IN THE SUPREME COURT OF FLORIDA

CHARLES LAMOND PRIDGEN,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 69,699
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

APPEAL FROM THE CIRCUIT COURT
OF THE JUDICIAL CIRCUIT
IN AND FOR COUNTY

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ERICA M. RAFFEL
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

/sas

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES:

PRELIMINARY STATEMENT

CHARLES LAMOND PRIDGEN will be referred to as the "Appellant" in this brief and the STATE OF FLORIDA will be referred to as the "Appellee". The Record on Appeal will be referenced by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE

Charles Pridgen was arrested for the murder of Anne Marz on October 26, 1984 (R.1). The grand jury returned an indictment charging the crimes of first degree murder, robbery, and burglary on November 15, 1984 (R.5-6).

Prior to trial, psychiatric evaluations determined Mr. Pridgen to be competent (R.1574-1579).

On May 20-23, 1985, trial by jury was held before the Honorable Oliver L. Green, Circuit Judge, in and for Polk County, Florida. On May 22, 1985, a verdict of guilty as charged was returned by the jury (R.1027, 1028, 1029).

On May 23, 1985, the penalty phase commenced (R.865, 939), and the jury returned an advisory sentence of death (R.1032).

Prior to the imposition of sentence however, the trial court ordered psychiatric evaluations of the appellant (R.1033).

On July 5, 1985, a competency hearing was held before the trial court (R.1037). After testimony of experts, the trial court specifically found the appellant to have been competent during the guilt and penalty phase of his trial:

> "I specifically find Mr. Pridgen was competent for those two proceedings. I do that not only based on the comtemporary findings of the two psychiatrists but based on my own observation of Mr. Pridgen's conduct at pre-trial proceedings. This is not to say that I find he does not have mental problems. It suggests that most people committing crimes such as in this case do have mental problems. But having heard his testimony, having observed his demeanor, I think the findings of the doctors were initially correct and, I, in fact wouldn't have believed otherwise if I had had a different finding then. Be that as it may,

> having ruled that he was competent during those proceedings, the sole evidence before me is that he has deteriorated." (R.1146, 1147).

The court then ordered the appellant transferred to Florida State Hospital for treatment and following treatment, sentencing (R.1147, 1151, 1152). To this order, Mr. Pridgen stated, "God, why don't you save the tax payers money and go ahead and sentence me mister . . ." (R.1148).

On October 22, 1985, having been advised the appellant was competent, the trial court ordered him returned for sentencing (R.1159, 1160), and on October 31, 1985, the trial court ordered further psychiatric evaluations. On November 12, 1985, a competency hearing was held before the trial court (R. 1164-1249). The trial court reiterated its prior findings, noted the disparity in the experts' opinions but, because of the extreme possible penalty, recommitted the appellant to Florida State Hospital (R.1249, 1252, 1253).

On March 14, 1986, having been advised the appellant was competent, the trial court ordered him returned for further proceedings (R.1254) and ordered further psychiatric evaluations (R.1255).

On May 1, 1986, another competency hearing was held before the trial court (R.1259). The trial court ordered the appellant recommitted, stating, ". . . the possible penalty in this case is too great for opportunities to be overlooked, and I would value the opinion of a psychiatrist who has had an opportunity to treat

Mr. Pridgen, if that's necessary, and observe him on a residential basis." (R.1354). And again specifically delineating the disparity in the expert opinions at the competency hearing, the trial court recommitted the appellant (R.1360, 1361, 1362).

Thereafter, the court was again advised that Mr. Pridgen was competent (R.1383) and the trial court ordered three more evaluations for him (R.1381, 1382).

On October 31, 1986, a hearing on the appellant's motion to set aside the jury's recommendation of death was heard within the context of a competency hearing (R.1391, 1392). After testimony of experts, the trial court denied the appellant's motion to empanel a new jury, found Mr. Pridgen competent to be sentenced, (R.1515) and after hearing testimony in mitigation sentenced Mr. Pridgen (R.1521).

The trial court's findings of fact upon which sentence of death is imposed were filed on October 31, 1986 (R.1524-1526), and the court's written reasons for a guideline departure were filed as well on that date, October 31, 1986 (R.1531-1532).

Notice of appeal was filed on November 26, 1986 (R.1534).

STATEMENT OF THE FACTS

Sergeant Harry Haak testified as the State's first witness, that he is a sergeant, and has been with the Lake Alfred Police Department since January 1975 and that he went to Mrs. Marz' home

when her neighbors called the police to advise them they had not seen Mrs. Marz for two days (R.402). Upon arrival, the neighbors advised him that her newspapers and mail had not been picked up; they could hear a television inside the residence; however, no one answered the door (R.404). Sgt. Haak noticed that Mrs. Marz' car was parked in the carport, and after he rang her doorbell without response he picked the lock and entered her home (R.404-405). Sgt. Haak first observed that the house had been ransacked (R.405). He saw that the drawers in the bureaus of both bedrooms in the home had been rifled through and various articles were strewn about (R.405). He heard a television coming from the rear of the house and proceeded into the TV room where he found Mrs. Marz lying in a face down position with her hands tied behind her back with a cord cut from an iron and saw duct tape across her mouth, and a pool of blood on the floor by her head (R.405, 406, 407). Upon arrival of other investigators, a determination was made that there was a possibility of checks missing from Mrs. Marz' checkbook; First Bankers of Lake Alfred where Mrs. Marz had her checking account was notified to be on the lookout if anyone attempted to pass a check on Mrs. Marz' account (R.408, 409). At approximately noon the same day, Haak was notified by the bank that somebody had contacted them the day before regarding Mrs. Marz' account (R.409-410). Again, the same day, the bank notified the police that two white males in a brown car were attempting to cash a check on Mrs. Marz' account (R.410).

At the bank, Haak met up with Mike Turturro and John Harris attempting to cash one of Mrs. Marz' checks (R.410, 411). Turturro told the police that the individual who had given him the check was somebody named Chuck Marz and that an individual named Martha Jones would be at his (Turturro's) house at approximately 5:00 p.m. and could in fact identify this Chuck Marz (R.412). The police went with Turturro back to his house and just prior to 5:00 p.m., an orange truck pulled into Turturro's driveway with two female adults, a male adult and two children. Turturro identified Chuck Marz with long blond hair and glasses sitting in the middle of the front seat (R.412-414). The individual identified by Turturro to Sgt. Haak as Chuck Marz was in fact the appellant Charles Pridgen (R.414). In the middle of the front seat where the appellant had been sitting, Haak found two rings (R.415). The rings were shown to Mrs. Marz' neighbors who identified these rings as those belonging to Mrs. Marz (R.416, 417). Haak testified further that the Lakeside Villa Motel is one half mile and within walking distance of Mrs. Marz' home (R.421).

Lori Egan testified that she is a crime scene technician with the Polk County Sheriff's Department (R.423), and that she arrived at the crime scene at approximately 11:40 a.m. on October 26, 1984 (R.424). She described the room where the deceased was found. It appears from her description of the victim's house that the closet in which the iron, absent its severed cord, was found and the location of the scissors that were used to sever

the cord from the iron were both some distance from the victim (R.429, 430). She testified she photographed the deceased and observed noticeable injuries to the front of the face area; specifically the right eye was swollen and there appeared to be discoloration and swelling to both sides of the face (R.442). She observed that the house had been ransacked (R.443). Egan then testified that she collected a piece of paper from one of the chairs in the family room where the deceased's body was found and sent it to the crime lab for fingerprint examination; she also collected various papers from the top of the ransacked desk in the master bedroom for the purpose of obtaining fingerprints as well (R.444-446). Later that same evening, she received from investigator Craig Smith of the Polk County Sheriff's Department, a motel registration card (R.451-452). On October 27, at approximately 5:00 p.m. Egan made contact with the appellant at the Polk County Jail (R.458-459). She was asked to photograph him and stated that when she inquired of the appellant as to whether or not he would allow the police to photograph him, Mr. Pridgen stated to her, "you are just trying to see if she fought with me" (R.459-460).

Mike Turturro testified that on October 25 and 26 of 1984 he was living in Winter Haven, Florida with his fiancee Wendy Sweat (R.469). He stated that on Thursday, October 25, 1984, he came home from work sometime between 4 and 6:00 p.m. (R.469-470). His fiancee was not there when he got home, but approximately half an hour later, his fiancee Wendy arrived with Martha Jones and a guy

who was introduced to him as Chuck (R.470-471). He stated he had never seen Chuck before that day (R.471). Thereafter, Turturro and Chuck discussed Chuck's purchase of Turturro's stereo (R.471-472). Turturro and his fiancee sold the stereo to Chuck for $125 which Chuck paid for with a check that had been dated October 25 and was signed by Anne Marz (R.472-473). Chuck told Turturro that Anne Marz was his wife (R.474). Turturro observed that Chuck had several other checks in his possession when he took this particular one out of his pocket (R.474). The next day, Friday, October 26, Turturro went to the bank in Lake Alfred with his friend John and attempted to cash the check and within five minutes he was surrounded by police (R.475-476). He testified that he then took the police officers back to his residence because he was expecting Martha Jones and his fiancee; and Martha had known this individual named Chuck who had given Turturro the check (R.477). Thereafter, Wendy Sweat and Martha Jones drove up to Turturro's home and Chuck was in the truck with them (R.478). Turturro pointed out Chuck as the individual who had given him the check (R.478).

Wendy Sweat testified that she was Mike Turturro's financee and that they were living together in Winter Haven on October 25, 26, 1984 (R.483-484). She stated that at that time she worked with Martha Jones and rode back and forth to work with her in Martha's car (R.484). She said that on the day the stereo had been sold, she went to work with Martha and at lunch time they went over to Martha's ex-husband's house (R.486). While they

were there at lunch, Martha received a phone call from a friend of hers and was told that he would meet them after work (R.487). When they got off of work, they went back over to Martha's ex-husband's house to pick up her friend which turned out to be the appellant (R.487). Wendy Sweat testified she did not know him before that day but that Martha did seem to know him (R.488). She testified that the appellant gave her and Turturro $125 for their stereo (R.490). The next morning when Martha Jones came to pick Wendy Sweat up for work, the appellant was in the truck with Martha (R.492). They dropped Pridgen off at Martha's ex-husband's house on their way to work and after work, they picked him up and returned to Wendy and Michael Turturro's house (R.492-494). En route back to the Turturro home, Chuck showed Wendy a set of wedding bands and asked them if they were real (R.494). She testified that she thought he had said they belonged to his grandmother (R.495). Upon arrival back at Turturro's house, the police were already there and Chuck made a statement to the effect let me out (R.497). She stated the last time she saw the rings in the car she thought they were on Martha's hands (R.498). However, they were in fact found stuffed in the crack of the front seat of Martha's truck right under where the appellant had been sitting between Wendy and Martha (R.413).

Diane Guderian was called as a witness for the State and testified that she is a photographer and a crime scene technician (R.501-502) and that she went to the morgue the morning following

October 26th to attend Mrs. Marz' autopsy (R.502-503). She had observed Mrs. Marz at the scene and stated that the autopsy was performed on the same individual she saw at the scene of the murder (R.503). She recalled that when she first observed Mrs. Marz, she noticed there was some skin tears and bruises on her left ring finger in the area where a ring would normally be worn (R.507).

Mark McFall testified that he is employed with the Polk County Sheriff's Department and was present at Turturro's house when the appellant was taken into custody (R.510). He testified that when he asked the appellant to identify himself, he gave a name other than Charles Pridgen. McFall said he believed the name Lee (R.511).

Dr. Mack Reavis testified that he is a pathologist and medical examiner (R.514) and that he performed the autopsy on Mrs. Marz on October 27th (R.514, 517). He said her body was first observed by him clothed in pink pajamas with a housecoat (R.517). He stated that she was 5' 4" and weighed approximately 130 pounds (R.517-18). She appeared to the Dr. to be an elderly individual (R.518). He first observed her body at the scene of the crime (R.518) where he noticed her hands were found behind her back, there was a belt around her neck and duct tape over her mouth (R.518). He testified that her head "revealed that there was a number of traumatic injuries present on the head and face". In evaluating the eyes, it was apparent that there were small hemorrhages present in the tissue surrounding both eyes of-

ten associated with asphixia (R.519). He also found that her right eye was swollen shut due to a large hematoma and bruises in the tissues surrounding the right eye and that the injuries were recent (R.519-520). He testified there were recent abrasions, scrapes, and scratches on the bridge of the nose and on the right cheek. There were multiple areas of recent bruising on the face both in the regions of the front of both ears, on the right cheek and on the jaw bone area and on the victim's chin. There were bruises about the victim's neck. And he stated the injuries to the face were of the type "that are usually associated with a blunt force trauma that is, being struck with something or having something . . or having the head actually strike another object" (R.520-521). He testified "in the anterior aspect of the neck and skelletal muscles that support the head there were bruises. These injuries are the types of injuries we see in strangulation (R.521). He testified "it does take a significant amount of force to inflict bruising into the deep soft tissues of the neck. The fact that the victim in this case was an elderly woman who by virtue of her age and size would have been unable to have mounted much of a resistance in this setting, it may not have taken as much force in this type of individual as it would perhaps in a young healthy male". (R.522). He found an area not obvious externally, of bruising of the soft tissues on the scalp overlying the skull bone of the right ear as well as on the back of the head near the top of the head (R.522). He testified that two primary areas of bruising above the right ear and in the top

or crown of the head indicated at least two instances of being struck or having the head strike some other object (R.523). He could not quantify the number of actual blows that may have been inflicted since some of the injuries were in fact superimposed upon each other (R.524). It was Dr. Reavis' opinion that Anne Marz died of asphixia due to strangulation (R.524-525) and that it was his opinion that she was alive at the time the injuries to the face and head were inflicted and that although there were a number of signifcant injuries to the face and head they "probably would not have been sufficient to have resulted in death" (R.525). He also found injuries in the upper extremities in an area of bruising present above the right breast which was also seen internally (R.526). He further found that Mrs. Marz had a pacemaker implanted in the soft tissues in her chest and it was in operating condition when he found it and there was no indication that pacemaker failure had anything to do with her death (R.526-529). He further testified that Mrs. Marz did not die from being smothered with a pillow, but that she was in fact strangled (R.531).

Mrs. Williams, the victim's neighbor testified that she had known Mrs. Marz for eighteen and a half years as her next door neighbor (R.533). She stated that Mrs. Marz lived with her husband Charles (R.533, 535) until he died and that Mrs. Marz was 78 years old (R.533). She stated that Mrs. Marz owned an automobile, drove the car around, and was capable of doing things for herself on her own (R.534). She recalled that Mrs. Marz recently had the trees in her yard trimmed (R.536).

Jennie Teadt testified she is a teller at First Bankers in Lake Alfred (R.539). She recalled on October 25th, the day before Mrs. Marz' body was found, a call came through by a male caller wanting a balance on the account of Anne Marz, she left the phone to check on the amount and when she returned to the phone the caller had hung up (R.539-542). She stated this call came in at about 3:15 p.m. on October 25th.

Thuong Nguyen testified that she also worked at First Bankers of Lake Alfred and recalled getting a phone call at the bank around 3:20 or 3:30 from a man asking about the balance on Mrs. Marz' account; prior to giving the amount of the balance, she had to obtain certain information. She inquired of the male caller the account number and the amount of the last deposit. The caller gave both the account number and the amount of the last deposit. She inquired if the caller signed on Mrs. Marz' account and he replied that he did. The witness checked the file cards and discovered that the signature cards had the name of Charles F. and Anne E. Marz and that Charles F. was deceased. She returned to the phone and asked if the caller was a signatory on the signature card and he replied again that he was. She returned to the file cards to check one more time (R.545-546). The caller advised that he had called the bank earlier but someone had put him on hold so he was trying again (R.547). Because she was confused when she checked the signature card and determined that the only male signatory on the card was dead, she asked the caller who he was and the caller informed her that he was Mrs.

Marz' grandson (R.548). When she returned to the phone, the caller had hung up (R.548-549).

Martha Jones was called as a witness and testified that she has known the appellant approximately seven years (R.561). She said that she was "real good friends" with the appellant and that he had been a tree surgeon the entire time they had known each other (R.563). She stated that on October 25th, the appellant called her and asked her if she could help him cash some checks for him and that he told her that if she could cash the checks he would give her half of the money (R.564). Martha told the appellant she could not cash the checks because she was on probation herself at that time for bad checks (R.565) but that her friend Wendy could cash them (R.565). She testified that the appellant was calling her from Lake Alfred even though he did not live there (R.565-566). Martha testified that after work, she and Wendy picked the appellant up at Martha's ex-husband's house and then went to Turturro's house to see if he (Turturro) and Wendy would cash the checks (R.567). Martha testified the appellant told her he got the checks from a lady who picked him up while he was hitchhiking. She said the appellant told her that after picking him up, they went back to her house; that she was going to leave for a couple of weeks and that he went back afterwards and took checks, some prommisory notes and some rings (R.569, 570, 571). She also stated that the appellant told her he had called the bank that day to check on the amount of the account (R.571). She said the appellant removed the rings from his

pocket and showed them to her on Friday October 26th and told her that he was going to have them appraised and see what they were worth and then give them to her (R.573). She testified that she and the appellant helped each other out and talked a lot (R.574). She said he told her he wanted to leave the state and that he was in trouble; he would not tell her precisely what he had done, but he did tell her that he had done something that would get him a hundred years (R.574). She said the appellant slept in her pick-up truck that night (R.575) and the following Friday, she picked up Wendy and the appellant went with her; she then dropped the appellant off at her apartment, and he stayed there all day, and when she and Wendy got off for lunch the appellant was still there (R.576). After work that Friday she returned to pick the appellant up and drove Wendy back to Turturro's house. It was at that time the appellant showed her the rings (R.578-579). When they drove up to Turturro's house, she said the appellant stated he hoped to God it was not detectives (R.579). At that time the appellant was arrested and the rings recovered from the truck (R.579). She then testified that on December 18th of that year, she was incarcerated for violation of probation (R.580). While in jail, she testified the appellant wrote her letters (R.580). When she got out of jail, she gave these letters to Detective Putnel (R.582). The letters were introduced at trial and in one of them the appellant wrote to Martha "I am not asking God to get me out of jail, but I am asking him to give me a peace of mind because it is so hard for me

to face up to reality to what I did . . . I think I'm going to get the chair or life imprisonment, but who knows. . ." The second letter contained in part, "I should take you up on your offer for marriage because then your testimony would not be any good because you would be my wife . . . my aunt came down here to bond me out but I have not gotten one and she said she would spend every penny she has to get me out of this trouble. But I told her that money cannot get me out of this unless she pays someone to confess it . . . make sure you flush this letter after you read it of course . . ." (R.583, 584, 585). He also wrote to Martha "My mom said you called her one day this week, have you called Earl? When you were at the flea market, did you see Lisa? Like I said before Martha, I do not want you to think I blame you for any of this . . ." "PS. write me back and let me know what is going on and if you know of any more girls down there that want to write a good looking male prisoner, I am willing" (R.586).

Martha testified that she had heard the name Darrell Meadows from the appellant long before the murder, but that she does not know Meadows personally (R.587). She stated that the appellant never indicated to her that he was afraid of Meadows nor that he had any problems with him. She only knew from what the appellant had told her that he (Pridgen) and Darrell Meadows were friends (R.587, 588). She then stated that there was never any real stereo that was purchased from Mike Turturro but that was just a story that was made up for Turturro to cash the check, and that

Turturro was supposed to keep half of the money he received from it (R.589, 590). She finally stated that on Thursday night, Chuck was upset, he said that he had gotten into trouble, but did not indicate that anyone else was involved (R.590).

Rhoda Goldsmith testified that she is a jeweler and that she had done an appraisal on Mrs. Marz' rings and that they were worth approximately $7,000 (R.595-597).

Detective Richard Putnel testified that he has been a detective with the Polk County Sheriff's Office since 1972 (R.599) and that he observed the scene of the crime and observed that everything had been rifled through on the premises, that jewelry was dumped out on the floor of the victim's bedroom, that her pocketbook was turned upside down and that everything appeared to be out of place (R.601). He stated that at the time of his arrest, the appellant gave Putnel an address in Auburndale (R.604).

Brenda Gaule testified that she too worked at First Bankers in Lake Alfred and that she is the custodian of records at the bank (R.621). She stated that the bank keeps copies of all checks and identified a check drawn on the account of Anne Marz and made payable to one Jack Strickland for $200 on July 18th, 1984. She testified there was an indication on the check for its purpose and that the check stated "for tree work with Lee Pridgen" (R.622).

Jack Strickland testified that he is a brick mason and that the appellant is his nephew and that he and the appellant who is a tree surgeon had done work at Anne Marz' house (R.623-625). He

stated that Mrs. Marz gave the check to the appellant but that she made it out to him (Jack Strickland) because the appellant had lost his license and had no identification to cash the check (R.626).

Louis Waggoner testified that at the time of the murder, he owned the Lakeside Villa Motel in Lake Alfred and that all guests had to fill out a registration card with the license number of their car (R.629-630). He identified a specific registration card shown to him at trial to be in his handwriting and that the individuals who registered on that card were two males in a black Camaro (R.630-633).

Billy Julian testified that he is the appellant's half-brother (R.635). He stated he last saw the appellant on the Wednesday prior to the Friday the appellant was arrested when the appellant called him from a convenience in Haines City (R.635-636). He testified that he was in a black Camero (R.636-637). Mr. Julian stated he took the appellant to a motel room in Lake Alfred (R.637). He was shown the registration card from the motel and testified that the tag number that was written on the card was in fact his car license number (R.637). Julian testified that he stayed with the appellant for a few hours, they went to a drive-in movie and back to the motel but that Julian did not stay overnight with the appellant (R.638-639). He testified further that the appellant appeared depressed (R.620).

Robert Wood testified he is a detective with Polk County and he went to the Lakeside Villa Motel in Lake Alfred and received

the registration card which bore the name of Charles Wilson, 107 Pike Street, Orlando (R.645).

Kurt Bradley testified that he is a police officer with the City of Lake Alfred (R.646) and that he was at the scene of Mrs. Marz' home when her body was found on October 26th (R.647). He stated that he noticed on the table in the kitchen there were bank statements and the very top paper was a statement that gave a balance of $11,000 in a checking account (R.648).

Nancy Gandy testified that she is a registered nurse and in charge of the medical program at the Polk County Jail (R.652). She testified that she keeps any notes that she receives from an inmate and that they are filed in the records (R.654). She stated she knows the appellant and further that she received various communications from him while he was in jail (R.654). She was shown two documents in court that bore her initials that she stated had been picked up from her by Detective Putnel (R.658-661). One of the letters states "the question is will I kill again? Because I damn sure am not getting any help in here" (R.658) . . . and then "I have sit here in this hell hole day after day just thinking what I have been going through as a human being, and I keep asking myself why do I keep going on? Why don't I end it all right here and now? And I have come up with the same answer, why give the sons-of-bitches the satisfaction. Why should I take my own life when they are going to do it. It is hard for me to think straight anymore because my hate is so deep. I have become the animal they claim me to be. Yes, sir,

the question is, will Charles Pridgen kill again? (it is very possible) . . . I am going to use this so-called criminal system for my own purpose, just like Hitler used the political system for his own purpose. Look at the result he caused." (R.661).

Nurse Gandy testified she was present at the time blood and hair samples were taken from the appellant (R.661). She said that while the samples were being taken she heard Mr. Pridgen ask why all this was necessary since he had already confessed (R.661). She further stated that she recognized the appellant had emotional problems and that on a number of occasions he asked to see a psychiatrist (R.662).

Grady Judd testified that he is a major with the Sheriff's Office and that he had met the appellant during his investigation of the instant homicide (R.667-668). He testified that he first came into contact with the appellant at the time of his arrest and that evening he took a taped statement from the appellant after advising him of his rights per Miranda (R.669-670). Judd testified that toward the end of the tape the appellant actually showed him how he was squatting over the victim (R.673). He further stated that on November 2nd, 1984 he received word that Pridgen wanted to speak with him and when he went over to the jail the appellant "asked me if I could give him the home address or the address where he can get in touch with Mrs. Marz' relatives, that he had just realized what he had done. It just sunk in, and he wanted to send them a letter of apology." (R.674). Judd testified that the appellant questioned him as to the rami-

fications of first degree murder, and thereafter Judd testified the appellant told him, "he'd rather die in the electric chair than spend the rest of his life in prison." (R.675). Judd testified that during his conversations with the appellant he never indicated that anyone else was involved in the murder (R.677).

Carrol Kinger testified she is a crime lab analyst at Sanford Regional Crime Laboratory and performs fingerprint analysis. She testified she had examined standard prints taken from the appellant and examined a piece of paper from a chair in the family room of the home of the victim which was a statement of a savings account belonging to the victim and that in her opinion the appellant's palm print was in fact found on this bank statement (R.718-723). Kinger also testified that he had made an examination of 212 other miscellaneous items removed from the top of the desk in the southeast bedroom of Mrs. Marz' home and in processing each of these items he determined to find one fingerprint that was suitable for comparison purposes and in fact it came from the left ring finger of Mr. Pridgen (R.727-729). Kinger also testified he received standard fingerprints from Darrell Meadows (R.729) and compared all the various exhibits he received with Mr. Meadows' fingerprints. Kinger testified that Meadows' fingerprints were not found on any of the items noted (R.730).

Darrell Meadows testified as a witness for the defense. He stated he was presently residing in the Polk County Jail and, contradicting the testimony of Martha Jones who testified that

the appellant had spoken years before of Darrell Meadows as someone he had worked on race cars with, Mr. Meadows on the other hand stated that he first met the appellant on October 24th which was a Wednesday when he picked the appellant up as he was hitchhiking towards Lake Alfred (R.736-737). He stated they began discussing going into the tree trimming business together and the appellant took him to the victim's home to see if she still had a power saw for sale (R.738-740). After leaving Mrs. Marz' home Meadows stated he took the appellant back to a convenience store where they agreed to meet the following day to go see about another power saw (R.741). When he returned the following morning he did not see Pridgen there and he went to another convenience store and parked (R.742-743). He testified that earlier that morning he had decided he was going to rob Mrs. Marz (R.743) and after parking his car at this other convenience store he walked to her home (R.743). He stated he took a pair of socks to put on his hands and his gun with him (R.743). He said when he got to Mrs. Marz' home he rang the doorbell and when Mrs. Marz answered the door she inquired what he wanted (R.744). He stated he pulled out his gun and told her he was robbing her. At first she did not resist but later she starting screaming and he hit her with his fist (R.745-746). He stated that this occurred in the TV room and he saw a coffee table with some tape and some scissors on it and at first he was going to cut her belt and was going to tie her hands up behind her. He stated that the belt was from her houserobe and that he cut it too short and did not tie

her hands with it (R.746-747). He then stated that he went to a closet and there was an iron and he cut the cord on the iron with a pair of scissors and tied her hands with that (R.748). He stated that he then put duct tape over her mouth and at that point she started struggling (R.748). He then saw a belt on a table and strangled her with it (R.748-749). He said he strangled her for about 8 or 10 minutes and went and looked through the house for money and jewelry (R.749). He testified he took about 10 checks, $300 in cash and the rings off her finger (R.750). He said he got the checks off the kitchen table and the cash out of her pocketbook (R.750). After that he said he walked back to his car and then went back to the first convenience store to see if the appellant was there (R.750). He said it was about 10 or 10:30 in the morning at this time (R.750). When he pulled into the parking of the convenience store he saw the appellant who got into Mr. Meadows' car (R.751). Meadows told the appellant that he needed to go to Haines City and the appellant went with him (R.751). Meadows took Pridgen to the parking lot of an Army Navy store and told him "I told him, I said well, you know that woman that we saw yesterday, he said yea I said, I killed her" (R.752). Meadows testified he told the appellant that if he did not believe him he would show him and that he threatened the appellant with his gun (R.752-753). Meadows stated that he told Mr. Pridgen that if Pridgen told anybody he would kill him and his family (R.753). They went back to the convenience store, Meadows parked the car and told Pridgen to walk down to the

victim's house and he did so (R.754). Meadows said that the appellant was gone about 15 minutes and when he came back he asked why Meadows had done it. Meadows testified he gave the appellant the checks and told him he wanted them cashed because he had just got out of prison for cashing checks and that he wanted Pridgen to sell the rings as well (R.754-755). Meadows testified that he again threatened to kill the appellant and that they then made a date to meet again (R.755). Meadows testified he gave the appellant the checks, the rings and something like a notebook (R.755). Meadows stated the next time he saw Pridgen was approximately a month later in jail. He testified that he had no idea why Pridgen was in jail and when they finally spoke they were in cells approximately two doors down from each other and they had conversation between the two of them (R.757-760). Meadows testified that the appellant had never asked him to testify and that while in jail Meadows requested to speak to Detective Putnel about this murder and that he did so (R.763-764). He further testified that nobody offered him anything for his testimony (R.764). On cross-examination Meadows stated that he was not concerned with getting away or leaving the scene of the murder (R.782). He stated that had Pridgen been at the convenience store where they were supposed to meet at the correct time that he may not have committed this robbery and that in fact he probably would not have committed the robbery (R.777) because "I am just not going to out-of-the-blue take somebody to do a robbery with me" and when asked why he testified "because I do not

trust them that good" (R.777) (then query why he told Pridgen about it at all?). When asked if he was afraid that Pridgen would go to the police and advise them of the murder Meadows testified that he had a doubt but that he would take the chance (R.791). He stated he was in fact at that time more concerned with going to jail for forgery than for the robbery and murder he had just committed (R.791-792). He then stated that he told Pridgen the details of how he committed the crime on the way back to Haines City, when asked "you told him you went to the bedrooms and the whole nine yards" Meadows responded, "No sir, not the whole nine yards". He was then asked if he told Pridgen everything, and Meadows replied "not everything". When asked "what didn't you tell him" Meadows replied "I ain't going to make no comments on that." When further pressed and asked "You're not going to make any comments on that" Meadows stated "no sir". (R.795). Mr. Meadows testified that Anne Marz had white hair (R.797-798). However, at trial, the prosecutor asked Mr. Meadows if he recalled telling Detective Putnel in his statement that Mrs. Marz had black hair and Meadows did not recall that (R.798). At trial, Meadows stated Anne Marz was in her late 60's or early 70's (R.741) and later testified she was in her late 70's or early 80's (R.798-799).

The appellant, Charles Pridgen, then testified in his own defense. He testified that he first met Anne Marz three years ago when she called him pursuant to his advertisement in the News Chief for his tree trimming service (R.802). He gave her an

estimate at that time regarding removal of one of her oak trees, but did not do the work for her (R.803). Thereafter in June or July of 1984, he was going door to door trying to find work and he went to her house and worked there for her only one day (R.804). He said the day he worked for her he went into her house for a glass of water and talked with her in the house (R.804). He testified he saw her again in early October 1984 when he took some fruit over to her (R.805). He stated that when he brought the fruit to her he stayed in her house with her for about an hour and talked (R.805). He testified that although the first time they discussed the sale of the chain saw was the day he and his uncle Jack Strickland did the yard work for her (R.806) that at the time he took the fruit to her in October he also spoke about the chain saw (R.805-806).

He testified in March 1984 he took sleeping pills in an effort to kill himself and in the summer of 1984 he took more sleeping pills and slept for three days straight (R.808). He stated that the problem in his life was falling in love with a girl whose mother did not like him (R.808).

He stated the first time he met Darrell Meadows was when he was hitchhiking on October 23rd or 24th and they began discussing going into the tree trimming business together (R.809). They went to Mrs. Marz' house in Lake Alfred because the appellant knew she had a chain saw for sale (R.809-810). After arriving at Mrs. Marz' home she informed the appellant that she already sold it and they spoke for about 30 minutes while Meadows just stood

there (R.810). Upon leaving Mrs. Marz' home Meadows and Pridgen went to a convenience store and they parted company there making arrangements to meet again the next day (R.811-812).

Pridgen stated that after he left Meadows he hitchhiked to Haines City to his uncle's house (R.812). Thereafter he called his brother to pick him up and he went with his brother to a motel in Lake Alfred (R.813). He stated he did not go home because he thought there was a violation of probation charge out on him (R.813-814).

He testified he and his brother went to a drive-in in Auburndale and after returning to the motel his brother left (R.814). He stated that the next morning he got up and walked down to the convenience store to wait for Meadows who showed up between 10:00 a.m. and 12 noon (R.814-815). (Meadows testified the time was 10:00 to 10:30) (R.750). Meadows told Pridgen he wanted to go to Haines City and Pridgen got into the car (R.815). En route Meadows told Pridgen that he had killed that woman they saw the previous day about the chain saw (R.816). Pridgen testified he did not believe Meadows (R.816). Pridgen stated that Meadows told him he wanted Pridgen's help in cashing the checks and selling the rings and that Meadows threatened him with a .38 by putting it in his face (R.816-817). Pridgen further stated that Meadows threatened Pridgen's family even though he knew that Meadows was not aware of Pridgen's family nor did Meadows know where they lived or worked (R.817). They returned back to the convenience store and Pridgen testified he still

didn't believe Meadows had killed Mrs. Marz and Meadows told Pridgen to go down to her house and look (R.817). Pridgen testified that he did so (R.817). Pridgen stated that he did not just run away because he believed that Meadows would kill him and his family even though he knew that Meadows was unaware of where his family lived or worked. He testified that he went into Mrs. Marz' house and looked around and he saw her body lying there. He approached her, lifted her head up and noticed that her nose was bleeding. He said he saw the bedrooms were torn up and that there was a belt around her neck. After he looked at her and realized she was dead, he went into the backroom and looked up under the bed in both bedrooms to see if anyone was there and looked into the bathroom and the closet (R.818). He stated that he just stood there and that he did not know what to do. He testified that he thought about calling the police but felt that he would have a hard time explaining why he was there (R.818-819). He then stated that he left the residence at that time locking the door behind him and walking back down to where Meadows was parked (R.819). Again, upon seeing Meadows, Meadows threatened him with a gun and told him to cash the checks (R.819). He stated that after calling Martha Jones and determining that she would help him cash the checks (R.820) Pridgen made arrangements to meet again with Meadows at the convenience store in the next few days (R.821). Pridgen testified that he took the rings and the checks and the notebook from Meadows (R.822). He then stated that he hitchhiked to Martha Jones' apartment and met

Martha and Wendy Sweat (R.822-823). At trial, he testified there was no discussion regarding the sale of a stereo with Wendy or Mike Turturro (R.824-825). He left the Turturro home with Martha after leaving one of the checks with Mike Turturro and went to a restaurant with Martha and told her that he was involved in something that he could not explain (R.826). He then said that he threw the rest of the checks away and left the book in Martha's car and gave the rings to Martha (R.826-827). He testified that even though he threw all the checks away that if he could sell the rings and give Meadows the money that he might be satisfied with that (R.827). However, he stated that when they got to the Turturro home he was arrested (R.828). Pridgen testified that he always had a fear about the law and how it operated and he gave his confession to Major Judd "partly because out of fear and partly because of Grady Judd" (R.828-830). He then stated that he confessed to this crime to prove a point (R.830-831). Mr. Pridgen then testified that he wrote the "Hitler" letter because "I wrote Mr. Green here a letter that was read yesterday about Hitler. I didn't want to be found incompetent to stand trial like everyone seems to think. I wanted to be sent to a place where for a temporary time to get some answers to some of the questions I have about myself before I actually die in the electric chair." (R.833). When asked by his attorney if that was the reason he wrote that note Mr. Pridgen responded "That's right" (R.833).

Pridgen stated at trial that he saw Meadows in the jail (R.836) and testified that when they were in isolation together they were in the cell right next to each other and they had conversation between each other (R.837).

On cross-examination, he testified that he registered under a false name at the Lakeside Villa Motel because he thought there was a violation of probation warrant out for him (R.839). He stated that even though he thought the police were looking for him for this violation of probation, he could still easily discuss going into business with Meadows (R.840). Pridgen testified he did not know why Meadows told him that he committed the murder and that he had no idea why Meadows would want Pridgen to be a witness to the murder (R.843). He stated that when he went to Mrs. Marz' home the door was unlocked and after looking at her body he looked under the beds and everywhere to determine if anyone else was in there. He stated that he looked in the closets and under the beds because he thought that Meadows might have killed more than one person (R.845). He again stated that he thought about calling the police but did not because he didn't know how to explain what he was doing there. He stated that it did cross his mind that if he called the police and had Mr. Meadows arrested at the convenience store where Mr. Pridgen was supposed to meet him he would not be a threat to Pridgen but he said that he was afraid that Meadows might escape from jail or something (R.853). He stated that he did not tell Martha Jones if the rings weren't worth much that he would give them to her

(R.847). He stated he had no idea how much he would get for the jewelry but that he hoped whatever he got would satisfy Meadows since he threw away all the checks (R.849-850). He stated that he did call the bank and tell them he was Anne Marz' grandson (R.850) and that he gave them the account number but does not believe he gave them the amount of the last deposit that had been made to the account (R.850-851). He testified that he did not get the amount of the last deposit off the bank statement as he was rummaging through the house (R.851) and he testified that the two bank tellers that previously stated in court that the caller gave them the correct amount of the last deposit on Mrs. Marz' account were mistaken (R.852).

Pridgen testified he did not recall being caught in Mr. Meadows' cell at the jail the Friday prior to trial by jail officers. He stated that he did not go into the cell to see Meadows, he went to see another individual. He denied telling the officers that he was there to give cigarettes to Meadows (R.854). He testified that he was given a disciplinary report for being in the cell talking to Meadows only because people in the jail were out to get him (R.855).

The State then recalled Detective Putnel who testified that he was familiar with an area in the jail called isolation (R.856-857). He stated that cellmates can talk to each other in that area (R.859) and that they can communicate with each other also by passing notes (R.859). Putnel stated there was no way to control an inmate from seeing someone if he wants to see him and

talk to him or communicate with him (R.859). Detective Putnel testified that Mr. Pridgen was put in the isolation unit on March 6th, 1985. Mr. Meadows was put in the isolation unit on March 11th, 1985. Mr. Meadows came forward with his alleged confession to the instant murder on March 18th, 1985, and that Mr. Meadows had been in jail approximately five or six months prior to coming forward with his confession but did not do so until after he had been in isolation with Mr. Pridgen (R.860).

SUMMARY OF THE ARGUMENT

Issue I: Mr. Pridgen's statement to the police was free and voluntary and not in exchange for any deal that was made. Mr. Pridgen initiated the conversation with the police by requesting to speak to Major Judd. There is nothing to show that his statement was induced by extraneous pressure and after his so-called "deal" wherein he stated he would confess if the police let him call his aunt, it should be noted that he made the call to his aunt and after hanging up he was readvised of his right to remain silent, but chose to waive that right and give his statement.

Issue II: After the guilt phase, prior to the commencement of the penalty proceedings, the appellant raised absolutely no evidence that would form bona fide reasonable doubt as to his incompetency and the court clearly articulated its observations of Mr. Pridgen's demeanor throughout the proceedings and trial, and that he noted the doctors' pre-trial findings of competency, and therefore failing to raise reasonable grounds to believe that the appellant's mental condition had deteriorated in any fashion other than depression over the verdict rendered the previous afternoon there was no necessity to halt the proceedings and order further psychiatric evaluations and/or a competency hearing.

Issue III: Nunc pro tunc determinations of deterioration into incompetency made long after the commencement of trial that not only conflict with one another, but clearly contradict pre-trial expert determinations of competency is not reason to find

the appellant was incompetent prior to trial. Even a more likely than not probability of incompetence is insufficient to establish that the appellant is entitled to a new trial. Williams v. State, infra.

Issue IV: There is no violation of Farretta in the instant cause. A waiver of counsel must be clear and unequivocal. At no time during the penalty phase did Mr. Pridgen request discharge of his attorneys, or ask to proceed pro se. It can clearly be inferred that had he wished to do so he would have, since months before trial he did in fact make such a motion. A defendant can waive an advisory recommendation from the jury entirely; and therefore clearly can waive the opportunity to present mitigating evidence. Sub judice, the trial court inquired of Mr. Pridgen as to his understanding of the ramifications of failing to present such mitigating evidence to the jury, and Mr. Pridgen stated he did not want witnesses to be called "to beg for my damn life." Such a waiver of the opportunity to present mitigating evidence having been made freely and voluntarily, the appellant cannot now complain. It should be known however that although mitigating evidence was not presented to the jury, the trial court did in fact hear and consider all of the mitigating evidence suggested and urged by the appellant prior to sentencing.

Issue V: Direct appeal to this Honorable Court is an inappropriate forum to raise ineffective assistance of trial counsel for the first time, and the State cannot satisfactorily address this issue without the benefit of the appropriate collateral pro-

ceedings wherein the witnesses testify under oath as to any communications and/or tactical decisions.

Issue VI: Mr. Pridgen clearly had the opportunity and was reminded again and again by the trial court of his opportunity to present evidence in mitigation during the penalty phase. Having validly waived this opportunity he cannot now be heard to complain.

Issue VII: The trial court did not err in denying the appellant's motion to empanel a new jury for a second penalty recommendation based only on his assertion that the jury did not hear any evidence of the appellant's mental illness and emotional state around the time of the offense. It was the appellant himself who, at trial, chose not to follow the advice of his attorneys and pursuant to a strategy disagreement with his counsel requested that no evidence of this nature be presented. Again having made this waiver there is no error in the trial court failing to empanel a second jury to hear of this evidence.

Issue VIII: The prosecutor's comment during argument sub judice was not a violation of Caldwell v. Mississippi as appellant urges. Unlike the prosecutor in Caldwell who urged the jury "not to view itself as determining whether the defendant would die because a death sentence would be reviewed for correctness by the state supreme court" Id at 472 U.S. 323, the prosecutor sub judice merely advised the jury what the law was. The distinction should be noted because the prosecutor's comment in Caldwell, was not true: in Mississippi, the jury is the sole sentencer. Not-

withstanding this distinction however, it still cannot be said that the statement of the prosecutor below in any way distorted or diminished the jury's responsibility; and in fact the prosecutor herein below did not suggest that the jury's advisory sentence itself would be reviewed. In any event, the appellant himself opened the door to the prosecutor's comment.

Issue IX: The trial court did not fail to find mitigating factors by relying on evidence of Mr. Pridgen's competence. The trial court did find appellant competent; however, it is apparent in its findings of fact upon which the death penalty was imposed, that the trial court considered and then rejected the mental mitigating factors urged. It is clearly, within the discretion of a trial court to reject a mitigating factor after it is considered and weighed, and the expert testimony, the testimony of the appellant's mother and sister clearly did not support a finding of the two mental mitigating factors urged below by the appellant.

Issue X: In the instant case the court found seven aggravating factors and no mitigating factors. Although appellee would urge that there was ample evidence to support all of the aggravating factors found by the court, even should this Court find that the trial judge erred in any one of the three aggravating factors attacked in appellant's brief that would still leave aggravating factors found and supported by the evidence, and no mitigating factors.

Issue XI: The trial court's guideline departure sentence imposed in the instant case is supported by its written reasons. It is also apparent from the court's written reasons for departure that deleting any of its reasons would not be a violation of Albritton v. State, infra.

Issue XII: Appellant asserts that in the interest of justice this court should grant him a new trial or reduce his sentence to life imprisonment and asserts that the evidence of guilt is not sufficiently conclusive enough to warrant the death penalty. Appellee would rely on the overwhelming evidence of the appellant's competence, his guilt as determined by the jury, and the aggravating factors supported by the evidence and found by the trial court as pointed out both in the statement of the facts and the argument portion of this brief.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS IN-CUSTODY CONFESSION TO MAJOR JUDD.

A hearing on the appellant's motion to suppress his confession to the instant crime was held on May 16, 1985. This hearing was held just four days prior to the commencement of trial (May 20-23) and it is important to note for the balance of the issues addressed infra how appropriately the defendant testified on his own behalf.

At the hearing on his motion to suppress, the defendant testified that he was picked up by the police at the home of Mike Turturro and taken to the police station but that at no time was he told that he was under arrest (R.165-166). Mr. Pridgen testified on direct examination at the suppression hearing that he was never advised that he had the right to have an attorney present (R.167-168). When asked, "Did you ever tell the officer at that time either one, that you wanted to talk to an attorney?" Mr. Pridgen responded, "No, sir" (R.168). He continued to testify that after arriving at the police station he did request to speak to an attorney and wanted to know what he was charged with (R.168-170). He again asserted at the suppression hearing that no one advised him of his Miranda rights but that he told everyone, "I told everyone I didn't have nothing to say" (R.171). When asked by his counsel, "Did you tell anyone there that you wanted to make a phone call and try and contact an attorney?", the appellant responded, "No" (R.171).

Mr. Pridgen testified that he remained by himself without anyone around for approximately five hours (R.172). Pridge testified that during this period, Captain Judd came back to the cell area at least once (R.173) and then counsel for the appellant inquired, "Had the topic yet turned or had he yet asked you anything about a murder? Were there questions to you about a murder or a killing?", Mr. Pridgen responded, "Once I asked to talk to him it did". Mr. Pridgen testified that approximately two to three hours transpired after his detention commenced and he was afforded the opportunity at that time to make a phone call and that he called his brother (R.176-177). He said that he called his brother instead of the public defender's office because he knew that the public defender's office would be closed at that time (approximately 9:00 p.m.) (R.177-178).

Mr. Pridgen testified at the suppression hearing that, "After I realized I was not going to get a lawyer until this man got what he wanted (referring to Captain Judd) and besides my feet were so blistered I did not think I was going to walk again, there was a long conversation about several things about my ex-girlfriend, my mother" (R.180). It is important to note however, that apparently the police did not ask him who he was going to call when he called his brother and Mr. Pridgen did not tell the police who he did call (R.177). When asked at the suppression hearing, "Did you ever ask to talk to him?" (meaning Captain Judd) specifically say "I want to talk to you" Mr. Pridgen responded "Yes, I did" (R.181). The appellant, at the suppression

hearing denied wanting to talk to Captain Judd about the facts of the case however, (R.181) but testified he merely wanted to know what crime he was being charged with (R.182). He finally testified that he was given a chance to call his aunt if he confessed (R.183). When asked, "Had he not told you you could call your aunt and made arrangements for you to call your aunt, would you have given him the statement?", Mr. Pridgen replied, "I do not think so, no" (R.184) (This testimony is of particular interest in Issue II infra wherein the appellant's competency to stand trial is at issue).

On cross-examination, however, Mr. Pridgen contradicted his earlier testimony and testified that when he was picked up at Michael Turturro's house that he was in fact read his Miranda rights at that time (R.186, but see R.167-168). Mr. Pridgen testified that he knew at the time he was detained by the police at Mike Turturro's house that he was in fact under arrest and that when detained, once he made it known to Captain Judd that he wanted to make a phone call he was allowed to do so and he called his brother (R.187). Mr. Pridgen was asked by the prosecutor, "Didn't Captain Judd at one point tell you that he could not talk to you because you had requested a lawyer?", Mr. Pridgen answered, "That's right" (R.188). Mr. Pridgen conceded in his testimony at the motion to suppress that in fact Captain Judd told him the only way Judd could talk to him was if he (Pridgen) initiated a conversation (R.188), and after that the appellant told Judd that he did in fact want to talk to him (R.188). However,

Mr. Pridgen denied telling the police that he would give them a confession if they would let him call his aunt (R.189). However, he also conceded in his testimony that subsequent to his phone call to his aunt, but prior to his statement, he was again advised of his Miranda rights and more importantly, he testified at his own motion to suppress that he in fact waived these rights and agreed to give Judd a statement, and in fact that he understood his rights (R.190). However, at the hearing on his motion to suppress he testified that the only reason he gave his statement would be so he in fact could go to jail to obtain medical treatment for his feet (R.191).

Detective Putnel testified on behalf of the state at the hearing on the appellant's motion to suppress. He said that he approached the appellant at Mike Turturro's house, asked him if his name was Charles Pridgen, read him his Miranda rights and advised him he was going to be arrested (R.200). Putnel stated that enroute to the police station Pridgen told him that he wished to converse with an attorney and thereafter Putnel made absolutely no attempt to question the defendant (R.201) and upon arrival at the police station advised Judd that the defendant had requested to speak to an attorney (R.201).

Major Judd (who held the rank of Captain at the time of the appellant's arrest) also testified on behalf of the state at the hearing on the appellant's motion to suppress (R.207). He stated he heard the appellant comment that he wanted a lawyer and no efforts were made at that point to interview or question the de-

fendant (R.208). Judd stated that later in the evening he walked down the hallway toward the area where the appellant was being held and observed other officers photographing Mr. Pridgen. Judd testified that he looked at the photographs and at that time the appellant made an attempt to talk to him (R.209). Judd testified at the hearing, "And I told him that I could not talk to him unless he asked to talk to me first because he had asked to talk to a lawyer or words to this effect. I told him up front that he had asked for a lawyer and basically I could not talk to him. And then he told me that he wanted to talk to me." (R.213). Judd then testified, "And he said that he had a deal for me that I could not refuse. And I asked him what that was. And he told me if I would get his aunt, who was Mildred, up here to be with his mother, that he would give me a confession. And we determined that Mildred was in the Keys so we went back and said, 'Well, how about if we allow you to talk to Mildred' and he said, 'that was fine'" (R.214). Judd testified that the defendant talked to his aunt for a few minutes and during his conversation with her admitted to the robbery and the burglary and the murder (R.215). After the telephone call to his Aunt Mildred concluded, Judd started a tape and read the appellant his Miranda rights yet again (R.215-216). When asked by the prosecutor "Did you promise Mr. Pridgen that if he would give you a confession you would allow him to call his aunt" Judd responded "No, sir I did not" (R.217).

Officer Bradley was also called as a witness on behalf of the state at the hearing on the appellant's motion to suppress (R.226). He testified that he was in the room when the appellant offered to confess if he could speak with his aunt; Bradley testified, "Mr. Pridgen stated that he would be willing to give us all the details of the case and everything if he could speak with his Aunt Mildred in Miami (R.233). When asked by the prosecutor, "Did you or Captain Judd in your presence ever tell Mr. Pridgen that if he would give a confession, you would allow him to call his aunt?" Bradley responded, "I don't remember that ever being said" (R.233).

After brief argument, the court correctly denied the defendant's motion to suppress his confession (R.238). With this as a backdrop, the appellant now asserts his confession was bargained for like a plea, and that his emotional state rendered his confession involuntary. However, not one case he cites as authority sustains his assertions.

To support his contention, appellant cites the following cases: Jarriel v. State, 317 So.2d 141 (Fla. 4th DCA 1975) where the police told the defendant if he didn't confess they would arrest his wife; M.D.B. v. State, 311 So.2d 399 (Fla. 4th DCA 1975) where the police told the defendant that if he confessed he wouldn't be charged at all with any of the other cases they had against him, and his confession would just be used by the police to clear up their paperwork; Brewer v. State, 386 So.2d 232 (Fla. 1980) where the defendant was threatened with the spectre of the

electric chair if he didn't tell the police the truth, and if he did they would help him avoid the electric chair; Fex v. State, 386 So.2d 58 (Fla. 2d DCA 1980) where an 18-year old defendant facing his first arrest, and known by the police officer on a personal level since he was 10-years old was promised reduced bail if he confessed; Foreman v. State, 400 So.2d 1047 (Fla. 1st DCA 1981) where the police told the defendant that if the stolen property was returned the victim would not prosecute; Fullard v. State, 352 So.2d 1271 (Fla. 1st DCA 1977) where the officer told the defendant if the victim got the property back there would not be any problems; Fillinger v. State, 349 So.2d 714 (Fla. 2d DCA 1977) where under the totality of the circumstances the court found the officer's conduct in telling a wheel chair confined defendant that her confession and cooperation would be taken into consideration in establishing the amount of her bond, were in fact calculated to delude the accused and exert undue influence; Bradley v. State, 356 So.2d 849 (Fla. 4th DCA 1978) where the officer told the defendant if he confessed the officer would get the defendant "a deal" which would result in a lighter sentence; Brockelbank v. State, 407 So.2d 368 (Fla. 2d DCA 1981) where the officers promised the defendant immediate release from jail and that no other charges would be filed immediately if he confessed, and he was arrested two weeks later on all of the other charges; Brown v. State, 414 So.2d 413 (Fla. 5th DCA 1982) where the police arrested the defendant for burglary, false imprisonment and grand theft and promised the defendant if he confessed they

would drop two of the charges and charge him instead only with burglary and that he would in fact only get 5 years probation; Felder v. McCotter, 765 F.2d 1245 (5th Cir. 1985) where, in the absence of appointed counsel, the police interrogated the defendant and obtained a confession. Ware v. State, 307 So.2d 255 (Fla. 4th DCA 1975) where the defendant was clearly advised by the police that if he confessed he wouldn't be away from his family for as long a period of time as he would be if he did not confess. Also, it should be noted that Ware did not acknowledge that he understood his rights; Hawthorne v. State, 377 So.2d 780 (Fla. 1st DCA 1979) where the defendant had not slept for 36 hours nor eaten in 24 hours, had been advised by counsel to make no statements, the police were aware that counsel had been retained but even so assured the defendant that if she confessed they would assist her in obtaining bond and further told the defendant that her children were being interrogated and if she confessed the interrogation of her children would cease. These were five minor children the youngest of whom was 6-years old; Rickard v. State, 508 So.2d 736 (Fla. 2d DCA 1987) where the officers repeatedly advised the defendant of the substantial assistance program and told her that she would benefit by cooperating with them. As to her mental condition, the court said an accused's emotional state during a confession may have an impact on its voluntariness. Id. at 737. However, it is crucial to note that in Rickard, supra., the police came to the defendant's home at 4:00 a.m., drew weapons, surrounded the house, advised the defen-

dant and her family through a loud speaker to come out of the house, and once out the defendant's husband was arrested in front of her and the children and transported to jail and thereafter the children were taken away by H.R.S. personnel; K.H. v. State, 418 So.2d 1080 (Fla. 4th DCA 1982) where a defendant was found to have confessed upon a promise that if he confessed he would not be charged.

It is clear then that not one of the cases cited by the appellant in support of his contention is either on point or stands for any proposition whatsoever that his in-custody confession was improperly obtained. The balance of cases cited by appellant are equally unpersuasive.

It is clear that at the hearing on the defendant's motion to suppress, there were factual inconsistencies in the testimony between the appellant and that of the police officers. In Routley v. State, 440 So.2d 1257 (Fla. 1983), it was found where factual inconsistencies have been resolved by the finder of fact in favor of the state absent further evidence beyond resolution of the factual inconsistencies will not support a reversal. Id. at 1261. In Gilvin v. State, 418 So.2d 996 (Fla. 1982), the defendant alleged that at the time of his confession he wanted to expedite matters so that he could receive the death penalty quickly, and this court found his contention to be without merit. Id. at 998. In State v. Beck, 390 So.2d 748 (Fla. 3d DCA 1980), a statement by the police interpreted by the defendant to mean that if he confessed, the police would obtain psychiatric

help for him, was found not to render his confession involuntary. The court, in affirming the denial of his motion to suppress stated, "Instead Beck's statements must be regarded as stemming solely from his own self-induced desire to alleviate his mental illness and distress, and therefore is entirely voluntary and admissible". Id. at 750 (citations omitted). In Hawkins v. State, 399 So.2d 449 (Fla. 4th DCA 1981), the defendant's mental state was so shaky that the defendant broke down and cried during his statement. The Fourth District Court of Appeal found the defendant's confession voluntary citing Ebert v. State, 140 So.2d 63, 65 (Fla. 2d DCA 1962) wherein the Second District Court of Appeal found "mental disturbance not induced by extraneous pressure" will not render a confession involuntary.

Just as the experts throughout their psychiatric evaluations of the appellant sub judice, found him to be manipulative, so was he at the time of his confession. He wanted his own way and he tried to bargain for it. The police however, as the record amply supports, never held him to his own bargain. As soon as he finished speaking with his aunt, the police did not say, okay we let you call your aunt now confess. Instead, they read him his rights. Again. They advised him he could remain silent. There was no mention of any deal between them. Mr. Pridgen voluntarily gave his statement after being advised that he need not say a thing.

In the case sub judice, the police officers did not speak to Mr. Pridgen after he voiced a desire for an attorney. However,

it was Mr. Pridgen himself who re-initiated the discussion with the police. This re-initiation of conversation is a voluntary waiver. Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983).

Regarding the contention that Mr. Pridgen confessed due to fear of Darryl Meadows' threats to him and his family, note Stokes v. State, 403 So.2d 377 (Fla. 1981) where the defendant and others in his gang beat to death two members of a rival gang. The court held that "The fact that Stokes may have been motivated to confess because of his concern for the welfare of his family in the face of reprisal threats by the Outlaws Motor Cycle Gang is an insufficient basis on which to predicate a motion to suppress. Id. at 378 (citations omitted).

In Myles v. State, 399 So.2d 481 (Fla. 3d DCA 1981), the defendant had a border line intelligence and the literary capacity of a first-grader and asserted that he lacked the mental capacity to voluntarily waive his rights so that his confession should have been suppressed. The court stated, "Although mental capacity may be considered in determining whether under the totality of circumstances a confession is voluntary, the lack of mental capacity is generally considered only as it relates to credibility and not to admissibility, and a confession will not be excluded on these grounds where it is shown that the defendant understood his rights." Id. at 482. See also, State v. DeConigh, 400 So.2d 998 (Fla. 3d DCA 1981), where the court found mental disturbance not induced by extraneous pressure raises questions of credibility not admissibility.

In Colorado v. Connely, 40 Cr.L.Rptr. 3159 (Vol. 41, #19) [August 12, 1987], a defendant went to a police station and admitted to a murder, and took the police to the scene of the crime. He appeared sane to the police. The next day, he began to talk about voices that had commanded him to confess. It was later determined that he was suffering from a psychotic disorder and acting under the command of hallucinations when he confessed. The high court found that this still did not render his confession involuntary, that it was in fact the product of a free will, and that doubts about the defendant's ability to make rational decisions may call the reliability of a confession into question but not its admissibility. In Arizona v. Mauro, 41 Cr.L.Rptr. 3081 (Vol. 41, #19) [August 12, 1987], a defendant who had asserted his rights both to silence and as to the presence of an attorney, was allowed to speak to his wife in the presence of a police officer and their conversation was taped. The defendant confessed to the crime during the conversation with his wife. Contending that this was an interrogation within the meaning of Rhode Island v. Innis, 446 U.S. 291 (1980), the high court found the officers did not impermissibly interrogate the defendant by allowing a conversation they knew would likely produce incriminating statements to occur.

It is therefore apparent based on the facts contained in the record below and the prevailing authority, that Mr. Pridgen's statements were freely and voluntarily made after a knowing and intelligent waiver of his rights and the trial court did not err in failing to suppress his confession.

ISSUE II
(Restated)

WHETHER APPELLANT'S DUE PROCESS RIGHT NOT TO BE TRIED WHILE INCOMPETENT WAS VIOLATED BY THE TRIAL COURT'S DENIAL OF DEFENSE COUNSEL'S MOTION TO CONTINUE THE PENALTY PHASE OF THE TRIAL, AND BY HIS FAILURE TO CONDUCT A COMPETENCY HEARING WHEN PRESENTED WITH REASONABLE GROUNDS TO BELIEVE THAT APPELLANT'S MENTAL CONDITION HAD DETERIORATED TO THE POINT WHERE HE WAS NO LONGER COMPETENT TO STAND TRIAL.

The appellant concludes that he was in fact incompetent and bases his entire argument upon this faulty conclusion. Appellee, however, will not put the cart before the horse, and will instead refer to the record sub judice. Prior to trial, the appellant motioned the court to discharge the public defender and proceed pro se. (R.69-70). When brought to court for a hearing on this motion, he displayed a vulgar outburst of anger as to his treatment in jail (R.72-73). This inappropriate outburst prompted the trial court to order a psychiatric evaluation. The public defender indicated that this outburst was due to the stress of incarceration (R.73). Thereafter, the public defender withdrew due to a witness conflict (R.88) and private counsel was appointed (R.90, 98). Doctors McClane and Ainsworth were specifically requested by the defense and were so appointed by the court (R.129, 131, 133, 134). Doctors McClane and Ainsworth examined the appellant and filed reports. Dr. McClane's initial evaluation indicates that the appellant was referred to him "for the purpose of my serving as an expert to assist in the preparation of the defense" (R.1574). (Note: During the hearings after the guilt

phase and again after the penalty phase, no one asked any of the doctors of their feelings as to the death penalty in order to determine any possible bias in their reports, nor were they asked whether they felt their duty and responsibility was to the court, or to their patient, Mr. Pridgen.)

Approximately six months after the appellant's arrest and confession, Dr. McClane interviewed him for approximately two and a half hours on April 17th, 1985 (R.1574). During this initial pre-trial interview, the appellant indicated he did not commit this crime but that it was in fact committed by Darrell Meadows.

Dr. McClane found "This was a cooperative man of average body build wearing glasses. During the first half hour of our interview he was somewhat defensive and evasive, but after he began to feel more comfortable with me he appeared to talk freely and answer all questions promptly and reasonably and completely . . . there was (sic) no signs of organic brain disorder. His memory in general and intellectual functions were grossly in tact." (R.1578). Dr. McClane found "He clearly appreciates the charges, the range and nature of possible penalties, and the adversary nature of the legal process. He is able to relate to his attorney, to disclose to his attorney pertinent facts, and to assist his attorney in planning a defense. He has the capacity to realistically challenge the witnesses. He is able to testify relevantly. His depression and suicidal thoughts cast some doubt about his ability to cope with the stress of incarceration prior to trial. His motivation to help himself in the legal process

must be questioned somewhat because he has, up until very recently, steadfastly maintained his guilt. Also his ability to manifest appropriate courtroom behavior is somewhat questionable because of his obscene outburst during the hearing before Judge Green earlier. He says that this hearing occurred on about 4 or 5 days after he read the transcript where people were calling into the police department and asking if a mad killer was on the loose and wondering if the town was safe . . . he states that this sent him into a severe state of depression as well as angered and was praying on his mind when he made the outburst in front of Judge Green. I believe that he is currently capable of controlling his behavior better than at that time. Despite the above qualifications, I believe that at this point he is competent to stand trial". (R.1578-1579).

Dr. McClane's summary and recommendations from this pre-trial interview on April 17th, 1985 were as follows:

> (1) Mr. Pridgen is competent to stand trial.
> (2) I find no evidence that he was insane at the time of the alleged offense.
> (3) He does have serious depressive problems and personality problems.
> (4) He may have become overtly psychotic at times under stress.
> (5) He is in need of treatment. (R.1579)

It is therefore apparent that the pre-trial determination of competency herein and the progression to trial was appropriate. In fact, on May 16th, 1985, approximately one month after Dr. McClane's finding of competency, a hearing on the appellant's motion to suppress confession was heard. At that time, the trial

court asked "Do we have anything for discussion besides the motion to suppress" (R.163-164). Both the State and the defense indicated they were aware of nothing else (R.164). In fact, the appellant himself testified at the hearing on his motion to suppress (R.165-185). His testimony was intelligently appropriate to the specific issues regarding a motion to suppress, and he was fully cross-examined without incident or indication that he was anything but competent. Four days later on May 20th, 1985, trial commenced (R.242).

Trial was held on May 20-23, 1985. Throughout the three days of trial, the trial court had the opportunity to see Mr. Pridgen and observe his demeanor. On the last day of trial, he took the stand and testified as a witness in his own behalf, and was fully cross-examined at length by the prosecutor (R.802-855). On May 24, 1985, the jury returned a verdict of guilty as charged (R.936-939). The following morning, May 25th, 1985, the court reconvened for the penalty phase (R.939). Counsel for the appellant advised the court that the appellant wished to make a statement to the jury against counsel's advice and did not want counsel to put on any witnesses on the appellant's behalf. Appellant advised the court he did not wish to have witnesses called for "someone to beg for my damn life" and that he was going to "use this system for my own purposes just like I have been saying for the last eight months" (R.941-942). (It should be noted that the jury returned its verdict just the night before, and the appellant's reaction to that verdict even though another

individual (Darrell Meadows) confessed to the crime right there during trial before the jury must have been devastating and tempered the appellant's faith in his attorney). It should also be noted regarding the appellant's present assertions of incompetence during the penalty phase, that just the day before the penalty phase the defendant himself testified and was cross-examined at length and the court had an opportunity to clearly make a determination as to the defendant's willingness and ability to assist his counsel, and it is clear that everything the defendant testified to at trial urged his innocence, and that clearly a determination of his competence could be made. It is unreasonable to assume that the trial court even with the advice and the assistance of a court appointed expert (who in fact could not testify unequivocally as to Mr. Pridgen's incompetence) would believe that the appellant's competence had deteriorated so grossly but merely overnight.

Counsel for appellant advised the court they would have presented the testimony of Dr. McClane, the defendant's mother, and the defendant's step-father, and brother, all of whom would have testified as to the appellant's emotional state during the last year (8 months of which he was incarcerated for this crime). The defense advised the court that he wanted all mitigating reasons given in a jury instruction (R.947).

Thereafter, counsel for the appellant advised the court that appellant would testify in his own behalf (R.955) and he did so (R.956-963). The appellant's statement clearly reveals the mani-

pulating nature of his personality wherein he advises that the State Attorney produced exactly what he wanted (R.956). Appellant then went through some seven pages of monologue wherein he asserted his innocence (R.957-963).

Counsel for appellant then advised the court that at Mr. Pridgen's insistence and against his advice no more additional evidence was to be presented (R.963). Counsel requested that the proceeding be continued until Dr. McClane could further evaluate the appellant's competency to stand trial and assist in the proceedings (R.966). In support of his motion for a continuance, the defense offered the testimony of Dr. McClane (R.967). The trial court stated

> "WELL I HAVE NOT SEEN EVIDENCE THAT HE IS INCOMPETENT TO THE EXTENT THAT HE IS UNABLE TO ASSIST HIMSELF OR YOU. FOR WHAT IT IS WORTH, I HAVE . . . THIS IS NOT THE FIRST TIME I HAVE DEALT WITH AN ACCUSED WHO HAS CHOSEN THIS PATH AND I AM TALKING ABOUT AN ACCUSED . . . I DON'T MEAN SPECIFICALLY THIS PATH, BUT I AM TALKING ABOUT IN GENERAL, WHO AT ONE TIME OR ANOTHER SAID I AM NOT GOING TO DO ANYTHING. I WILL HEAR YOUR EVIDENCE UPON WHICH YOU BASE YOUR REQUEST. I CAN ONLY ASSUME FROM WHAT YOU SAY IT MUST HAVE OCCURRED DURING THE COURSE OF THESE PROCEEDINGS. AND I SAY AGAIN, SIR, I AM NOT AWARE OF ANYTHING THAT'S OCCURRED THAT SHOWS MR. PRIDGEN IS NOT UNDERSTANDING THE NATURE OF THESE PROCEEDINGS AT ALL."

(R.967-968)

Dr. McClane was then called as a witness in support of the appellant's motion for a continuance of the penalty proceedings (R.968). Dr.McClane testified as to his April 17th, 1985 (pretrial) evaluation of the appellant. Dr. McClane testified that his initial evaluation of the appellant questioned his motivation

to help himself in the legal process because until just prior to his evaluation on April 17th, 1985, the appellant had maintained his guilt (R.973). (However, Dr. McClane was obviously unaware that throughout the entire proceedings, the appellant maintained his innocence.) At this time, just prior to commencement of the penalty phase of the trial on May 25th, 1985, Dr. McClane could not give a clear answer as to his pre-trial finding of competency on April 17th, 1985 nor could he express himself as to his observations (R.974). Although Dr. McClane testified that there may at times be a difference between someone who is incompetent to assist counsel and someone who simply for his own personal reasons desires not to assist counsel (R.977), he testified that because in general a person would want to help himself unless he had some mental or emotional problems he would find an individual incompetent if they did not want to assist counsel (R.976-977).

The court then recessed the proceedings to allow Dr. McClane an opportunity to interview the defendant (R.978-979). The court noted that it would be rather uncomfortable for the jury to be in the jury room for 3 hours (R.979) and therefore, Dr. McClane's examination of the appellant was not in any way limited by the trial court to a mere lunch hour recess as the appellant now asserts (R.979). After this recess, Dr. McClane was again called as a witness and testified that he had spent 1 hour 45 minutes interviewing the appellant in a pleasant setting with a table and chairs (R.983), and he was able to conduct an interview with him (R.983). When asked if he had an opportunity within a reasonable

degree of medical certainty to determine the appellant's competency, Dr. McClane answered "I have arrived at an opinion but I can't say its to a criterion of reasonable medical certainty. I still have some doubts." (R.983).

Dr. McClane then discussed the appellant's desire to die and that this factor was in fact present during the trial proceedings. (Again apparently Dr. McClane was unaware that the appellant steadfastly maintained his innocence throughout trial.) Dr. McClane testified that this was perhaps the most difficult competency determination he had ever been asked to make and that "While I can't conclude that he is incompetent to a criterion of medical certainty, I still have substantial doubts about his competency." (R.985). Dr. McClane further testified "I am not talking about global incompetency. Incompetence in the sense of inadequately motivated to help himself . . ." (R.986).

On cross-examination, Dr. McClane said he was absolutely certain that appellant was competent nine of the eleven areas of consideration for competency (R.988) but that he had doubts about the appellant's competency regarding his motivation to help himself, and his motivation to assist his counsel (R.989). Dr. McClane concluded that the appellant's lack of motivation was due mainly to the fact that the appellant was found guilty of a crime that he believes he did not commit (R.991). He stated that his opinion might be different if the appellant had come in to be interviewed by him having just been found not guilty by the jury (R.991-992). (Query whether this indicates some bias on

McClane's part against the death penalty.) Dr. McClane asserted that the jury verdict played a part in the appellant's present condition and confirmed the appellant's negative bias about the legitimacy and fairness of the legal system (R.992). He again asserted that he could not conclude that the appellant was incompetent to a criterion of medical certainty but that he merely had considerable doubts about the appellant's competency (R.992).

Dr. McClane was then examined by the trial court. Dr. McClane stated that the appellant possesses a cronic cynicism of the legal system as evidenced by his letter campaign and maintaining his guilt for a period (R.995). The doctor stated "I think his attorneys convinced him there was a reasonable chance that if he cooperated; and I think his conviction, I guess, confirmed in his mind, that there was no chance, that all was over, that he had been unjustly adjudged guilty. And I think that's applied that . . . the extra element to push him into total <u>non-cooperation</u>. And as I said, marginal if not complete and unequivocal incompetence to be <u>motivated</u> to help himself and to assist his attorney (R.996).

Counsel for the appellant then stated that there had been a prima facie showing that his client was incompetent to sit calmly (R.101) and requested that the court continue the proceedings or order the committment of his client or order a committee of general psychiatric persons in the community to make an evaluation so that the court could continue when the appellant was competent to assist counsel (R.1001).

The trial court advised counsel he could proceed with witnesses if he wished to, however, the defense responded that Mr. Pridgen would not allow witnesses to testify on his behalf (R.1003). At that point, counsel moved to withdraw and both his motion to withdraw and his motion for continuance was denied (R.1004).

Upon these facts appellant makes his present assertion that he was incompetent to proceed to the penalty phase of his trial.

In the instant case, this Court must review the evidence relevant to the appellant's mental illness and determine whether the trial court applied the proper weight to what was known the court at the time it determined to proceed to the penalty phase of trial. Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). In Drope, the high court held that due process was violated when the trial court failed to suspend the proceedings for psychiatric evaluations where there were clearly sufficient indicia of incompetency presented. They held, "The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required . . . There are of course no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed . . ." Id at 420 U.S. 180-181. This is in accord with Fla. R. Crim. P. 3.210(b) which requires the court to immediately order a time for a hearing to determine the defendant's mental

condition if it "has reasonable grounds to believe that the defendant is not mentally competent to stand trial". Appellee does not disagree in any manner with this authority, but rather contends that the appellant herein below was fully capable and in fact did understand the nature and objective of the proceedings and in fact throughout the guilt phase of his trial consulted with counsel and assisted in his defense. It was not until the jury had returned a verdict of guilty that the appellant suddenly became ambivalent and refused to cooperate with his attorneys. However, the trial court had observed the appellant testify during the hearing on his motion to suppress, watched him throughout the trial and heard him testify on the last day of trial, and the record clearly shows nothing to indicate that the appellant was anything but competent at the commencement of the penalty phase, save for his attorneys' protestations that the appellant did not want to follow counsel's advice. The only expert finding up until this point were those in the reports of Doctors McClane and Ainsworth finding the appellant competent to stand trial.

It appears now that appellant is contending because he did not want his attorney to put on any witnesses during the penalty phase that he must be incompetent because no competent person would do such a thing; and now asserts that under the dictates of Drope, supra, the trial court's failure to hold a hearing for determination of the appellant's competency to proceed to the penalty phase was error. Appellant is in error. Section 3.210(b), Fla. R. Crim. P. and Drope, supra, requires a hearing only if

there are reasonable grounds to believe that the defendant is incompetent. It is important to note the facts upon which Drope v. Missouri was determined in assessing the manner in which the evidence of competence or incompetence is to be weighed by a trial court. In Drope, the trial court heard the defendant's wife testify she believed her husband was sick because when he didn't get his way or was worried he would roll down the stairs. Id at 420 U.S. 166. Prior to completion of the State's case in Drope the defendant failed to appear in court (he was free on bond) due to the fact that he had shot himself in the stomach and was hospitalized. Although there was psychiatric testimony that raping one's wife and shooting one's self during trial might indicate inability to comprehend the proceedings, the trial court ordered the trial to proceed in the defendant's absence. The criteria set out in Drope, irrational behavior, demeanor at trial, and prior medical opinion were all clearly inconclusive on the record sub judice to show that Mr. Pridgen was incompetent to proceed. The court in Drope said "In the present case there is no dispute as to the evidence possibly relevant to the defendant's mental condition . . . the dispute concerns the inferences that were to be drawn from the undisputed evidence and whether, in light of what was then known the failure to make further inquiry into the defendant's competence to stand trial denied him a fair trial. Id at 420 U.S. 174. The record sub judice on the other hand shows the appellant's behavior and demeanor at trial and prior medical reports revealed he was competent, and his so-called ir-

rational behavior of declining the opportunity to call witnesses at the penalty phase was explained by Dr. McClane as depression over the verdict which pushed him into non-cooperation. The inferences drawn by the trial court from this evidence that Mr. Pridgen was in fact competent to proceed was therefore clearly not error under the very dictates of Drope. The Drope court found that the trial court failed to give proper weight to the information suggesting incompetence, but the mere testimony of Drope's wife that he would roll down stairs when things didn't go his way was certainly an unavoidable suggestion of mental problems if not necessarily incompetence. The record sub judice and that which was before the trial court suggested nothing of such a nature, in fact it suggested contra.

In Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 836 (1966), the evidence of defendant's prior psychiatric hospitalizations, injuries to the head, (including a brick falling on his head and shooting himself in the head) and killing his 18-month old son, and psychotic episodes where he even foamed at the mouth, Id at 383 U.S. 379, were apparently ignored by the trial court who rejected contentions of the defendant's incompetence, holding instead that this evidence failed to raise a sufficient doubt as the defendant's competency to stand trial. Again, in the record sub judice there was nothing of this nature. Additionally, in Pate, a request for a continuance of several hours in order to obtain a psychiatric evaluation was denied. Herein, the trial court held a recess for Dr. McClane to re-examine the

appellant and thereafter heard Dr. McClane's testimony which amongst other things conflicted with his own pre-trial finding of competency, and secondly attributed the appellant's behavior to depression over the verdict and still could not even state with a medical certainty that Mr. Pridgen was in fact incompetent.

In light of this, appellee would assert the trial court was under no obligation to abide by Dr. McClane's opinion when (1) he had the opportunity to observe the appellant himself throughout the entire proceedings, (2) a prior finding of competency had been made but four weeks previously, the expert's opinion was anything but unequivocal and in fact concluded that this was not inability to assist counsel per se but rather "non-cooperation" due to depression over the verdict. An expert's testimony is merely to supply an opinion to aid the trier of fact. No case law holds that a trial court is bound by the testimony of such an expert. "The reports of psychiatric experts are merely advisory to the court, which itself retains the responsibility of the decision." Muhammed v. State, 494 So.2d 969, 973 (Fla. 1986) and citing Brown v. State, 245 So.2d 68 (Fla. 1971), vacated in part on other grounds 408 U.S. 938, 92 S.Ct. 2870, 33 L.Ed.2d 759 (1972). Since the test for a hearing pursuant to Drope and Rule 3.210(b), Fla. R. Crim. P. is whether there are reasonable grounds to believe the defendant is incompetent not whether he is incompetent Scott v. State, 420 So.2d 595 (Fla. 1982), appellee would again assert with this evidence before the trial court the necessity of such a hearing was clearly not triggered.

In Trawick v. State, 473 So.2d 1235 (Fla. 1985), this Court stated "Appellant's despondency and his ambivalence about his plea did not constitute reasonable grounds to believe he might be incompetent" Id at 1238. Regarding Mr. Pridgen's previous attempts at suicide (although the report of Ms. Roman at the Florida State Hospital indicated these were mere attention getting devices) the Trawick court said "In Drope the Supreme Court said that a suicide attempt is a substantial indication of possible mental instability, but refrained from holding that such an attempt legally creates a reasonable doubt about the defendant's competence to stand trial. A number of courts addressing this question have held that it does not." (citations omitted) Id at 1238. In Card v. State, 497 So.2d 1169 (Fla. 1986), this Court addressed Card's contention that the trial court erred in failing to conduct a pre-trial competency hearing and contrasted Card with Hill v. State, 473 So.2d 1253 (Fla. 1985) in which this Court held a trial court must conduct a pre-trial hearing on the issue of whether a defendant is competent to stand trial when reasonable grounds exist to support a finding of incompetence. The court in Card stated "The contrast between the instant case (Card) and Hill is readily apparent. In Hill we held that a pre-trial competency hearing was mandated because among other things, Hill had a history of grand mal epileptic seizures, mental retardation with communication problems, acquiescence in acceptance of guilt regardless of actual fact, and an IQ as low as 66, reflecting borderline intelligence. The pattern of bizzare conduct and

behavioral problems presented to the court in the instant case does not compare to the factual predicate presented in Hill." Id at 1175. Appellee would assert that like Card, but unlike the facts in Hill the factual predicate presented to the trial court in light of the totality of all of the factors considered and known to the trial court failed to present the factual predicate giving rise to reasonable bona fide doubts as to Mr. Pridgen's competence.

It is therefore important to look at the factual predicate giving rise to a bona fide reasonable doubt of incompetency that would require the necessity to suspend proceedings pursuant to the dictates of Drope and Fla. R. Crim. P. 3.210(b) and order a hearing on competence. In Lane v. State, 388 So.2d 1022 (Fla. 1980), the only finding of competency was made nine months prior to trial; several days before trial the same doctor who had previously found Lane competent could not give an opinion; and two more experts testified that Lane was not competent. Lane's IQ was 56 which put him in the retarded level. Id at 1024. Nevertheless, the court somehow determined that Lane was malingering and proceeded to trial. Despite all that Lane addresses in its opinion, the facts upon which Lane were decided which are crucial to a determination of the necessity of a 3.210(b) hearing, and of course the weight afforded to the facts before the trial court, are clearly not analogous to those sub judice. The Lane court reiterated the necessity and obligation to hold a hearing to determine competency whenever it reasonably appears necessary. In

Mason v. State, 489 So.2d 734 (Fla. 1986), the evidence of the defendant's mental illness was enormous, in fact his institutional records dated from the time he was twelve and a half years old and the reports from numerous institutions clearly indicated his mental problems. Id at 736. In Walker v. State, 384 So.2d 730 (Fla. 4th DCA 1980), the court found that assertions by counsel that the defendant may be incompetent should be considered by the trial court, but standing alone are insufficient to require a hearing on the defendant's competence. The Walker court said "We note that the motion asserted only that counsel had difficulty communicating with his client. No showing was made of prior hospitalization for or diagnosis of mental difficulties or of prior adjudication of incompetency. No evidence of any kind was proffered to support the motion. The trial judge denied it stating that he had observed the petitioner closely throughout previous court appearances and actual trials and knew him to be a keen witted person competent to stand trial" Id at 732. In Holmes v. State, 494 So.2d 230 (Fla. 3d DCA 1986), the court found no abuse of the trial court in determining the defendant was competent after the conflicting pre-trial opinions of five different experts was heard. Three experts found the defendant incompetent, one reached a weak conclusion of competence, and another found him competent. During trial, defendant's counsel requested re-evaluation but his motion was denied. Citing Fowler v. State, 255 So.2d 513 (Fla. 1971) and Ferguson v. State, 417 So.2d 631 (Fla. 1982), the Third District Court of Appeal found that where

doctor reports are conflicting there is no abuse in finding the defendant competent. Id at 494 So.2d 232. Appellee would urge that at the time the penalty phase sub judice commenced, Dr. McClane had conflicted with himself, and additionally the trial court had the opportunity at the pre-trial hearing and trial to observe the defendant. These factors in and of themselves created a conflict which the trial court could resolve based on all of the evidence before him. Appellee would assert that there was no bona fide reason to doubt Mr. Pridgen's competence. It is also clear that the trial court afforded the proper weight to each of the factors it considered in determining to proceed to the penalty phase.

Sub judice the trial court had considered Dr. McClane's report of April 17th finding Mr. Pridgen competent, heard Mr. Pridgen testify and be cross-examined watching his demeanor throughout, observed Mr. Pridgen during the reading of the verdict of guilty, and then the next day hears Dr. McClane testify that Mr. Pridgen is incompetent to proceed to the penalty phase because he is depressed over the verdict and will not cooperate with his counsel. Appellee would assert that upon this the trial court correctly denied counsel's motion for a continuance for further psychiatric examination of Mr. Pridgen.

In Pericola v. State, 499 So.2d 864 (Fla. 1st DCA 1987), the court found that the trial court did not err in finding the defendant competent where the defendant had been found competent prior to trial and he did not raise bona fide and reasonable

doubts as to his capacity during the sentencing proceedings even where expert testimony revealed the defendant's mental condition had deteriorated; but also showed the defendant knew he had been convicted in a court of law and a penalty would result and the defendant understood the nature and effect of this penalty and why it was being imposed. Id at 867. Sub judice just prior to the commencement of the penalty phase Dr. McClane testified that Mr. Pridgen was clearly competent in nine of the eleven criteria employed to determine competency, but he had doubt regarding the criteria of ability to assist counsel and motivation to help himself in the legal process (R.988-989). Although Pericola v. State, supra, addressed competency at the sentencing phase, where a defendant has already been found guilty and there was no further defense in the criminal arena to be conducted; since a jury's recommendation in the penalty phase is merely advisory the same could be said of that stage as well, it is not then a deprivation of due process on these facts, upon this record, for the trial court to have proceeded to the penalty phase.

In Gilliam v. State, No. 66,850 (November 13, 1987) [12 F.L.W. 563], three doctors examined the defendant prior to trial and found him competent. On the eve of trial however, the defendant insisted upon discharging his appointed counsel, and on this alone counsel requested another psychiatric evaluation. Although the defendant refused to cooperate with the examination, this Court found that "The court in this case had observed Gilliam's behavior and any behavioral changes which may have occurred sub-

sequent to the initial competency evaluation. The defense offered no evidence to support its second allegation of incompetence" Id at 564 (except the defendant's insistence on discharging his attorney). The Gilliam court found no error in the finding of competency and denying further evaluations. Similarly, sub judice although in support of a continuance for further evaluation appellant below presented the testimony of Dr. McClane who could not state Mr. Pridgen was incompetent to a medical certainty pursuant to the totality of all of the evidence before the trial court including its observation of Mr. Pridgen's demeanor there was nothing to support further evaluations.

In his brief, appellant places great reliance upon State v. Bauer, 245 N.W.2d 848 (Minn. 1976). However, the very facts of the crime charged in Bauer were artfully deleted in appellant's lengthy discussion. "On January 27th, 1972, a letter synopsizing the defendant's history of mental illness and stating he was dangerous and in urgent need of treatment was sent to the United States Secret Service by Dr. Daniel Ferguson, M.D., of the Mental Health Clinic of the Veterans Administration Hospital where defendant had been undergoing psychiatric treatment. As a result, a petition for judicial committment was granted and an order directing the Hennepin County Sheriff to apprehend and confine the defendant for psychiatric examination was issued by the Hennepin County Probate Court" Id at 850. When the officers went to pick Bauer up pursuant to this order, Bauer fired shots at them, killing one of the officers. It is clear therefore that

the evidence of the defendant's mental illness in Bauer was not only compelling, but in fact part of the scenario that gave rise to the crime he was charged with itself.

Not to dwell on Minnesota law where our own state has been quite articulate as the issues raised, it must be pointed out that two years after Bauer, supra, in State v. Swain, 269 N.W.2d 707 (Minn. 1978), the Minnesota court gave insight as to the basis of its ruling in Bauer, "In Bauer the defendant's conviction for second degree murder was reversed on the grounds that the trial court failed to make a mid-trial re-determination of defendant's competency to stand trial and competency to waive counsel. In Bauer, the trial court's ruling on the defendant's competency was based on a prior pre-trial adjudication by another judge". It should also be noted in Bauer that in support of his motion to continue the trial a Dr. Swartz testified. Unequivocally. That Bauer was totally incompetent by statutory definition and paranoidly psychotic. Id at 853. It is also imperative to contrast the standard of competency in Minnesota at the time of Bauer's trial with the criteria in this State. "No person shall be tried, sentenced or punished for any crime while mentally ill or mentally deficient so as to be incapable of understanding the proceeding or making a defense . . ." Id at 850, n.1.

Therefore, based upon the evidence before the trial court herein at the commencement of the penalty phase, the prior finding of competency by Dr. McClane, the trial court's observation

of Mr. Pridgen throughout the pre-trial hearings and the trial itself, and Dr. McClane's clearly equivocal testimony regarding Mr. Pridgen's competence prior to the commencement of the penalty phase, did not raise any bona fide doubts as to his competence, and the trial court correctly weighed each relevant piece of evidence before it in making the determination to proceed to the penalty phase.

ISSUE III

BASED ON THE TOTALITY OF THE EVIDENCE, INCLUDING THAT WHICH CAME TO LIGHT DURING THE SUBSEQUENT HEARINGS ON COMPETENCY TO BE SENTENCED, APPELLANT WAS ACTUALLY INCOMPETENT DURING THE GUILT PHASE OF HIS TRIAL AS WELL: THEREFORE, THAT PROCEEDING VIOLATED DUE PROCESS.

Appellant asserts that a nunc pro tunc competency hearing is insufficient (see, n.78, p. 127 Brief of Appellant) and then rests his argument for Issue III on a nunc pro tunc determination of the appellant's competency prior to trial. The evidence of incompetency (if any) that the appellant now relies on to have this court make a determination regarding his incompetence prior to the guilt phase came long after the guilt phase, i.e., a nunc pro tunc determination. After the guilt phase, prior to commencement of the penalty phase, Dr. McClane contradicted his earlier finding of competency; but was completely equivocal in his finding of incompetency, i.e., he could not testify that the appellant was incompetent to a medical certainty, and stated that the appellant's non-cooperation with his lawyers was due to the verdict. Depression over a verdict is not reason for a court to make a nunc pro tunc determination that a defendant was incompetent prior to trial and verdict, and none of the authorites cited by the appellant supports his argument herein. Even assuming that Dr. McClane's vascillating opinion on Mr. Pridgen's competence can be interpreted as a more likely than not probability of incompetence during the guilt phase, that is insufficient to establish that the appellant is entitled to a new trial. Williams

v. State, 396 So.2d 267 (Fla. 3d DCA 1981). The United States Supreme Court in Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), noted the difficulty in evaluating the defendant's competence nunc pro tunc. Sub judice, that effort need not be made since the appellant was found competent by Dr. McClane approximately four weeks prior to trial and the court's observation of the appellant's demeanor throughout the proceedings and his testimony at trial confirmed competency. In Grissom v. Wainwright, 494 F.2d 30 (1974), the issue was whether the evidence before the trial court was sufficient to entitle the defendant to a hearing on the issue of competency to stand trial. In citing Pate v. Robinson, supra, as well as Jordan v. Wainwright, infra, the Grissom court held that "Evidence must be presented which is sufficient to raise a bona fide doubt as to the defendant's competency. Defining this more clearly the court said "This is whether evidence was before the trial judge which would be sufficient to clearly and unequivocally create reasonable doubt as to Grissom's competency to be tried. This is an objective standard. Ordering committment to a state institution on two occasions and holding an uncompleted sanity hearing did not constitute evidence. Significantly, neither prior to commencement of the trial, nor at any other stage of the proceedings against him, including the trial itself did Grissom or his counsel suggest to the trial court that Grissom was incompetent to stand trial." Id at 32. Similarly, sub judice, after Mr. Pridgen's competence was established by Dr. McClane pre-trial, no

mention of his competence arose during the pre-trial hearings or the guilt phase of the trial until after the verdict he no longer wished to cooperate with his attorneys due to depression over the verdict. In Reese v. Wainwright, 600 F.2d 1085 (5th Cir. 1979), cert. denied, 444 U.S. 983, 100 S.Ct. 487, 62 L.Ed.2d 410 (1979), the court noted at the outset of its opinion that the defendant had been plagued for years with recurring symptoms of serious mental illness. The issues raised argued his due process right to a competency hearing was violated and alleged he was actually incompetent during the trial. The Court of Appeals noted that at the competency hearing a month prior to trial there had been an outburst by the defendant (similar to Mr. Pridgen's at his motion to discharge the public defender). The Court of Appeals found the presumption of regularity in the trial court's determination to be amply supported because of the opinion of the doctor before trial, because counsel never claimed incompetency during trial, and because nothing that occurred during trial was sufficient to raise any bona fide doubt in the mind of the court that Reese was incompetent. Id at 1092. After a verdict had been returned, Reese stated "Okay. Good. I knowed that before I came on here. You knowed it. Anyway, I don't plan to do any six months. I plan to die after six months." The court noted the lack of intelligence in this statement but that was certainly evidence the defendant knew what was going on. Id at 1092. (Compare this with Mr. Pridgen's remark that he didn't want any witnesses to "beg for his damn life" during the penalty phase.)

The Eleventh Circuit held that Reese must bring forward facts that positively unequivocally and clearly generate a real substantial and legitimate doubt as to his mental capacity to assist in his trial defense. (citation omitted Id at 1093). The court went on to state, "The facts in Reese's case do not meet that standard. All of the expert opinions gathered before, during and after Reese's trial indicated that Reese floated in and out of touch with reality, that his symptoms tended to respond favorably to medication and other treatment, and that it was always difficult to judge Reese's past condition during the specific period on the basis of the symptoms he was manifesting at the time of an examination. Dr. Jacobson's suggestion that the actively psychotic man he beheld in mid-October may also have been actively psychotic in late-September was by his own admission a determination that was difficult and uncertain. Dr. Jacobson's tenative retrospective diagnosis must be weighed against the consensus of expert opinion prior to Reese's trial, the absence of any events during the trial that created any suspicion of incompetence, Reese's own statements at the close of trial that indicated his awareness and understanding of its significance, and ultimately a trust that the attorneys on both sides and the trial court itself would have exercised their duties in good faith had bona fide doubts as to Reese's competence surfaced from his behavior. Reese's deteriorated condition in the weeks following the trial could well have been the result of trauma attendant to the conviction itself, and in light of all the indicia of competence be-

fore and during trial that explanation is much the more plausible. Id at 1093-94.

Appellee would assert that Reese is on point with the facts sub judice, and that all of the information the trial court had before it before trial, i.e. Dr. McClane's finding of competence, the trial court's observation of the appellant's appropriate intelligence and articulate responses to questioning on direct and cross-examination during the pre-trial hearing on his motion to suppress, his demeanor throughout the trial, and his ability to testify as to his innocence appropriately during direct and cross-examination at trial without any incident, hint, suggestion, or advice from counsel during the progress of trial that Mr. Pridgen was incompetent do not now lay a foundation for a finding that he was incompetent prior to commencement of his trial, either the guilt or penalty phase.

It should be noted at the first competency hearing on July 5th, 1985, Dr. McClane testified that Mr. Pridgen was probably incompetent at the time of trial (R.1054) and yet when asked by the prosecutor whether he understood why he was testifying, Dr. McClane stated, "The only way that I am familiar with to apply, the closest thing to applying competence to that I know of is competence to stand trial and that is why I've continuously thought he was able to stand trial." (R.1058-59). Dr. McClane again testified on July 5th that part of the defendant's sense of depression was caused by the verdict rather by any mental problems he has (R.1067). The prosecutor noted that every time Dr.

McClane interviewed Mr. Pridgen his opinion changed. The prosecutor asked, "Sir, it went to probably competent to possibly incompetent but not being able to say to a reasonable degree of medical certainty, to now probably incompetent. Is that true?" and Dr. McClane responded, "That's correct." (R.1072).

ISSUE IV

THE TRIAL COURT FAILED TO TAKE ADEQUATE MEASURES BEFORE ALLOWING APPELLANT TO CONDUCT HIS OWN DEFENSE IN THE PENALTY PHASE, TO ENSURE THAT HIS CHOICE WAS INTELLIGENTLY AND UNDERSTANDINGLY MADE.

Appellant asserts the trial court erred in allowing him to proceed without counsel during the penalty phase. The record, however, fails to support this. When a difference of opinion between the appellant and his lawyers arose, this depression over the verdict and non-cooperation with his attorneys as Dr. McClane called it (R.996) was raised by the appellant herein into an assertion of both incompetence to stand trial and a Farretta violation. It is neither. The record shows that appellant's counsel advised the court that the appellant did not want any witnesses to be called during the penalty phase ("to beg for my damn life" as the appellant himself characterized it) and instead the appellant had advised his attorneys he would address the court himself contrary to their advice (R.947). Pursuant to this, counsel advised the court effective assistance could no longer be given and moved to withdraw. This motion to withdraw was denied (R.1004).

Mr. Pridgen's psychiatric examinations showed a negative bias and a mistrust of the legal system (R.992). In his letter to the trial court before trial requesting the original public defender discharged and requesting that he represent himself was also denied pre-trial. (This public defender later withdrew due to a conflict because of a witness that would testify at the defendant's trial.) However, the eloquence of this letter shed

some light on the appellant's understanding of the proceedings and discounts later theories of incompetence due to non-cooperation with his attorneys. At trial, counsel advised the court that the appellant wished to make a statement to the jury against counsel's advice, and announced, "We are prepared to the extent we can be in view of the fact our client does not choose for us to put on any testimony" (R.950).

After the state introduced the appellant's priors as an aggravating factor, counsel for the appellant advised the court that the appellant would testify as a witness on his own behalf (R.955); he was called as a witness, sworn, and did so testify (R.956-963). After the appellant's testimony which asserted his innocence, counsel again advised that against advice of counsel no further evidence would be presented (R.963). It was at this time that appellant's motion for continuance was made and in support thereof Dr. McClane testified for the appellant; then court recessed and Dr. McClane examined the appellant, and then testified again (R.968-978, 979, 982, 983). After Dr. McClane's second round of testimony, the court advised counsel he could put on his witnesses if he wished to; counsel advised the court that the appellant would not allow it (R.1003). After summation by the state (R.105, 1013), counsel advised the court that no argument would be made (R.1013-14).

Counsel had indicated that had the appellant allowed it they would have presented the testimony of Dr. McClane, the appellant's mother, the appellant's step-father and brother all of

whom would have testified as to the appellant's emotional state during the last year (eight months of which the appellant was incarcerated for the instant crime) (R.947).

Despite any assertions to the contrary, counsel continued to represent the appellant. Counsel advised the court he wanted all mitigating circumstances given in a jury instruction (R.947), and after the advisory sentence was returned by the jury (R.1020) counsel participated in discussion of the appellant's guidelines sentence on other charges (R.1025). During these proceedings where it is now asserted that appellant appeared without counsel, counsel in fact, called Dr. McClane as a witness in support of his motion for a continuance on the appellant's behalf (R.968) and this testimony was heard despite the appellant's own personal objection (R.968), and the appellant clearly did not represent himself.

> MR. FREDERICKS: Your Honor, my client would like to make a statement. We'll call him as a witness. (emphasis added)
>
> THE COURT: Yes. Come up, please.
>
> (The appellant was sworn at this time)

(R.955-956).

It is apparent therefore that there was a strategy disagreement between the appellant and his attorneys as to the progress of the penalty phase. The appellant had, however, just been convicted of a crime for which he steadfastly maintained his innocence throughout the trial; a trial in which another man confessed to the very crime the appellant was charged with. Reinforc-

ing the appellant's previously known mistrust and negative bias against the legal system, it is apparent the appellant chose not to proceed in accord with the advice of his attorneys. As noted in Farretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), even with counsel . . ."the right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails" Id at 422 U.S. 820. The Farretta court held that "The counsel provision supplements this design. It speaks of 'assistance' of counsel and, an assistant, however expert, is still an assistant." Id at 422 U.S. 820.

Nowhere in the record below did the appellant attempt to fire his attorneys or indicate in any way that he no longer desired representation. Even in the face of counsel's statements to the court regarding the appellant's choice to call no witnesses, to make to penalty phase summation, or to be called as a witness for himself, did the appellant ever say one word regarding self-representation. In fact, counsel's motion to withdraw based on his dispute with the appellant as to how to proceed during the penalty phase was not only denied but the appellant, usually quite vocal, said nothing (R.1004). It can be inferred if the appellant wanted his attorneys discharged he would have requested it. This inference can be drawn clearly upon the appellant's pre-trial letter to the court wherein he requested his public defender be discharged and that he be allowed to proceed pro se. (This motion was of course denied and private counsel were later appointed to represent the appellant after the public defender alleged a witness conflict.)

Mr. Pridgen did not waive his right to counsel, in fact he remained represented. He did not relinquish the right to advice, he merely disagreed with the advice given. Farretta, on the other hand was forced by the state courts to accept representation in contradiction of his own voiced wishes to represent himself.

Each of the cases appellant cites in support of his argument contain a request or a motion by the defendant himself to proceed without counsel pro se, or to have different counsel appointed.

There is a presumption that fundamental rights are not waived. Fitzgerald v. Wainwright, 440 F.2d 1049, 1051 (5th Cir. 1971) citing Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 146 (1938). A request to forego counsel must be clear and unequivocal. Brown v. Wainwright, 665 F.2d 607 (5th Cir. 1982). In Capetta v. State, 204 So.2d 913 (Fla. 4th DCA 1968), cited by the appellant herein, the Fourth District Court of Appeal addressed the contention that the trial court erred in denying the accused his right to conduct his own defense, and in fact the district court found error and reversed. It should be noted again, however, that the Fourth District Court of Appeal in Capetta required an unequivocal request to act as one's own lawyer in order to find a waiver. Certainly an attempt at a waiver of counsel need be made before any Farretta inquiry is triggered. The district court in Capetta did refer to "unusual circumstances" such as mental derangement that waiver of counsel would deny the appellant a fair trial. Sub judice, however,

there was no such waiver and although the expert testimony revealed Mr. Pridgen suffered from mental illness, there was absolutely no testimony to the extent that he was deranged; and his own testimony the day before at trial and again as a witness for himself in the penalty phase shows just the opposite. It certainly cannot fairly be said that the appellant's decision herein not to have his relatives testify as to his emotional state during the past year and instead address the jury himself jeopardized his right to a fair trial. The district court in Capetta held that whether "unusual circumstances" are in fact present rests in the discretion of the trial court and should not be disturbed unless abuse is shown. Id at 918. In Muhammad v. State, 494 So.2d 969 (Fla. 1986), this Court held, "The proffer indicates Muhammad suffered mental problems, but one need not be mentally healthy to be competent to stand trial, Id at 973, and ". . . competency to waive counsel is at the very least the same is competency to stand trial" Id at 975. Although by this reference to Muhammad, appellee does not concede that counsel was in fact waived sub judice, it is clear that under the very dictates of Muhammad appellant could have done so.

Although appellant relies on the Fourth District Court of Appeal's decision in Capetta v. State, supra, it should be noted that in State v. Capetta, 216 So.2d 749 (Fla. 1968), this Court reversed the Fourth District Court of Appeal holding instead that upon the record the trial court did not deny Mr. Capetta's request to proceed pro se and in addition, counsel remained with

Mr. Capetta throughout the trial conducting portions of it on Capetta's behalf. In its opinion this Court said, ". . . It is well-settled that a person cannot complain of alleged errors resulting from his own intentional relinquishing, or waiver, of his rights, if done intelligently and with competence" citing Mason v. State, 176 So.2d 76 (Fla. 1965). Id at 216 So.2d 750.

It is clear from the record sub judice that the appellant never waived his right to counsel, but merely disagreed with the strategy as to how to proceed. Never having made a motion to discharge his attorneys even after they moved to withdraw, there was no relinquishment of his right to counsel, and therefore no Farretta inquiry was required. However, the trial court sub judice, clearly warned the appellant as to proceeding against the advice of his attorneys (R.941, 942, 943). Mr. Pridgen indicated to the court that he clearly understood that his attorneys believed a different approach would be in Mr. Pridgen's best interest (R.943).

The manipulative aspect of the appellant's personality noted throughout many of the psychiatric evaluations submitted, does not render him incompetent for any of the purposes asserted herein nor does it rob him of the ability to disagree with his counsel.

Appellant has completely failed to show that there was a relinquishment of his right to counsel or even a request to do so and therefore a strict Faretta inquiry was not required; however, the court clearly did inquire as to whether Mr. Pridgen under-

stood that his attorneys felt the manner in which he himself wished to proceed was not in his best interest but that he wished to do so regardless. Having determined that the appellant was aware of the disagreement between himself and counsel and wished to proceed in his own manner despite this the court made a sufficient and adequate inquiry to establish Mr. Pridgen's knowledge of the possible ramifications of his strategy disagreement with counsel. See Smith v. State, 407 So.2d 894, 900 (Fla. 1981).

ISSUE V

ASSUMING ARGUENDO THAT APPELLANT IS DEEMED NOT TO HAVE WAIVED HIS RIGHT TO COUNSEL, THEN DEFENSE COUNSEL'S FAILURE TO CALL AVAILABLE WITNESSES IN MITIGATION OR MAKE ANY ARGUMENT AGAINST A DEATH SENTENCE AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL AS A MATTER OF LAW.

It is not possible to state that the record submitted is an adequate basis for a determination of this issue. In fact, without benefit of an evidentiary hearing pursuant to Fla. R. Crim. P. 3.850, the appropriate vehicle for such a claim, wherein the witnesses testify under oath as to any strategy or tactical decisions of a precise substance of the communications between the appellant and his counsel, no such determination of this issue is possible. To determine this issue without an evidentiary hearing merely on the record submitted would open the flood gates to attacks on the conduct of penalty proceedings as a tactical device to sabotage the trial itself after a verdict of guilt has been returned. Appellee is in no way asserting that any attempt to do so occurred in the case sub judice whatsoever. However, the record is clearly inadequate and would severely prejudice the appellee by being forced to address this issue without the benefit of the appropriate collateral proceedings.

However, should this Court determine the record is sufficient to address this issue, appellee would urge based on the record that the claim is without merit. In Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986), the Eleventh Circuit stated,

"The supreme court has held that a criminal defendant has a constitutional right to waive counsel." (citing Farretta v. U.S., supra.) "Giving that a criminal defendant may waive his constitutional right to counsel altogether, at some point a criminal defendant can be deemed to have waived to a certain extent his constitutional right to effective assistance by virtue of his unreasonable refusal to communicate with his lawyer" Id at 743. In Thomas, the defendant refused to communicate with his attorney from arraignment through the trial and penalty phase, and thereafter claimed ineffective assistance of counsel. He stated at an evidentiary hearing that his mistrust of the public defender's office (contrast Mr. Pridgen's mistrust of the legal system) led him to total non-cooperation. Id at 743.

In holding that the district court properly denied Thomas' relief, the Eleventh Circuit repeated the district court's finding that "[a] defendant cannot be allowed to refuse to cooperate with his attorney and the trial court in an attempt to create an issue of ineffective assistance of counsel on the basis of his own refusal" Id at 741. To rebut any assertion that refusal to cooperate was caused sub judice by any mental illness, Dr. McClane himself testified that it was Mr. Pridgen's depression over the verdict which reinforced his mistrust of the legal system and pushed him into total non-cooperation with his attorneys (R.992, 996).

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN ALLOWING APPELLANT TO PREVENT THE INTRODUCTION OF MITIGATING EVIDENCE IN THE PENALTY PHASE, SINCE AS A RESULT OF APPELLANT'S CONDUCT OF HIS "DEFENSE" THERE WAS NEVER ANY ADVERSARY PROCEEDING TO DETERMINE WHETHER DEATH OR LIFE IMPRISONMENT WAS THE APPROPRIATE SENTENCE.

In a capital trial, a defendant can waive his right to an advisory sentencing jury recommendation. See Florida Statute §921.141 which states in part, ". . . The sentencing proceeding shall be conducted before a jury empanelled for that purpose, unless waived by the defendant". See also Huff v. State, 495 So.2d 145 (Fla. 1986); Palmes v. State, 397 So.2d 648 (Fla. 1981), cert. denied, 454 U.S. 882 (1981); State v. Carr, 336 So.2d 358 (Fla. 1976). Analogous to this would be the right to waive the presentation of mitigating evidence as long as the defendant is afforded the opportunity to present such evidence if he so wishes. Sub judice, Mr. Pridgen clearly had the opportunity and was reminded again and again by the trial court of this opportunity. However, the trial court was clearly aware of all the psychiatric reports and testimony, the testimony of Mr. Pridgen's sister, Susan Jean Willingham (R.1516) and counsel for the appellant (notwithstanding his present assertion in Issues IV and V herein) argued in mitigation of sentence to the trial court two mitigating circumstances to the death penalty; one that the crime was committed while the defendant was under extreme emotional disturbance, and second that the defendant did not have the mental capacity to appreciate the consequences of his conduct

(R.1519). Since a defendant can waive his right to an advisory jury recommendation altogether, and in fact sub judice the trial court did hear evidence in mitigation and therefore the very evidence he claims he should have been forced to present to the jury was in fact heard and considered by the trial court. Had Mr. Pridgen exercised his right to waive an advisory jury recommendation, the trial court still would have considered as it did herein the evidence submitted to it relative to these two specific mitigating circumstances pursuant to the testimony of the appellant's sister, which the trial court heard, and the testimony of all of the experts, which the trial court heard, and their reports, which the trial court considered. In Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), the Supreme Court said, "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. 304 U.S. at 464. Mr. Pridgen made a knowing and intelligent waiver of his opportunity to present the testimony of witnesses to the advisory jury and instead address the jury himself. However, once a valid waiver is made, as the record herein clearly supports, any lack of wisdom in that waiver afforded through hindsight is of no moment. Similarly, (although appellee does not wish to analogize the opportunity to present mitigating evidence to an advisory jury to a constitutional right), an individual has a right under the constitution to remain silent. However, should he waive this right and speak to the police and give a confession, he thereafter with hindsight may regret the prejudice this confession may

cause him at trial when it is introduced. However, once a valid waiver is made, it is made. Therefore, Mr. Pridgen has no right to complain or allege any error to a decision and waiver he intelligently made. Appellee would also remind this Court that the trial court did in fact hear and consider the evidence relative to the two mitigating circumstances urged.

Counsel for the appellant no where suggested that he wished to present any non-statutory mitigating evidence but only that he wished to present the mitigating circumstance that the appellant was under the influence of extreme mental or emotional disturbance at the time of the murder and that the capacity of the appellant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired. And, the trial court clearly considered all these factors in its findings of fact upon which the sentence of death is imposed (R.1524-26) prior to sentencing the appellant.

Therefore, having made this valid waiver of the opportunity to present mitigating evidence to the advisory jury, he cannot now be heard to complain; and ultimately the trial court heard and considered the evidence relevant to the two statutory mitigating factors that counsel for the appellant presented prior to imposition of sentence.

Appellant thereafter adopts in its entirety the argument he made in Hamblen v. State, Case No. 68,843, presently pending before this Court. Although appellant failed to attach a copy of that argument to his initial brief filed herein, the undersigned

has obtained copies of that brief and similarly adopts the state's argument in its entirety in Hamblen, relative to this issue.

ISSUE VII

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION TO SET ASIDE THE JURY'S PENALTY RECOMMENDATION.

Appellant cites Trawick v. State, 473 So.2d 1235 (Fla. 1985) for the proposition that the trial court herein below erred in not empanelling a new jury to hear of the appellant's mental illness and emotional state around the time of the offense. Trawick held, "Because the jury heard evidence and argument that did not properly relate to any statutory aggravating sentence, (emphasis added) the jury recommendation is tainted." Id at 1240-41. In Trawick, this court found that the trial court's finding of aggravating factors was replete with statements not specifically linked to any statutory aggravating factor. Id at 1240. The trial court in Trawick found the fact that the defendant had shot someone in the face, wounding them earlier on the night of the murder, and then shooting out of a car prior to commission of the murder an aggravating factor. This Court held that this was of course admissible as res gestae of the offense, but should not have been relied on to establish an aggravating factor because it was not directly related to the capital felony. Id at 1240. This of course is not sound authority for appellant's assertion herein. Here, appellant is asserting the jury did not hear of his mental illness. Trawick, on the other hand, concerns facts considered by the trial court not relative to the actual crime charged. In Dougan v. State, 470 So.2d 697 (Fla. 1985), also cited by appellant for authority on this assertion, the trial

court was found to have speculated on consideration of one aggravating factor, allowed the state to present and consider as an aggravating factor an indictment for another murder for which the appellant merely stood accused, not convicted, and finally considered two prior contempt convictions as an aggravating factor. Again, this case points to errors made in the evidence introduced and considered as to aggravating factors and fails entirely to support appellant's contention herein.

Appellant also cites Teffeteller v. State, 439 So.2d 840 (Fla. 1983). Again, Teffeteller is not on point. In fact, Teffeteller holds that it is within the province of the trial court to decide whether a mitigating circumstance is proven and the weight to be given it in sentencing the defendant. Sub judice, prior to sentencing, in denying the appellant's motion to set aside the jury verdict, the court allowed Mr. Pridgen's attorney to present evidence that the appellant was suffering from a strong mental and emotional disturbance at the time of the offense (R.1515). Appellee would urge that it has shown Mr. Pridgen made a valid waiver of his opportunity to present any testimony to the advisory jury (other than his own) and once having made a valid waiver, the trial court did not err in denying appellant's motion to set aside the jury's penalty recommendation and empanel a new jury to hear of Mr. Pridgen's mental illness. Appellee has shown that it was appellant's free, intelligent and completely voluntary choice to address the jury himself rather than present witnesses and argument of counsel, and that he can-

not fail to do that of which he is capable, and then claim error in his own failure. There was then no error for the trial court's denial of his motion and the trial court itself considered all of the mitigating evidence before it (R.1524-26).

In Richardson v. State, 437 So.2d 1091 (Fla. 1983), also cited herein by appellant, the trial court overrode the jury recommendation of life and sentenced the defendant to death. A different jury was empanelled for the penalty phase and therefore did not hear evidence of the defendant's guilt. Although this Court did not condone a proceeding that detracted from consideration of the aggravating and mitigating factors, it held that it is a defendant's right to have a jury advisory opinion absent a voluntary and intelligent waiver of that right. Id at 1095. Sub judice, the appellant did not want a parade of witnesses to testify at the penalty phase to "beg for my damn life" and instead chose to address the jury himself. Although perhaps unwise the appellant chose this route and should not now be heard to complain or allege error in the trial court's failure to give him a second advisory sentence recommendation.

ISSUE VIII

THE PROSECUTOR'S COMMENT IN HIS PENALTY PHASE CLOSING ARGUMENT WHICH TENDED TO DIMINISH THE JURY'S SENSE OF RESPONSIBILITY FOR ITS PENALTY RECOMMENDATION BY INFORMING THEM THAT APPEALS WOULD BE TAKEN WHETHER APPELLANT LIKED IT OR NOT, VIOLATED THE EIGHTH AMENDMENT STANDARDS OF RELIABILITY IN CAPITAL SENTENCING AND WAS FUNDAMENTAL ERROR.

Appellant has taken a prosecutor's comment out of context and thereafter urges the words complained of diminished the jury's sense of responsibility.

> "MR. PICKARD (the prosecutor): LADIES AND GENTLEMEN, REGARDLESS OF MR. PRIDGEN'S EXPRESS DESIRE TO RECEIVE THE DEATH PENALTY, THERE ARE STILL CERTAIN LEGAL REQUIREMENTS THAT HAVE TO BE MET. AND ALSO REGARDLESS OF HIS DESIRE THAT THERE BE NO APPEALS, APPEALS WILL BE TAKEN WHETHER HE DESIRES THAT TO BE DONE OR NOT. THE QUESTION BEFORE YOU NOW IS WHAT YOU FEEL IS THE APPROPRIATE RECOMMENDATION IN THE CASE."

Appellee would assert that the prosecutor's comment was not only invited by the appellant, but did not lead the jury to believe the appropriateness of their advisory sentence would be determined elsewhere. In Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633 (1985), the prosecutor urged the jury, "Not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court." Id at 472 U.S. 323. In Caldwell, the court found, "The delegation of sentencing responsibility that the prosecutor here encouraged" (emphasis added). Sub judice, the prosecutor advised the jury that the law would be followed whether Mr. Pridgen wanted an appeal or not; and only in response to Mr.

Pridgen's own remarks specifically to the contrary,

> "You found me guilty; so therefore, you've got to put me in the chair because I have . . If you think I'm bluffing that's your choice. And I'm dropping all appeals; and I'm going to state in this courtroom that if any lawyer touches my appeal, I will ruin his career. I'm dropping all appeals after today . . ."

(R.936).

The prosecutor's comment herein did not distort or diminish the jury's responsibility; it merely clarified the law. No where did the prosecutor herein even faintly suggest the jury's advisory sentence would be reviewed as in Caldwell.

It is important to note the record sub judice is devoid of any objection to these remarks, and notwithstanding appellant's assertion that counsel was not permitted by the appellant to interject at all during the penalty phase, their representation continued throughout until sentencing. Failing to object and request a curative instruction, appellant has defaulted this issue. Phillips v. Dugger, Case No. 71,404 (Nov. 27, 1987) [12 F.L.W. 581]; Card v. Dugger, (Fla. Sept. 15, 1987) [12 F.L.W. 475] and Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985).

Section 921.141(2), Florida Statutes (1981) describes the function of the jury in the penalty phase as advisory. "The ultimate decision on whether the death penalty should be imposed rests with the trial judge." White v. State, 403 So.2d 331 at 340 (Fla. 1981). In the Florida Standard Jury Instructions in Criminal Cases, the jury is told that the final decision for sentence is the responsibility of the judge, told six times that their sentence is advisory, and the jury's duty is described as

making a recommendation or advising and recommending on four other occasions. This has been viewed with approval by this Court. Smith v. State, Case No. 68,834 (Fla. Oct. 22, 1987) [12 F.L.W. 541 at 542]; Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987) and Pope v. Wainwright, 496 So.2d 798 at 805 (Fla. 1986). Sub judice, the prosecutor's comment did not minimize or dilute the jury's responsibility any more and probably less than the jury instructions themselves. All the prosecutor did do was to advise the jury that the law would indeed be followed whether Mr. Pridgen liked it or not.

It is interesting to note also under a Caldwell setting that in Mississippi, the jury's penalty sentence is not advisory as it is in Florida. In Mississippi, the jury is the exclusive sentencer. (§94-14-100 Mississippi Code Supp. 1987) The trial court in Mississippi therefore plays no substantive role in the life-death decision, and there is no provision for a waiver of a jury recommendation as in Florida. Therefore, with this as a backdrop, the urged error herein is diminished further by appellant's own argument. In Caldwell, there was an affirmative act, the making of a statement which misled the jury as to their function which was exclusively their domain. The court sub judice advised the jury pursuant to the Florida Jury Instructions of the advisory nature of their sentence and recommendation (R.950, 1014) and the prosecutor's comments complained of herein in no way indicated that the jury's sentence recommendation would be reviewed for correctness as in Caldwell.

ISSUE IX

IN FAILING TO FIND THE EXISTENCE OF ANY STATUTORY OR NON-STATUTORY MENTAL MITIGATING CIRCUMSTANCES, IN THE FACE OF OVERWHELMING EVIDENCE THAT APPELLANT SUFFERS FROM A SEVERE MENTAL ILLNESS, AND THAT HE WAS EMOTIONALLY DISTURBED, DEPRESSED, AND SUICIDAL AROUND THE TIME OF THE HOMICIDE . . EVIDENCE WHICH THE TRIAL COURT IGNORED IN FAVOR OF TESTIMONY WHICH WAS EXPRESSLY LIMITED TO THE QUESTION OF APPELLANT'S COMPETENCY TO BE SENTENCED TWENTY MONTHS AFTER THE HOMICIDE . . THE TRIAL COURT BOTH ABUSED HIS DISCRETION AND VIOLATED THE REQUIREMENTS OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

(As stated by Appellant)

The trial court did not fail to find mitigating factors by relying only on evidence of Mr. Pridgen's competence as he now asserts. The court found the appellant competent to be sentenced, and as reflected in its findings of fact (R.1524-26) considered the mental mitigating factors and thereafter rejected them. Anything needs to be considered before it can be rejected, and merely because the appellant disagrees with the trial court in the existence of the factors does not mean they were not considered or that the trial court merely considered competency to be sentenced in rejecting the mitigating factors.

The reports of the defense experts (Doctors Dee, Ainsworth, and McClane) and those of the experts at Florida State Hospital (Roman, Tooley, Han, and Phillips) were clearly in conflict with one another. It is entirely evident then that the trial court rejected any assertion of mental illness as a mitigating factor based on the very testimony and reports now urged to be overwhelming in their support of such a finding. They were not.

On July 5th, 1985, the appellant's competency to be sentenced was considered (R.1041, 1042). Dr. McClane testified he met with other experts who examined Mr. Pridgen in order to reach his own opinion (R.1053). He reiterated that part of the appellant's depression was caused by the verdict and not by any mental problems (R.1067). He agreed with the prosecutor that every time he examined Mr. Pridgen his opinion changed (R.1072). McClane described the appellant as a "rather clever but deeply disturbed man of somewhat limited intelligence who has manipulated the investigating officers, the prosecution, the jury, the court, and even earlier, the examining psychiatrist (R.1073-74). He said that Mr. Pridgen has the ability to understand that he is to be punished for an act that he was found guilty of committing (R.1072), and that his refusal or lack of cooperation with his attorneys could in fact be another indication of his attempts at manipulating the system (R.1074, 1075).

Dr. Dee, a clincal psychologist, testified he examined Mr. Pridgen on June 3rd, 1985 (R.1075). Although he testified at the competency hearing on July 5th, 1985, that Mr. Pridgen was incompetent, (R.1085), his report of June 19th, 1985, makes no finding of competence or incompetence whatsoever (R.1584, 1588). And, although Dr. McClane's report indicates that Mr. Pridgen enjoys racing cars and attending car races as well as fishing and enjoys playing tennis and basketball (R.1577), Dr. Dee's report states, "He is a person who has few pleasurable pursuits and who enjoys almost nothing in life. His few solitary pursuits are carried on

in the solitude of the night (e.g., tinkering with his automobile in his garage in the middle of the night) (R.1586). Dr. Dee refers to the appellant as, "a lad" (R.1586) and describes him as "an extremely guilt prone young man who is exquisitely sensitive to what others feel about him" (R.1586). And, found in his report that "his self pity and self dramatization are remarkable" (R.1587).

Dr. Ainsworth also testified on July 5th, 1985 (R.1095) and he stated that he had worked for Polk General Hospital and had responsibility of the majority of the court work there (R.1098). It appears that Dr. Ainsworth has a practice with a fairly high precentage of court ordered forensic evaluations, oddly however, he testified that he was not familiar with the criteria as set out in the Dusky case (R.1104). He testified that if he was asked to give an opinion as to Mr. Pridgen's competency on the day his trial began, he would have testified that he would have found him more competent than not (R.1114). Dr. Ainsworth testified that the second time he saw Mr. Pridgen he felt that the appellant was more genuinely competent to communicate in a sense with counsel (R.1105) but that after his third meeting with Mr. Pridgen with regard to this category of competency he would have found him not competent (R.1105) (this doctor first saw the defendant on April 10th, 1985, then on April 17th, 1985 and finally on June 11th, 1985). Ainsworth testified that he, Dr. Dee and Dr. McClane had a meeting and discussed Mr. Pridgen and that the purpose of the meeting was to attempt to come up with

some sort of consensus of opinion (R.1119). No one asked any of these doctors whether or not they believed in the death penalty in order to reveal any possible bias in their conclusion even though each of them knew that the jury had returned a recommendation of death and found him competent before trial and somewhat incompetent after the verdict. Thereafter, the trial court found the defendant was competent for the two phases of trial (R.1146) and that he entered this order based on the findings of the psychiatrist, and his own observation of the defendant's conduct during trial and pre-trial proceedings, and the court's observation of his demeanor (R.1146). Having ruled on the defendant's competence during both phases of trial however, the court accepted the doctors' opinions regarding his deterioration and ordered the appellant transferred to Florida State Hospital (R.1146-47).

On November 12th, 1985, another competency hearing was held before the trial court to determine his competence to be sentenced. Dr. Dee testified again and stated that prior to examining the appellant on November 5th he had read the report by the psychologist from Florida State Hospital, Debra Roman (R.1168). He noted that his description of the appellant did not differ from that contained in the report from Florida State Hospital but that the conclusions reached by Dr. Dee and Ms. Roman differ (R.1169). (It should be noted that Dr. Dee examined the appellant for one hour and fifteen minutes whereas the doctors at the state hospital had an ongoing day to day opportunity to view and observe Mr. Pridgen (R.1171)). Again, Dr. Ainsworth testified as

well. He testified he had last examined Mr. Pridgen on November 3rd for one hour and forty-five minutes and that he too had read the reports from Florida State Hospital (R.1178-79). He testified that if ". . . one takes the issues of cognitive ability to understand his situation as a major ingredient in this stage of the trial then Mr. Pridgen is competent" (R.1180-81). He also stated, "So I would say that more likely than not if the preponderance of those factors are given, Mr. Pridgen is competent and that's a decision really" (R.1183). Regarding Mr. Pridgen's ability to communicate with his attorney, Dr. Ainsworth stated, "Mr. Pridgen is well able to . . he is a good talker if he wants to" (R.1185). Obviously indulging in his own fantasy as to what Ms. Roman may or may not have felt, Dr. Ainsworth testified in regard to her report, ". . . in having read an awful lot of reports like this and also seeing that it was written by a young female . . . I have a suspicion that she . . . sees him as a little more cunning and a little more dangerous than he really is because she is frightened. I mean this is a young relatively young therapist we're talking about here." (R.1186-87).

Dr. McClane again testified that he examined Mr. Pridgen again on November 1st, 1985 and that he too had access to the report written by Debra Roman, the psychologist from Florida State Hospital (R.1187-88). He testified that sometimes Mr. Pridgen does have the desire to help himself in the proceedings and sometimes he does not and that this kind of inconsistency is typical of a border-line personality (R.1195).

Debra Roman testified that she is a psychologist at Florida State Hospital and prepares approximately two to ten competency evaluations a week with an average of five evaluations weekly for competency to stand trial or competency for sentencing (R.1199). She testified she has a paper that is being published in the International Journal of Offender Therapy and Comparative Criminology (R.1201). She said she spent somewhere between ten and fifteen hours with Mr. Pridgen while he was at the hospital however, other members of the treatment team were constantly in contact with him (R.1205) and that part of the information she used in formulating her opinion came from those other sources of information on the team (R.1206). She testified she was not afraid of Mr. Pridgen and that she had been working with people like him for approximately nine years (R.1207). She testified that Mr. Pridgen suffers from an anti-social personality disorder which is often referred to as the criminal personality disorder. She explained the reason for this description is that anti-social individuals have a strong likelihood of getting involved with the legal system. The reason for this is they tend to be narcissistic and that they are constantly trying to meet their personal needs any way they can. She testified they have very little regard for the needs or rights or feelings of other people (R.1211-12). The second personality disorder she found in the appellant is the border-line personality disorder (R.1213). As to this, she testified that individuals with this type of disorder walk a thin line between psychosis and normality

(R.1213). She said such individuals would have, "brief fleeting periods of psychotic like symptoms usually in response to extreme stress" and that "the key word here is brief, and they do not have extended periods of psychotic episodes which require hospitalization or psychotropic intervention" (R.1214). She testified regarding the defendant's ability to work with counsel "there was no doubt from all of my numerous interactions with Mr. Pridgen that he can be very demanding, argumentative, intense individual who no doubt has not been peach to work with as far as his attorney is concerned. Also because he is psychotic he has a tendency, he has a very exagerated opinion of himself and his abilities to handle his case himself" (R.1217). She further testified that much of his behavior is very well thought out, rational and calculated (R.1218) and that he has been successful in delaying the court process, transfering himself to a hospital environment rather than the jail and he has "raised doubts" in the minds of some including Dr. McClane who went so far as to say Mr. Pridgen is not guilty and a mistrial should be declared (R.1218). She testified that what appears on the surface to be bizzare or irrational behavior, "if you consider the consequences of those behaviors, they have been in his best interest, and they have, indeed helped him" (R.1219-21). She testified while in the hospital Mr. Pridgen decided to starve himself and go on a hunger strike but he usually merely refused breakfast (R.1222-23). She testified that although he claimed he was flushing his food down the toilet, during this strike as an attempt to kill himself he

lost 1 1/4 pounds (R.1223). She testified that this all goes along with his anti-social character and that he wants people to feel sorry for him and wants to attract attention (R.1223). She tesified that he would never really behave in a fashion that is harmful to himself (R.1223) and that regarding his courtroom outbursts it was her belief that "Mr. Pridgen is perfectly capable of controlling his behavior when it is in his best interest (R.1224). It was her opinion that Mr. Pridgen possessed a low average intelligence (R.1230). She testified that it was her opinion that Mr. Pridgen was not choosing to communicate with his attorneys due to his character disorder which is not a mental illness per se and would not lead to incompetency (R.1236). Regarding Dr. Dee's conclusion that the defendant is of a low intelligence somewhere in the 70's, Ms. Roman looked through letters that were received from the appellant and noted that he organized his ideas well and uses words used by people of average intelligence and spells correctly as well. She noted that people of an IQ in the 70's are not capable of doing that, but that Mr. Pridgen is not only able to, but that he can formulate a neat outline with various topics he wants to cover; that he uses language and develops ideas and thoughts that are fairly complex. She stated, "Certainly there was nothing simplistic, ignorant or border-line mentally defective about him. He communicates in a very articulate fashion." She then stated that the content suggests the presence of a thought disorder (R.1245).

The court then ordered the state to draft an order "reflecting that I remain firm in my belief that Mr. Pridgen was competent on occasion of the commission of these crimes, that Mr. Pridgen was competent at the time of trial including the bifurcated proceeding . . . however, because of the extreme possible penalty involved here, and in light of the opinion evidence presented by three other capable witnesses, . . . it is my decision that Mr. Pridgen be returned to Florida State Hospital for further treatment including psychotropic medication to be administered involuntarily (R.1249). The court entered orders committing Mr. Pridgen to Florida State Hospital on November 19th, 1985 (R.1252-53).

On May 1st, 1986, another competency hearing was held before the trial court. Again, Dr. McClane was called as a witness. He testified that he examined Mr. Pridgen again on April 17th, 1986 and the opening sentences of his written report is a verbatim repeat of a prior evaluation (R.1267). When asked whether it "appeared to you that Mr. Pridgen is telling different stories to different medical personnel depending upon who he is talking to? In other words, he is telling you different things than he is telling the people in Tallahassee (sic)? Dr. McClane responded, "to some degree I believe that's true, yes." (R.1270) When asked whether Mr. Pridgen admitted to you that that is in fact what he is doing, Dr. McClane responded, "yes" (R.1270). Dr. McClane concluded that Mr. Pridgen would never be competent (R.1277-78). (Although Dr. McClane found him competent BEFORE trial.)

Dr. Ainsworth testified that he examined Mr. Pridgen again on April 16th, 1986 for an hour and fifty minutes (R.1279) and that Mr. Pridgen indicated to the doctor that he knew he was being transported down to court for sentencing and that he would cooperate with his attorneys and sit quietly but further indicated that if he could get a newspaper headline he would be disruptive (R.1280).

Dr. Ainsworth found, "Speech pattern was logical, coherent and goal directed. Currently there is little evidence of a thought disorder." Regarding Mr. Pridgen's delusional beliefs, he said, "However, this kind of statements made by the defendant appear to be more manipulative than indicative of genuine suicidal ideation (R.1608). Dr. Ainsworth concluded that the appellant would be considered more competent than not for sentencing (R.1611).

Debra Roman evaluated Mr. Pridgen again on March 5th, 1986 and found him essentially unchanged since her examination in December 1985. She found no thought processes associated with a formal thought disorder. She found that he was not blatantly psychotic but had unrealistic observations about his environment (R.1612-13). She found Mr. Pridgen to be well acquainted with the particulars of his case and displayed a rather sophisticated understanding of the legal system (R.1614), and found that he was particularly cognizant of the potential laws in the prosecution's case and he speculated outloud as to the potential relevance of these issues in an upcoming appeal (R.1615). While arguing to

her that his attorneys had not handled his case as he felt they should have, he did admit that they were qualified to do the job and that his anger with his attorneys seemed to stem from the fact that they had not been successful in achieving the outcome that he hoped for (R.1615). She said, "There is certainly no doubt that Mr. Pridgen is capable of being contentious and demanding, but in this regard he is no different than many non-psychotic criminal defendants (R.1615). She found that it is certainly true that Mr. Pridgen was pensive and upset, but that these would be considered normal emotions for any one in his situation (R.1616). She further noted however, that he continued to display some symptoms of psychosis and severe character disorder, but that his psychosis does not significantly impage on his ability to realistically participate in the sentencing process (R.1616-17).

In October 1986, Dr. McClane interviewed Mr. Pridgen again and found him incompetent for sentencing (R.1620).

Dr. Dee also interviewed Mr. Pridgen again in October 1986. Mr. Pridgen advised Dr. Dee about how he was able to fool the court and that he is able to control the court (R.1622). Dr. Dee's evaluation very interestingly states that "he notes that one of his physicians, a Dr. Phillips, says that he is competent but mentally ill, in order to evade making a decision, remarking that one cannot execute a man with mental problems, according to his interpretation of new laws" (R.1622). Dr. Dee found Mr. Pridgen's basic condition unchanged (R.1624).

Mr. Pridgen was also evaluated by Dr. Earl Hahn, M.D., Medical Executive Director of Forensic Services at Florida State Hospital on August 13th, 1986 (R.1631). Dr. Hahn reviewed all of the psychiatric evaluations previously prepared for the appellant. Dr. Hahn was not able to detect well defined delusions in the appellant's thinking although he did find a flare of grandeur in his ideas (R.1633). Dr. Hahn found the appellant has an anti-social personality disorder and an obsessive compulsive disorder but that "neither condition is considered to constitute a major mental disorder that is to say a psychosis" (R.1636) (emphasis added).

Dr. James Phillips, a psychiatrist at Florida State Hospital, also interviewed Mr. Pridgen on August 20th, 1986. Dr. Phillips was Mr. Pridgen's psychiatrist throughout all of the appellant's three separate admissions to Florida State Hospital after trial, pending sentencing. Dr. Phillips found "during this hospitalization, I have not observed any hard evidence of a major thought disorder or a major effective disorder" (R.1639). He found that the appellant's insight into his present charges and long term goal oriented planning was in tact (R.1639). Dr. Phillips further found that "Charles reveals himself as a very sensitive, reserved, cautious, defensive, and manipulative individual" (emphasis added). Dr. Phillips found no evidence of psychosis but continued the appellant's medication to aid in anxiety control (R.1641). Dr. Phillips finally stated "In further summary of Mr. Pridgen:

(1) He appears to be fully competent;
(2) He does not appear to be psychotic (there is no evidence of a major thought or major effective disorder);
(3) His behavior has been appropriate throughout this hospitalization;
(4) He has cooperated fully with the treatment team and the treatment plan;
(5) He possesses multiple mixed personality traits with the most outstanding being those of anti-social personality disorder;
(6) He seems to be experiencing mild situational depression which most likely is associated with situations which have developed from frequent poor judgment in the past and prolonged incarceration."

(R.1641).

Dr. Phillips' final conclusion contained the following: ". . . Charles may not cooperate with his attorney and other members of the court and most likely will only cooperate in ways determined by him to be in his best interest" (R.1641).

Appellee has therefore filled in some of the gaps left by the appellant in his recitation of the psychiatric evaluations. It is apparent from the testimony of these experts in total that the trial court had ample evidence before it regarding any opportunity for it to find any statutory or non-statutory mental mitigating circumstances.

It is apparent from all of the psychiatric reports and testimony of experts in the case sub judice, there was truly confusion as to the extent and nature of Mr. Pridgen's mental illness, and absolutely no consensus of opinion as to whether or not he was psychotic as appellant now asserts, or merely suffered from a border-line personality and an anti-social personality.

In Bates v. State, 506 So.2d 1033 (Fla. 1987), Mr. Bates argued, "that the court did not really consider the newly presented evidence and that, therefore, the court failed to perform the proper weighing and analysis of evidence required of the sentencer. Specifically, Bates claims that the court totally ignored the evidence given by a psychologist who examined Bates for the purpose of resentencing. Because the state produced no evidence to rebut this expert's testimony, Bates argues that the trial court erred in not finding the establishment of the mitigating circumstances of commission under the influence of extreme emotional or mental disturbance and substantially impaired capacity to appreciate the criminality of conduct and to conform conduct to requirements of the law." Id at 1034. This court went on to hold "contrary to Bates' contention, on the other hand, the fact finder (in this case the trial court) has great discretion in considering the weight to be given expert testimony and need not be bound by such testimony even if all the witnesses are presented by only one side. United States v. Esle, 743 F.2d 1465 (11th Cir. 1984). In other words, expert testimony ordinarily is not conclusive even where uncontradicted. United States v. Alvarez, 458 F.2d 1343 (5th Cir. 1972)."

In Magwood v. Smith, 608 F.Supp. 218 (D.C. ALA. 1985), the district court noted the trial court's observations in finding the existence of two mitigating circumstances, i.e., that Magwood had no significant prior criminal history and that he was 27 years old at the time of the crime. The trial court then stated,

"These mitigating circumstances exist. The jury in the guilty phase of the trial rejected the not guilty by reason of insanity plea. The court concludes Magwood did not kill Grantham under the influence of extreme emotional disturbance and when the three bullets were fired into the body of Grantham, Magwood had the capacity to appreciate the criminality of his act." Id at 225. It is therefore obvious that the Magwood court's rejection of mitigating circumstances was not based on his own consideration of them and a subsequent weighing process, but rather merely upon the jury's rejection of an insanity defense. It is important to note in Magwood that even though the court appointed general practitioners and clinical psychologists were inconclusive in their opinion regarding Magwood's mental health, the unanimous opinion of the three doctors who served on the state lunacy commission found that Magwood was insane and incompetent and probably was at the time of the commission of the offense. Id at 226. The district court held, "It is wholly incredible in light of the unanimous (emphasis added) state lunacy commission's findings after a lengthy evaluation process engaged in by trained professionals who were appointed by the state, to find that said murder was not committed while Magwood was under the influence of extreme mental or emotional disturbance. Similarly, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law simply had to be impaired when all (emphasis added) members of the lunacy commission found him to be suffering from a severe mental disease."

Id at 227. Sub judice, there is no such unanimous opinion as to the existence or extent of Mr. Pridgen's mental illness. In Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986), the court of appeals affirmed the district court findings in Magwood v. Smith, 608 F.Supp. 218, supra. However, the court of appeals found that four experts ascertained that Magwood suffered from some form of serious mental disorder on the date of the murder and not one testified that Magwood was free from mental illness on that date. Id at 1450. It is interesting to note that Magwood relied on an insanity defense, Mr. Pridgen clearly did not, and whether or not Mr. Pridgen was under the influence of extreme mental or emotional disturbance or had the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not squarely addressed by any of the expert testimony. It should again be noted that in Magwood, the trial court's rejection of these mental mitigating factors was based solely on the jury's rejection of the insanity defense, and is therefore distinguishable from the instant case.

Sub judice, the appellant relies heavily on the reports and the testimony of Dr. McClane. In Dr. McClane's written evaluation from his interview with the appellant on April 17th, 1985, he found "I find no evidence that he was insane at the time of the alleged offense" (R.1579). It must be remembered also that the appellant was a very manipulating individual and the court heard Dr. Ainsworth testify regarding his emotional appreciation of the death penalty as a game ". . .It's like a game to him and

that is unfortunately why we are here the third and fourth and fifth time". (R.1284). When asked by the prosecutor what do you mean by a game, Dr. Ainsworth responded, "It's not real. It's getting the attention he wanted from other people, important people, and it's displaced from the reality of a legal fact finding reality based court" (R.1284). When asked if Mr. Pridgen indicated to Dr. Ainsworth anything about an obvious attempt to manipulate the system, Dr. Ainsworth responded, "Yes he did" (R.1284). In regard to this, Dr. Ainsworth stated that he doubted that it was a result of a genuine depression but rather as a conscious manipulation (R.1285). Dr. Ainsworth defined manipulation as "the art of verbal deceit to gain one's own ends" (R.1285). It is therefore apparent that the content of the expert opinion sub judice hardly matched that in Magwood, supra, as appellant urges. Dr. Ainsworth also testified that Mr. Pridgen has the ability to appreciate if he does something wrong (R.1421). Dr. Ainsworth further testified that had Mr. Pridgen been found not guilty and knew he was going to walk free that his mental state would have been different and that the verdict of guilty had an adverse impact on Mr. Pridgen (R.1425).

Prior to sentencing, counsel for the appellant asked the trial court to empanel a new jury and allow them to present testimony regarding the appellant's mental health (R.1514). The trial court denied this motion to set aside the jury's recommendation and found Mr. Pridgen competent to be sentenced (R.1515). Prior to sentencing, however, the court allowed the

defense to put on testimony to show that the appellant was suffering from a strong emotional and mental disturbance at the time of the offense (R.1515). At this time, counsel for Mr. Pridgen called the appellant's sister as a witness (R.1516) and she testified that the appellant was her brother and that prior to his arrest she had an opportunity to know and observe him and that he was depressed about "that girl Lisa" (R.1516-18). Thereafter counsel for Mr. Pridgen pointed out two mitigating circumstances to the death penalty; one, that the crime was committed while the appellant was under extreme emotional disturbance; and second, that the appellant did not have the mental capacity to appreciate the consequences of his conduct (R.1519). In Stano v. State, 460 So.2d 890 (Fla. 1984), there was conflict between the experts regarding the mental mitigating factors. The Stano court held "finding or not finding a specific mitigating circumstance applicable is within the trial court's domain, and reversal is not warranted simply because an appellant draws a different conclusion. Moreover it was the court's duty to resolve the conflict here, and his determination should be final if it is supported by competent, substantial evidence. The testimony relied on by the court is competent, substantial evidence, and we find no error in the court's failure to find these mitigating circumstances applicable." Id at 894 (citations omitted). It should be noted that in Stano, one psychologist and one psychiatrist firmly testified that Stano had been under extreme mental disturbance and that his capacity to conform his conduct to the requirements of law was

substantially impaired. Id at 894. Sub judice, we have no such testimony save for Dr. McClane's initial report wherein he clearly states that Mr. Pridgen was not insane at the time of the offense (R.1579). Citing Stano v. State, supra, this court in Kight v. State, Case No. 65,749 (Fla. July 9, 1987) [12 F.L.W. 357] noted a proffer by the defense during the guilt phase regarding the testimony of a Dr. Krop that Kight was mentally retarded and that the evidence of Kight's deprived childhood offered to support these mitigating circumstances; and that it was not error for the trial court in failing to find these factors applicable, stating, "a trial court has broad discretion in determining the applicability of mitigating circumstances urged" citing Johnston v. State, 497 So.2d 863 (Fla. 1986) and Daughtery v. State, 419 So.2d 1067 (Fla. 1982), cert. denied, 459 U.S. 1228 (1983).

Sub judice, there was virtually no expert opinion as to whether Mr. Pridgen was under the influence of extreme mental or emotional disturbance at the time the crime was committed or whether his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Having had ample opportunity to ask any or all of the witnesses who testified as to their expert opinion regarding Mr. Pridgen's competence appellant was clearly not precluded below from eliciting such testimony, therefore, the record does not support any conclusion that these mitigating factors exist nor is the present assertion of their existence supported by the

record. In Rogers v. State, Case No. 66,356 (Fla. July 9, 1987) [12 F.L.W. 368], this Court stated that "Finding that no mitigating factors exist has been construed in several ways: (1) that the evidence urged in mitigation was not factually supported by the record; (2) that the facts, even if established in the record had no mitigating value; or (3) that the facts, although supported by the record and also having mitigating value, were deemed insufficient to outweigh the aggravating factors involved." Id at 371. Referring to Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982) and their teachings this Court stated, ". . . We find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court must then determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed." Id at 371 (emphasis added). A perusal of the record submitted sub judice lacks evidence that the appellant committed the instant crime while he was under the influence of extreme mental or emotional disturbance and further lacks evidence that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. However, to now assert that the trial court in failing to find the existence of these two mental miti-

gating factors ignored any evidence introduced thereof in favor of testimony limited to Mr. Pridgen's competency is error on appellant's part.

In its findings of fact upon which the sentence of death was imposed (R.1524-26) the trial court stated that it was mindful of the appellant's anti-social mental condition and recited the findings of Dr. Hahn that Mr. Pridgen has manifested a mental disorder diagnosed in accordance with the DSM-III of the American Psychiatric Association as an anti-social personality disorder and an obsessive compulsive disorder (R.1526). Quoting Dr. Hahn, the trial court found "neither condition is considered to constitute a major mental disorder that is to say, a psychosis." (R.1526) It is therefore apparent that the trial court in rejecting these mental mitigating factors (R.1525) clearly considered all of the testimony and factors presented to it, weighed the evidence presented and then correctly rejected these factors. The trial court found that "none of the mitigating circumstances provided by Florida Statute 921.141 apply to the circumstances of this case." (R.1525). The trial court is not precluded from making such a finding. Rogers, supra. In Mann v. State, 420 So.2d 578 (Fla. 1982), this Court remanded for a new sentencing proceeding because from the trial judge's reference to the psychiatric testimony this Court was "unable to discern if the trial judge found that the mental mitigating circumstances did not exist . . . On the other hand, he may have found them to exist and weighed them against the proper aggravating circum-

stances. We, however, cannot tell which occurred." Id at 581. Sub judice, however, the trial judge made it clear that these mental mitigating circumstances clearly do not exist (R.1525). Again, appellee would urge that such a factor must be considered before it can possibly be rejected. However, the conflict in the testimony regarding the appellant's mental illness in conjunction with the lack of evidence regarding the two statutory mental mitigating factors amply supports the trial court's rejection of these mitigating factors. Compare Mines v. State, 390 So.2d 332 (Fla. 1980), where this Court found error in the trial court's failure to consider the mental mitigating circumstances because "we find unrefuted medical testimony in this record which reflects that appellant had a mental condition diagnosed as schizophrenia, paranoid type. This condition was severe enough to require the trial judge to initially find the appellant incompetent to stand trial until his mental condition could be brought under control by medication at the state hospital." And, "the evidence clearly establishes that appellant had a substantial mental condition at the time of the offense." Id at 337. Nothing of this nature is revealed in the record sub judice, and the trial court clearly did not rely on a mere finding of competency for sentencing in rejecting the urged mitigating factors.

ISSUE X

WHETHER THE TRIAL COURT ERRED IN IMPOSING A DEATH SENTENCE BASED IN SUBSTANTIAL PART ON AGGRAVATING FACTORS WHICH WERE EITHER UNSUPPORTED BY THE EVIDENCE OR INVALID AS A MATTER OF LAW.

In the present case, the trial court stated in his sentencing order, in pertinent part ". . . the defendant was at the time of the commission of the crimes in this case on probation for felony offenses." (R.1524) Appellant now asserts that this is either a non-statutory aggravating circumstance or an effort to make this probationary status an aggravating factor pursuant to 921.141(a), i.e., that "the capital felony was committed by a person under sentence of imprisonment." In support of his assertion, appellant cites Peek v. State, 395 So.2d 942 (Fla. 1981), wherein this Court said "probation is a sentence alternative but is not generally considered to be a sentence of imprisonment. An exception arises, however, if the order of probation includes as a condition a term of incarceration and the capital felony is committed while the defendant is or should be incarcerated." Id at 499. The record sub judice, however, shows clearly that various judgments and sentences were introduced into evidence during the penalty phase in part to rebut any assertion that the appellant did not have any prior significant criminal history (R.953). The record shows that Mr. Pridgen was convicted of grand theft (stealing firearms) in Polk County Case No. 81-1037 on September 10th, 1981 and placed on five years probation. On November 18th, 1982, however, Mr. Pridgen's probation was revoked

and he was sentenced to one year in the county stockade and five years probation to follow that one year (R.954). The five year probationary period arose from Circuit Court Case No. CF-81-1945 where Mr. Pridgen was charged with burglary, grand theft and dealing in stolen property and again on November 18th, 1982, was found guilty of the crimes charged in CF-81-1945 and was placed on a three year withheld sentence of imprisonment and probation for a period of five years (R.955). It is therefore evident that Mr. Pridgen committed the instant murder during the period of his three year withheld sentence (R.955). Under the very dictates of Peek, supra, cited by the appellant, probationary status may be considered as an aggravating circumstance as set forth in §921.141(5)(a), "If the order of probation includes as a condition a term of incarceration and the capital felony is committed while the defendant is or should be incarcerated." Id at 499 (emphasis added). Since Mr. Pridgen committed the instant crime during the three year period where his prison sentence was withheld, appellee would assert that the appropriate showing has been made to support this factor.

Appellant next asserts that the trial court erred in finding "previous conviction of a violent felony" as an aggravating circumstance. In support of this contention, appellant alleges that the Lake County Information's allegation that appellant while armed with a shotgun "unlawfully by force, violence, putting in fear feloniously did rob, steal and take" certain money and property from the person or custody of David Pietchell (R.952) would

support a finding of a prior violent felony conviction based both on the allegations in the charging document and on the fact that the use or threat of violence is a necessary element of the crime of robbery. Appellant then states "however, the Lake County jury did not convict appellant as charged in the information but rather convicted him of the lesser included offense of attempted robbery." (R.953, see Brief of Appellant, p.165-166). Appellant goes on to say that the record sub judice does not disclose the evidence which convinced the Lake County jury to acquit the appellant of the completed robbery as charged in the information, and to convict him only of attempt, and it is incumbent on the state to prove the aggravating factor on the face of the prior conviction. (See Brief of Appellant, p.166.) Appellant then concludes that because the appellant was convicted of a lesser included which did not necessarily include the use or threat of violence that the trial court erred in finding this aggravating factor.

Appellant relies heavily throughout his brief on the reports submitted sub judice by Dr. McClane. And although asserted throughout that the trial court failed to consider these reports, it is evident that the appellant himself has failed to realize that Dr. McClane, in his report of April 17th, 1985 related information regarding Mr. Pridgen's early life (R.1576). In this report, Dr. McClane stated, "Just before his 18th birthday in 1975 when he had been laid off construction work, he entered a used car lot with a shotgun and stole some money and a car. He

says he tied the man up and then checked to see if he was comfortable, that is, if the knots were too tight. He left; then turned around and came back and checked again with the man to see if he was comfortable before he finally drove off in the car." (R.1576). Appellee would assert that this clearly rebuts appellant's assertions herein and shows that notwithstanding the jury's verdict of guilty on the lesser included of attempted robbery clearly the facts of this case as related by Mr. Pridgen to Dr. McClane and obviously considered by the trial court showed that Mr. Pridgen did in fact enter a used car lot armed with a shotgun, tied up the victim and stole money and a car. It is therefore evident that even though the jury in the Lake County case returned with a conviction on a lesser included offense, the information and the allegations therein fully support this aggravating factor and the facts of this crime as filled in by Mr. Pridgen himself in his conversation with Dr. McClane and contained in Dr. McClane's report clearly supports the finding of this aggravating factor.

Appellant next asserts it was error for the trial court to find the aggravating factor that the instant murder was committed for the purpose of avoiding arrest. Appellant asserts that the trial court found this aggravating factor "only because he could think of no other purpose." See Brief of Appellant, p.167. In fact, the trial court found, "The killing of the victim Anne E. Marz, was not necessary for the commission of the burglary and robbery" (R.1525) and also found in paragraph G of its findings

of fact that the deceased was murdered only after she was completely subdued (R.1525). The trial court found that Mr. Pridgen achieved no purpose by the murder of Anne E. Marz except an attempt to avoid lawful arrest. Appellee would assert that this is not an unlawful inference to be drawn from the facts; wherein Mr. Pridgen had previously done yard work for Anne Marz and they knew each other and she was in fact subdued and tied up during the course of the burglary and robbery and her murder clearly was not necessary for the commission of the burglary and the robbery.

Although appellee is cognizant of this Court's rulings regarding the finding of this aggravating factor and that merely because the victim and the defendant may have known each other prior to the murder, this alone is not a sufficient basis for finding this aggravating factor. However, it should be noted in the instant case that the victim was in fact tied and subdued during the course of the burglary and the robbery sub judice and there appears to be no other plausible reason for the victim's murder other than avoidance of lawful arrest.

However, should this Court find this aggravating factor inapplicable, appellee would urge any such error is harmless in light of the fact that the trial court sub judice found seven aggravating factors and no mitigating factors whatsoever. In Ferguson v. State, 417 So.2d 631 (Fla. 1982), this Court in negating an aggravating factor found by the trial court stated, "our negation of said aggravating circumstance would not, however, change the result of this case in the absence of mitigating cir-

cumstances. In such cases a reversal of the death sentence is not necessarily required, as any error that occurred in the consideration of the inapplicable aggravating circumstances was harmless." Id at 636 (citations omitted).

Appellant next asserts that the aggravating factor that the murder was committed in a cold, calculated and premeditated manner was not established. In Huff v. State, 495 So.2d 145 (Fla. 1986), this Court found that the murders were committed in a cold, calculated and premeditated manner because they were committed in a wooded and secluded area in which the defendant felt safe. Similarly, the instant murder took place in the victim's home which was sufficiently secluded in the sense that the appellant felt secure that he could commit the crime without being seen. Additionally, it should be noted in his own confession to Major Judd that the appellant gained entry to the victim's home under the pretense of wanting to use the telephone (R.1564). Additionally, once having gained entrance to the victim's home, by Mr. Pridgen's own admission, he said that he tied her hands up with an electric cord that he cut off an iron, put tape over her mouth, put her mouth against a throw pillow and sat on her during this (R.1563, 1564, 1565, 1560). The medical examiner testified in accord with this and noted that the victim had suffered blows to the head and trauma to the head and face (R.430, 442, 519-524). The medical examiner finally testified that the cause of death was asphyxia probably due to strangulation (R.524-525, 531).

In Mason v. State, 438 So.2d 374 (Fla. 1983), evidence that the defendant broke into the victim's home, armed himself in her kitchen and attacked her as she lay sleeping in her bed, combined with the absence of evidence that she provoked the attack in any way or that the defendant had any reason for murdering her was found to be sufficient to support the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner without any basis of moral or legal justification. Id at 379. Appellee would urge the facts sub judice are analogous to those in Mason, supra.

Appellee would urge however, that the finding of seven aggravating factors and no mitigating factors in the instant case would not, should this Court find that the aggravating factor of cold, calculated and premeditated is unsupported, effect the sentence imposed. Ferguson v. State, 417 So.2d 631 (Fla. 1982); Johnston v. State, 497 So.2d 865, 872 (Fla. 1986). Cf. Johnson v. State, 465 So.2d 499, 507 (Fla. 1985) where murder by strangulation was held to have been committed in a cold, calculated and premeditated manner without pretense of moral or legal justification.

ISSUE XI

THE TRIAL COURT, IN SENTENCING APPELLANT FOR ROBBERY AND BURGLARY, IMPROPERLY DEPARTED FROM THE SENTENCING GUIDELINES.

Although the guidelines scoresheet submitted sub judice is found at R.1530, and indicates the guideline sentence is nine to twelve years, but the sentence imposed is death, it should be made clear that the trial court did not exceed a recommended guidelines sentence of nine to twelve years and instead imposed death on the guideline charges. At sentencing the court stated, "The defendant, Charles Lamont Pridgen is sentenced to death on count I. The court will exceed the guidelines on the remaining charges. Mr. Pridgen is sentenced to fifteen years in the state prison on count II robbery; and life on count III; and fifteen with respect to dealing in stolen property. These sentences are to run consecutive, each to the other (R.1521).

In its written reasons for the departure sentence, the trial court addressed the dictates of Albritton v. State, 476 So.2d 158 (Fla. 1985) (R.1532) and it can fairly be said from the court's written reasons for this departure sentence that deleting any reason for the departure that this court may find invalid would not alter the court's determination that the impermissible reason did not effect the sentence imposed.

Further, the court noted in its written reasons for its departure sentence (R.1531-32) the nature of the appellant's criminal history. This justifies a finding of an escalating pattern of violence which has been determined to be a valid reason

for a departure. Keys v. State, 500 So.2d 134 (Fla. 1986); Williams v. State, 504 So.2d 392 (Fla. 1987). Additionally the trial court noted that in the course of committing the robbery and burglary the appellant beat the victim unmercifully and after subduing her caused her death by suffocation and stripped rings from her fingers. Lerma v. State, 497 So.2d 736 (Fla. 1986); Vanover v. State, 498 So.2d 899 (Fla. 1986). It was also shown that Mr. Pridgen had been on probation several times (R.952, 953, 954, 955). In its written reasons for the instant departure sentence, the trial court referred to the appellant's probationary status (R.1531) and appellee would assert that successive violations of probation have been found a valid reason for a departure sentence. Adams v. State, 490 So.2d 53 (Fla. 1986); Pentaude v. State, 478 So.2d 1147 (Fla. 1st DCA 1985), cert. denied, 498 So.2d 1030 (Fla. 1st DCA 1986), affirmed, 500 So.2d 526 (Fla. 1987). See also Hansbrough v. State, Case No. 67,463 (Fla. June 18, 1987) [12 F.L.W. 305].

Nothing precludes a reviewing court from going to the record to "flesh out" factual support fot he departure. Vanover v. State, supra.

ISSUE XII

IN THE INTEREST OF JUSTICE, THIS COURT SHOULD GRANT A NEW TRIAL OR REDUCE APPELLANT'S SENTENCE TO LIFE IMPRISONMENT.

Although not squarely addressed, appellant appears to be arguing the sufficiency of the evidence to support the appellant's conviction and sentence.[1]

In response, appellee would rely on the evidence adduced at trial as appears in the statement of the facts portion of this brief. In specifically addressing the three areas of question that appellant raises in his Issue XII, the appellee would state that not only did the jury have the opportunity to observe Mr. Meadows during his in-court testimony and confession and weigh his credibility, but the circumstances surrounding Mr. Meadows' confession is also highly suspect. Mr. Pridgen confessed to this crime at the time of his arrest, and maintained his guilt for some time thereafter. When crime scene technician Egan saw Mr. Pridgen the day after his arrest and asked whether or not he would allow the police to photograph him, Mr. Pridgen stated to her, "you are just trying to see if she fought with me." (R.459-460). While hair and blood samples were being taken from Mr. Pridgen, Nurse Gandy was present and heard Mr. Pridgen ask why all this was necessary since he had already confessed (R.661).

1/ See Hardwick v. Wainwright, 496 So.2d 796 (Fla. 1986) where this Court held that a failure to argue sufficiency of the evidence does not establish incompetency of appellate counsel as ". . . this court independently reviews each conviction and sentence to ensure they are supported by sufficient evidence."

Major Judd testified that on November 2nd word was sent to him that Mr. Pridgen wanted to see him, and when he went over to the jail to see the appellant, the appellant asked for the address of relatives of the victim so that he could write to them and apologize (R.674). When Judd responded to the appellant's inquiry as to the ramifications of a conviction for first degree murder, the appellant told Judd that he would rather die in the electric chair than spend the rest of his life in prison (R.675). Martha Jones testified that the appellant told her that he had done something that would "get him a hundred years" (R.574). It certainly cannot be said that even Mr. Pridgen thought cashing the checks and selling the rings for Darrell Meadows would have netted him a one hundred year sentence. The record is replete with these and other spontaneous statements made by Mr. Pridgen evidencing his guilt. The suspicion cast upon Darrell Meadows' confession arises in the very circumstances in which it came forth. Mr. Meadows had been in jail for approximately six months when, on March 11th, 1985 he was placed into the isolation unit. Similarly, Mr. Pridgen was also incarcerated at the same jail for approximately six months when he was put into the isolation unit on March 6th, 1985 (R.859). Up until this time Mr. Pridgen had maintained his guilt, and Mr. Meadows had failed to come forward. Pridgen stated that when he was in isolation with Meadows they were in the cell right next to each other and they had conversations (R.837) and even admitted that he had been in the same cell with Meadows the Friday prior to trial although he

insisted he was not there to see Meadows (R.854). Seven days after Mr. Meadows was placed in isolation with the appellant after six months of silence he came forward with his confession. Contrasting Meadows' confession with his credibility and demeanor at trial as determined by the jury, with the backdrop of all of the evidence against Mr. Pridgen combined with his ample opportunity to call the police and blow the whistle on Meadows and his failure to do so clearly support a finding of his guilt and ample reason for the jury to reject Darrell Meadows' confession.

Appellant next asserts that in the interest of justice this court should grant a new trial or reduce appellant's sentence to life imprisonment based on the post-trial testimony regarding the appellant's mental illness and especially his pathological reaction to his rejection by Lisa. Appellee would respond that Mr. Pridgen's sense of rejection was not quite so devastating as he claims or was able to convince the experts. Regarding his so-called obsession with Lisa, it must be recalled that Mr. Pridgen wrote a letter to Martha Jones while he was incarcerated which stated in part "my mom said you called her one day this week, have you called Earl? When you were at the flea market did you see Lisa? Like I said before Martha, I do not want you to think I blame you for any of this . . ." (R.585), and really driving home his total obsession with this one woman, Lisa, the appellant then wrote ". . . P.S. write me back and let me know what is going on and if you know of any more girls down there that want to write to a good looking male prisoner, I am willing."

(R.586). It is apparent then that in one letter he mentions Lisa, the woman he is supposedly obsessed with and then makes further inquiries to see if there are any other girls who might be interested because as he put it "I am willing" (R.586). These are the words of Mr. Pridgen himself not any opinion of some so-called expert interpreting his words or feelings.

It is noteworthy that Martha Jones testified as to her friendship with Mr. Pridgen that spanned several years (R.563) and that Mr. Pridgen had spoken of Darrell Meadows long before the time of this murder, (R.587) that Martha believed the appellant and Meadows were friends (R.588) and that Mr. Pridgen never indicated to her in any way that he was afraid of Darrell Meadows (R.587). Additionally, in one of his letters to Martha Jones prior to trial he wrote that his aunt had tried to bond him out "but I told her that money cannot get me out of this unless she pays someone to confess it" (R.583-585).

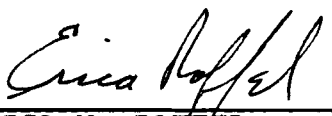
Appellee would urge that the appellant is guilty of this crime and his conviction is amply supported by the evidence. The penalty was imposed pursuant to a penalty hearing conducted in accord with the law, and in sentencing Mr. Pridgen the trial court considered and weighed all of the factors before it.

CONCLUSION

Based on the foregoing reasons, arguments and citations of authority, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

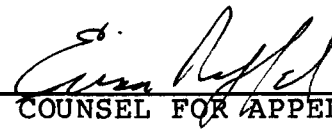


ERICA M. RAFFEL
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Steven L. Bolotin, Assistant Public Defender, Public Defender's Office, Tenth Judicial Circuit, Polk County Courthouse, P. O. Box 9000 - Drawer PD, Bartow, Florida 33830, this 23rd day of December, 1987.



OF COUNSEL FOR APPELLEE