There is no evidence showing that Garron ever contemplated escaping prosecution for the shooting of his wife other than by shooting himself. Although his suicide attempt was perhaps also an attempt to avoid arrest, Appellant does not believe that the legislature intended this aggravating circumstance to be applied under the facts present at bar.

C. The Court's Finding That The Capital Felony Was Especially Heinous, Atrocious Or Cruel.

The Findings of the sentencing judge show that the evidence relied upon was irrelevant to the especially heinous, atrocious or cruel aggravating circumstance. See R2354 (A2) Shooting the pistol with two hands from a "steady firing position" does not in any way establish that the victim suffered more than from a more impromptu shooting.

In Lewis v. State, 377 So.2d 640 (Fla.1979), the victim was shot in the chest first and then several more times as he tried to flee. This Court held that such a shooting death was not especially heinous, atrocious or cruel.

The sentencing judge also mentioned "the firing of shots after the victim became helpless" as reason for finding the HAC aggravating factor. [R2354,(A2)] In Jackson v. State, 451 So.2d 458 (Fla.1984), this Court explained that once a victim becomes unconscious, further acts contributing to his death cannot support an HAC finding. Like the victim in Jackson, there is no evidence at bar that Tina Garron remained conscious for more than a few moments after the first shot was fired.

Accordingly, the trial court's finding that the aggravating circumstance of §921.141(5)(h), Fla.Stat. applied was erroneous.

D. The Court's Finding That The Capital Felony Was Committed In A Cold, Calculated And Premeditated Manner.

The sentencing judge relied on testimony that Garron procured his pistol and concealed it under a towel during the quarrel with his wife, Le Thi Garron. [R2354,(A2)] He denied having a weapon. Then, he shot Le Thi Garron and, moments later, Tina Garron. (R2354,(A2)]

The sentencing judge, in his Findings, called this "heightened premeditation." However, even if these facts show calculation prior to the shooting of Le Thi Garron, they do not show any such calculation in regard to the shooting of Tina. Rather, it is likely that the shooting of Tina was a spontaneous reaction to her telephoning for help.

The sentencing judge further noted that Appellant shot Tina four times at relatively close range. [R2355,(A3)]

Shooting a victim numerous times does not establish the heightened premeditation necessary for application of the CCP factor. Cannady v. State, 427 So.2d 723 (Fla.1983)(victim shot five times).

In McCray v. State, 416 So.2d 804 (Fla.1982), this Court said that the CCP aggravating circumstance

> ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive. 416 So.2d at 807.

Accordingly, the McCray court found the CCP aggravating factor was improper where the defendant had approached the van where the victim was seated, yelled "This is for you, mother fucker," and proceeded to shoot the victim three times.

Like the shooting in McCray, the shooting at bar of Tina Garron shows only a responsive act with barely enough premeditation for first-degree murder.

Appellant would further note that the sentencing judge found the mental statutory mitigating factors §921.141 (6)(b) and (f) to be applicable. [R2355-2356,(A3-4)] The killer's state of mind is the essence of the cold, calculated and premeditated aggravating circumstance. Mason v. State, 438 So.2d 374 (Fla.1983), cert.den., 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984); Hill v. State, 422 So.2d 816 (Fla. 1982), cert.den., 460 U.S. 1017, 103 S.Ct. 1262, 75 L.Ed.2d 488 (1983). Certainly, Garron's mental condition as found by the trial judge makes it highly questionable whether Garron had the mental capacity to engage in "heightened premeditation."

E. Weighing Of The Aggravating Circumstances Against The Mitigating Circumstances.

The sentencing judge found as a non-statutory mitigating circumstance that Garron has been a model prisoner. He found two statutory mitigating circumstances; committed under extreme mental or emotional disturbance (§921.141(6)(b), Fla. Stat.) and capacity to conform conduct was substantially impaired (§921.141(6)(f), Fla.Stat.). [R2355-2356,(A3-4)] These mitigating factors were clearly given great weight by sentencing judge, although he found that they did not outweigh the aggravating factors. [R2356,(A4)] If any of the aggravating factors are stricken however, the balance might well point to a life sentence. Thus, remand for a reweighing would be required.

F. A Sentence Of Death Is Not Proportional In The Case At Bar.

The facts of the case at bar contain many similarities to the facts in Blair v. State, 406 So.2d 1103 (Fla.1981) where this Court vacated the death sentence and ordered a life sentence imposed. Of course, the facts at bar contain more aggravation because two victims were killed. However, there was less deliberation and planning prior to the killings at bar. Moreover, the extensive mitigating evidence relative to Garron's mental condition was not present in Blair. A sentence of death is no more justified by the facts at bar than it was in Blair.

Accordingly, if this Court affirms Garron's convictions, it should reduce his sentence of death to life imprisonment. If Garron is to be retried, much judicial labor could

be saved if this Court declared the death penalty inappropriate under these facts.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Joseph Garron, Appellant, respectfully requests this Court to grant him relief as follows:

On the arguments raised in Issues I, II, III, IV, V and VI, he asks this Court to grant him a new trial.

On the arguments raised in Issues VII, VIII, IX and X, he asks this Court to remand for a new penalty phase proceeding before a new jury.

On the argument presented in Issue XI, he asks this Court to vacate his sentence of death and to order either a) a reweighing of the aggravating factors against the mitigating factors, or b) imposition of a life sentence.

Respectfully submitted,

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