IN THE FLORIDA SUPREME COURT

CHARLES LAMOND PRIDGEN, :

Appellant, :

vs. : Case No. 69,699

STATE OF FLORIDA, :

Appellee. :

:

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant, CHARLES LAMOND PRIDGEN, was the defendant in the trial court, and will be referred to in this brief as appellant or by his proper name. Appellee, the State of Florida, was the prosecution and will be referred to as state. The record on appeal will be referred to by use of the symbol "R". All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

A. Pre-Trial

Charles Pridgen was charged by indictment returned November 15, 1984 with first degree murder, robbery, and burglary (R5-6). At his first appearance hearing, the Public Defender was appointed to represent him (R3-4). On Thursday, January 17, 1985, appellant filed a pro se motion to discharge the Public Defender (R69-70). Aside from a few misspellings, the written motion is fairly well-written and restrained in tone. The following Monday, however, in open court, appellant launched into a torrent of obscenities and threats, to the effect that he was being abused by the guards and treated like an animal; and that he wanted to be put in the electric chair, and didn't want a trial (R72-73). Twice, appellant demanded that the judge put him in the electric chair right now (R73). After appellant was removed from the courtroom, the judge ordered a mental evaluation, and instructed Assistant Public Defender Shearer to remain as counsel (R74). Mr. Shearer told the court "By the way, when I

saw him Friday afternoon, he apologized to me, said everything was fine" (R74). Shearer speculated that "a lot of this grief comes from, like he says, the incarceration and the problems in there"(R74).

On February 15, 1985, the Public Defender was permitted to withdraw on the ground of conflict of interest (arising from his representation of a potential state witness)(R88,90). Attorneys Roger Alcott and Benjamin Fredericks were appointed to represent appellant (R90,99).

On March 27, 1985, upon defense counsel's motion, the trial court appointed Drs. Thomas McClane and Gary A. Ainsworth to examine appellant for the purpose of determining, inter alia, his competency to stand trial (R129-134). Dr. McClane reported that (despite the qualifications that appellant's motivation to help himself in the legal process, his ability to cope with the stress of incarceration, and his ability to manifest appropriate courtroom behavior were all somewhat questionable) he believed appellant was competent to stand trial (R1578-1579, see R966-977). Dr. Ainsworth, similarly, found appellant to be "marginally competent" to stand trial (see R1105,1107-1108). [In subsequent hearings concerning appellant's competency to stand trial in the penalty phase (May 23, 1985) and his competency to be sentenced (July 5, 1985), both Dr. McClane and Dr. Ainsworth stated that they now believed that their original (i.e., pre-trial) finding of competency was erroneous (R1050,1054,1108)].

In Dr. McClane's pre-trial psychiatric evaluation report dated April 17, 1985, he set forth the circumstances of the charged homicide (as related to him by appellant) as follows (R1574-1575): Appellant was picked up hitchhiking by a man named Darryl Meadows. The two of them talked about buying a chain saw and going into the tree business together. Appellant mentioned that Anne Marz (whom he had done work for previously) had a chain saw so they went to her home, but learned that she had sold it. Appellant and Meadows decided to meet the next day to discuss their business plans further. The following morning, Meadows told appellant that he had "killed that woman". When appellant told Meadows he didn't believe him, Meadows showed appellant a gun, and threatened to kill him and his family if he said anything to anyone. They then drove to the Marz residence; appellant went inside and saw her body lying on the floor. Appellant then returned to the car, whereupon Meadows asked him to cash the checks he had taken from the residence. Appellant was ready to do anything at that point just to get away from Meadows. Meadows repeated his threat to kill appellant if he didn't get the checks cashed or if he told anyone about the murder. Appellant was subsequently picked up by the police after another individual (Michael Turturro) attempted to cash one of the checks. When the police first approached him, it occurred to appellant that he could confess to the murder and have the state kill him in the electric chair (R1575). Accordingly, after his arrest, appellant made a confession to the police (R1575). Subsequently, Darryl Meadows was arrested for an unrelated offense, and confessed to Anne Marz' murder himself (R1575).

Dr. McClane's report states:

> BACKGROUND TO THE CONFESSION: Pridgen says, "I confessed to the murder for a purpose - to die in the electric chair - for 2 reasons: to show that the legal system is a bunch of bullshit and to let Lisa know what she has done to me".
>
> He states that he met Lisa Johnson and her mother when they started bringing things to the flea market where he worked with his mother approximately 11/83. She was about 17 years old at that time. He was quite attracted to her, and they talked daily, sometimes talking 4-5 hours on the phone. He says, "she looked up to me". He felt they became close friends. He shared many of his inner most thoughts with her. About 4 months after he met her he says, "I made a fool of myself by writing her a 5 page letter and then trying to contact her repeatedly to explain things". Apparently after the letter both Lisa and her mother cooled greatly in their relationship with Pridgen. He began to hate Lisa's mother for this. Friends would tell him that Lisa and her mother told them he had written "a bunch of filthy, nasty letters". He became extremely depressed about this. He states that he lost interest in things and "sold and practically gave away" his records collection and tree surgeon equipment. In approximately 4/84 he became acutely depressed when Lisa's mother would not let him explain himself. He then took 1/2 a bottle of his mother's sleeping pills and was hospitalized for 5-6 days at Winter Haven Hospital, signing out of the hospital against medical advice.
>
> Less than a month after he was out of the hospital he again took some type of pills and slept a lot for 3 straight days in a suicide attempt.

Two weeks after that he took a pistol from his sister's fiance's home, pointed the gun at his head, and attempted to fire it, but it didn't fire. He continued to feel suicidal after that and has felt suicidal intermittently ever since.

He has been so obsessed with Lisa and with the feelings of being rejected by Lisa and her mother that he has not been able to function well socially or vocationally since the spring of 1984.

He had sporadically attempted communications with Lisa between April and early June of 1984. In 6/84 Lisa and her mother left for several months. After her return he continued to attempt to communicate with her intermittently. The last communication was a phone call approximately 2 weeks before his arrest when Lisa hung up on him.

In approximately 8/84 he had told some friends and relatives that "I was thinking about killing this girl and her mother and then killing myself". He said his own mother talked to him for hours at a time trying to talk him out of such ideas. He says that he never was more than half serious about killing them but that he was quite serious about killing himself.

He says that in the late summer or early fall he spent 3 weeks in the Carolinas with an uncle working in an apple orchard trying to forget about Lisa and the feeling of rejection. He then spent about 2 weeks in Marion County Florida with another uncle trying to get away and forget it all.

He states that after his arrest it appeared to him that he could solve all his problems by confessing to the murder. He says he would then be put to death by the state, and Lisa and her mother would read about it in the newspapers and feel guilty. The third reason for confessing emerged later in jail when he wanted "to show that the legal system was a bunch of bullshit".

(R1575-1576)

Dr. McClane's report goes on to state that while in jail awaiting trial for the murder of Anne Marz, appellant continued to be obsessed with his rejection by Lisa. He was having dreams about her about every other night, and on several occasions dreamed about killing her mother (R1578). "He is also somewhat grandiose when talking of the book he is writing about the legal system and his case. He says it will be entitled Not Guilty and have a picture of the electric chair on the front of it. In the book he will tell 'what these 2 women have done' to him" (R1578). Appellant told Dr. McClane that he "had planned to hang himself in jail on Lisa's birthday which he believes is 4/12/85. He decided not to do so because he thought 'going to the electric chair would be more dramatic and have more effect on them'"(R1578).

In the section of his report entitled "Psychiatric Impression", Dr. McClane made the following diagnosis of appellant's mental condition:

> 1. Major depressive disorder with suicidal thoughts and previous suicidal attempts.
>
> 2. Mixed personality disorder with paranoid, borderline, narcissistic, antisocial, and dependent personality traits.
>
> 3. Possible underlying psychosis.

(R1579)

Dr. McClane did not find any evidence that appellant was insane, within the meaning of the M'Naghten rule, at the time of the alleged offense (R1579).

On May 14, 1985, appellant, through counsel, moved to suppress his confession to Major Grady Judd of the Polk County Sheriff's Department (R159). Following an evidentiary hearing on May 16, 1985, the trial court denied the motion to suppress (R238,241)[1/]

B. TRIAL

The case proceeded to trial before Circuit Judge Oliver J. Green, Jr. and a jury on May 20-23, 1985.[2/] The trial featured two mutually exclusive[3/] full confessions; appellant's in-custody statement to Major Judd that he killed Anne Marz, and Darryl Meadows' testimony in court that he committed the murder, and that appellant was only a reluctant accessory after the fact.

The direct evidence presented at trial can be categorized as follows: (1) appellant's tape recorded confession to Judd (R673, 1563-1573); (2) other inculpatory or possibly inculpatory statements made and letters written by appellant before and during the pre-trial proceedings (459-460,574-575,658-661,715-716) (3) appellant's testimony in

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1/ Facts relating to the motion to suppress are set forth in Issue I, supra.

2/ Due to the length of this brief, and since appellant does not challenge the legal sufficiency of the evidence, a detailed presentation of the trial testimony will be omitted.

3/ In other words, it was not merely a question of who was the "trigger-man"; in appellant's statement to Judd, Meadows is not even mentioned and apparently played no role in the crime, while according to Meadows' testimony, appellant was merely an accessory after the fact (with a possible defense of duress).

court explaining why he had confessed to a crime he did not commit[4], and stating that the murder was in fact committed by Darryl Meadows (R802-855); and (4) Meadows testimony that he, not appellant, committed the murder (R735-801). In addition, the state presented circumstantial evidence which, inter alia, placed appellant in Anne Marz' residence and put him in possession of the proceeds of the robbery (rings and checks). This circumstantial evidence was consistent with appellant's guilt, but was also recooncilable with his role as accessory after the fact as described in

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[4] Appellant testified that he gave the confession partly out of fear of what Meadows might do to his family, and partly because "I seen a chance to end it all, and I grabbed it" (R830, see R828-832). He testified, inter alia:

> Q. [by Mr. Fredericks]: And what was the other reason you made a statement?
>
> A. Out of love.
>
> Q. What do you mean by that?
>
> A. Since I've been in here, I have tried every way in the world to try to get these two ladies in the newspapers. I wanted them to know and always remember what they done to me. I want it on their conscience. I'm not in here for murder of Annie Marz. I'm in here because of what two red-headed women done to me.
>
> * * * * * *
>
> These -- these two women came into my life when I was minding my own business. They told me that they was in the entertainment business. They told me -- gave me the impression that they were glamorous and that they knew movie stars, things like that....

(R829)

Meadows' testimony and in appellant's trial testimony.[5]

On May 22, 1985, the jury returned a verdict finding appellant guilty as charged on all counts (R936-937).

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[5] According to Meadows, he had picked appellant up hitchhiking and they got to talking about going into the tree trimming business together. Appellant knew a lady [Mrs. Marz] who had a chainsaw, but when they got to her house, it turned out that she had already sold it. Meadows and appellant made plans to meet the next morning. When he got up that morning, Meadows decided to do a robbery, and chose as his victim the lady that Chuck [appellant] had gone to see about the chainsaw. During the robbery attempt, the woman began to scream. Meadows hit her, tied her up, and strangled her. He took some checks and rings, and then went to the convenience store where he was to meet appellant. Meadows told appellant he had killed the lady, and when appellant did not believe him, Meadows took him back to the house to see for himself. When appellant came back out of the house, Meadows pulled out the checks and told appellant to cash them for him, and also to sell the rings. Meadows threatened to kill appellant and his family if he refused, or if he told anyone about the murder. They set a date (either the next day or the day after) when they were supposed to meet back again at the convenience store, but when Meadows went by there at the appointed time, appellant was not there (R737-757).

C. Penalty Phase

The next morning the penalty phase began, with the following announcement by defense counsel:

> MR. FREDERICKS: Your Honor, I have discussed this with my client. He wishes to make a statement this morning but against my advice. He doesn't want me to put on any witnesses. We have witnesses here who are supposed to testify, but he does not want any put on, and he has insisted that I make no argument in his behalf.
>
> THE COURT: Would you wish for me to make inquiry of Mr. Pridgen?
>
> MR. FREDERICKS: Yes, sir.

(R940)

The following dialogue between the court and appellant then took place:

> THE COURT: Mr. Pridgen, may I speak with you a moment? Mr. Fredericks advises you wish to call no witnesses in your behalf. I am given to understand that you will testify; is that correct?
>
> MR. FREDERICKS: Yes, sir, he wants----
>
> THE COURT: That you will testify and that you wish for Mr. Fredericks to make no argument in your behalf; is that correct?
>
> MR. PRIDGEN: That's correct.
>
> THE COURT: Understanding that it's personal whether you have to explain your reasons, can you tell me why you have made those decisions?
>
> MR. PRIDGEN: Well, I've got some things I wrote here that I'd like to read out to not only you, but the jury.
>
> THE COURT: You'll be permitted to do that, but that doesn't answer my inquiry. Why do you not--
>
> MR. PRIDGEN: Oh, I see what you're saying.
>
> THE COURT: --why do you not wish to have witnesses called?

MR. PRIDGEN: What for? For somebody to beg for my damn life?

THE COURT: Pardon?

MR. PRIDGEN: Your Honor, I'm going to use this system for my own purposes just like I've been saying for the last eight months. That's all. No. Kill me.

THE COURT: All right. If--if you change your decision, you will be permitted to proceed without request to the Court, of course.

Now, Mr. Pickard, do you have--well, let me back up. Mr. Pridgen, I'm not sure there's any rule of law that governs this situation. The closest thing I can----

MR. PRIDGEN: Kill me.

THE COURT: Wait now, hear me out. The closest parallel that I can imagine would be not being represented at all, and under those circumstances it's necessary for me to determine whether you truly understand the consequences of your actions.

MR. PRIDGEN: Now you're concerned with the consequences of my actions?

THE COURT: Yes, you should be concerned with----

MR. PRIDGEN: I remember writing you a three-page letter stating that I did not want Larry Shearer as my attorney. Gave you some very good reasons why I did not want Larry Shearer as my attorney. You made a copy of that letter, sent it back with a little note attached to it stating that I want you two to kiss and make up: and now you're concerned about me? Kill me. I demand it.

THE COURT: Do you understand that your attorneys believe it would be in your interest to call favorable witnesses and for them to make argument in your behalf?

MR. PRIDGEN: No, I don't want nobody coming in here.

THE COURT: I know that's what you want to do, but I'm asking if you understand that that's what they believe? That they believe it would be best for you to take this approach?

MR. PRIDGEN: Right.

THE COURT: And the other side of that coin is obviously they believe your position will be worsened if you do not call witnesses in your behalf, and if they are not permitted to make argument in your behalf. Do you understand that?

MR. PRIDGEN: Your Honor, I was found competent by three doctors. I don't need a doctor no more. I asked for a goddamn doctor for the last 14 months. Kill me. I demand it.

(R941-943)

At the request of the prosecutor (who expressed concern about a possible claim of ineffective assistance), defense counsel profferred that Dr. Thomas McClane, a psychiatrist, was present in court and prepared to testify concerning appellant's emotional state during the last year (which included the date the crime was committed (R944)). Also present were appellant's mother, stepfather, and brother, each of whom would testify regarding appellant's emotional state during that year, and his background (R944). The trial court asked:

Mr. Pridgen, do you still wish for these witnesses not to be called?

MR. PRIDGEN: Kill me.

THE COURT: Pardon me?

MR. PRIDGEN: Kill me.

THE COURT: All right. Mr. Pickard, do you have your instructions?

(R944-945)

The state introduced into evidence certified copies of four prior convictions. One of these was for attempted robbery and larceny of an automobile, which took place in Lake County in 1975 (R952-953). The other convictions, which, according to the prosecutor, were being introduced not to establish an aggravating circumstance,

but to rebut the statutory mitigating circumstance of no significant criminal history (R953), were for grand theft (1981); dealing in stolen property (1982); and trespass and littering (1982)(R953-955). The state put on no further evidence in the penalty phase (R955).

Appellant then took the stand, and spoke to the jury[6/]:

> Mr. Pickard's correct. When I was 17, I done a robbery; and it was such a big joke, even the State Prosecutor in Lake County told me I should get in another line of work because I'm too kind hearted. But that was more than 11 years ago.
>
> I'm not going to sit here and argue the facts about this case, this present case. I'm going to--because you done found me guilty. As I told you before, that was my purpose.
>
> The question is: Did I really and truly murder Anne E. Mars? If I'm permitted, I'd like to go over some of this stuff real quick; and y'all can go ahead and sentence me to the chair and go home and--in Mr. Pickard's opening statement he said that lawyers have a bad habit of making the jury believe that they were at the scene of the crime, which they are not.

6/ Although it is often difficult to tell, the thrust of appellant's statement seems to be that he did not kill Anne Marz; the witnesses against him were lying, the police and the prosecution did a lousy job of investigating the case, etc. Yet at the same time, appellant also explained to the jury that it was his purpose to be found guilty of the crime, and that he was the one pulling everybody's strings in that direction from the beginning. The reason for all of these machinations, appellant explained to the jury, was because his life had been ruined by his girl friend Lisa, and her mother. Appellant concluded by telling the jury that he was capable of suicide but not of murdering an elderly lady; but since they had found him guilty, they had to put him in the chair. He told the jury that he was writing to the governor to demand his execution, and that he would ruin the career of any lawyer who touched his appeal.

Because appellant's mental condition at the time of the penalty phase is central to several of the key issues on appeal, and because the flavor of his statement is destroyed by paraphrasing, undersigned counsel believes it necessary to set it forth here verbatim, and in its entirety.

Also, Mr. Pickard has stated that he is going to produce overwhelming evidence against me. In reality, what Mr. Pickard produced is exactly what I wanted him to produce.

First, let's take a look at the physical evidence against Charles Pridgen. First of all, I want to explain what the term physical evidence means in our so-called criminal justice system. It means definite proof linking a person to a crime that he has committed.

Let's take a look at what is considered physical evidence. Let's say a murder. In a murder, blood type is usually taken from the victim and the suspect. That is considered-- that is considered physical evidence.

I guess you say a witness can be considered physical evidence because there's more than one man that's sentenced to die in the electric chair.

I get the impression that hair samples is physical evidence. I've seen and read about hair samples in murder cases. And in my murder case, there was plenty of hair taken off the top of my head; but it was never produced. I can't understand why.

Last and not least, fingerprints is definitely considered physical evidence. But in some cases, it can be very tricky indeed. Like my case, for instance, I stated that I had been in Anne E. Mars' home as a guest three or four times, but I wouldn't want you to just take my word for it.

I've got an eyewitness that seen me go in the house with Anne E. Mars to get a pitcher of water and two glasses. But because of the bizarre circumstances and how the criminal system operates, it would have done more harm to this witness by telling the truth. So, therefore, he had to lie.

Getting back to the physical evidence, blood type. My blood was not found anywhere in the Mars' home, and it's O type blood. And what Mr. Pickard said about the O type blood being there before the murder of Anne E. Mars, well, he was definitely insulting your intelligence, not to mention Darryl Meadows' type blood.

If Mr. Pickard can say that the O type blood was there, had been there, if I can remember correctly, Mr. Pickard said six months or maybe even a year, then why can't I say that the blood that was on my shirt and pants had been on there for five or six months before the murder of Anne E. Mars? I mean, doing tree work you do bleed a lot.

Hair samples was not mentioned and other eye-witnesses. Mr. Pickard is claiming that I came out of nowhere, walked into a subdivision in broad daylight without no one seeing me and robbing and smothering Annie Mars and then leaving by walking down the street.

Now, when I say this, I'm not incriminating myself, but the point I'm trying to make here is that someone had to see Meadows walk up to the Mars' home and then walk back down again. Same thing about myself.

I think I can explain this to a certain degree. After I had give my so-called confession, all police investigation concerning Anne E. Marz' death came to a sudden halt. Because of my hilarious confession and it being in the papers the next day, no one came forward. In other words, there is and never was any physical evidence.

Martha Jones says that I told her I did something that I could get a hundred years for. Remember in my jury room testimony he stated I was the number suspect at the time.

I was doing anything I could to make them believe me, talking about the signature of the check. For my understanding, Martha Jones was a suspect at one time, also. If Turturro can lie, why can't Martha Jones?

Mr. Pickard asked the jury what would Martha Jones gain by lying; and it is obvious, the same reason why Mike Turturro lied.

Martha was placed in jail for violation of probation and some other charges around January or February. She wrote me a letter telling me her charges and that the authorities had taken away her little girl named Karen and placed her with her ex-husband.

I wrote Martha a letter saying that if you would come down and do me a favor, I would do you a favor.

I went on to tell Martha that I was going to write some incriminating letters to her, that when she received them to hand them over to the authorities.

The purpose of this was two reasons, to help Martha Jones get out of her trouble, and to scare my former girlfriend and her mother. That was what I meant when I wrote them two redheads never really know just how close they came to dying.

I will explain that statement later, but I notice Mr. Pickard don't have the first letter that I wrote to Martha. She had gotten out of jail and about a month or two later, she called my mother and sister different times and made the statement that she was going to tell the truth about the stereo and the phony letters that I had written her. Then she came here to the jail to see me and told me that, also to tell me that also and asked me not to demand the electric chair. I assumed she was actually going to tell the truth.

My lawyers never told me that Martha Jones was indeed going to testify against me, using them letters. Come to find out, Martha had gotten herself into some more trouble since then, another violation of probation charge, forgery of checks and other charges; but Mr. Pickard has the nerve to look you--into the jury's eyes and ask what Martha Jones has got to gain by lying.

Like I said before, the man is playing with your intelligence. Martha Jones stated that I told her that Darryl Meadows and I used to work on race cars together two years ago. How is that possible when Meadows was in the State prison? And to be truthful, I never owned or worked on a race car in my life. Ask my mother or anyone else that knows me.

OK, Mr. Pickard will agree to this. Judge Green received a letter from an inmate by the name of Roland Hall.[7] Getting to the point of the letter, it stated that I told Roland Hall that in my mind, I didn't kill Anne E. Mars; I killed Carla Johnson, my girlfriend's mother.

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[7] Rollin Hall, although listed as a potential state witness (R85, see R88), did not testify at trial, nor was there any evidence concerning this letter.

I basically told him that--what I told Martha, that if he could say this, it would help him out of his prison term. But this guy got cold feet at the last minute. When my lawyer took his deposition, he claimed that he had lied, that Pridgen never really told me that.

I have approached several inmates with the same type of deal. I guess you are wondering what the purpose of all this is about. You see, to make a long story short, I fell in love with a girl named Lisa Johnson. Her mother didn't like me. She told--she told Lisa a bunch of lies about me, made the girl hate me. Together they teamed up and ruined my life.

Yes, I made a fool out of myself; but always remember, Lisa, when you lie about something, you always have got to remember what you lied about, or just hope that the person that you lied to has a bad memory.

I didn't get to finish this; and I can't say it because it's not that I'm nervous or scared, it's just that I've always been a shy person.

Yes, I've been in trouble with the law in the past, but actually strangling a woman and hitting her? Sure, I was depressed and took my own life, but it's a big difference taking your own life than to actually brutally murder somebody.

But, like I said, 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 and writing Governor Bob Graham demanding my execution.

(R956-963)

At the close of appellant's speech, defense counsel stated "[A]t the insistence of my client and against our advice, we are going to put on no additional evidence" (R963).

Following a brief bench conference, defense counsel requested the trial court to continue the penalty hearing in order to afford Dr. McClane an opportunity to evaluate appellant's competency, at this point in the proceedings, to stand trial and to assist counsel (R966). Dr. McClane had submitted a report, prior to trial, indicating that appellant was competent, through characterizing it as a "borderline call" (R966). According to defense counsel, Dr. McClane, having been informed of what had thus far transpired in the penalty phase, had some concern as to whether what was at one time borderline competency had degenerated to where appellant was no longer competent to assist in his defense (R966).

Appellant objected to his attorney's motion (R966-967). The trial court expressed the opinion that he had seen nothing to indicate appellant was insane or that he did not understand the proceedings (r967-968), but he allowed defense counsel to present testimony in support of his request for a further competency evaluation (R968). Accordingly, Dr. McClane took the stand and testified that he had examined appellant on April 17, 1985, and had concluded at that time that appellant was, on balance, competent to stand trial, even though there was some doubt in his mind with regard to several of the criteria (R870-872). Specifically, Dr. McClane had had reservations regarding appellant's ability to assist counsel, his ability to manifest appropriate courtroom behavior, his capacity to cope with the stress of incarceration, and his motivation to help himself in the legal process (R871). Dr. McClane continued:

> ...when his attorney described to me some of the events of today, I was--I only had a brief description, but it was enough to make me at least

> question whether this earlier considered marginal but competent to stand trial might have moved beyond what I would consider competent; but of course I couldn't express a really informed opinion on that without spending considerable time, an hour or so, with Mr. Pridgen again.
>
> MR. ALCOTT (defense counsel): Do you feel that given an opportunity to have a further diagnostic evaluation or interview with him you'd be in a position to render an opinion as to whether he has slipped into an area of incompetency to assist counsel and himself in his defense?
>
> DR. McCLANE: I think there is a reasonable probability that I could, yes. I can't guarantee that of course.

(R972-973)

On cross-examination, Dr. McClane testified that he believed that appellant's initial confession [to Major Judd] was the product of his psychiatric condition, and was motivated by depression and suicidal impulses, and:

> ...a rather grandiose idea that by getting himself a lot of publicity and getting himself killed, he could--killed, his words by the legal system as he put it, he could finally show his ex-friend, Lisa and her mother, the shame and humiliation they had put upon him, made him feel.

(R975)

In the April 17, 1985 (pre-trial) examination, appellant "still had a lot of ambivalence" about whether he wanted to maintain his guilt (as stated in his confession), or whether he wanted to testify to what he now told Dr. McClane was the true version, that the man who had picked him up hitchhiking (Darryl Meadows) had actually killed the woman (R975). At that time, appellant "described to me swinging back and forth in his own mind about whether he wanted to go through with this or whether he wanted to live bringing in the

importance of his -- his relatives and his mother and so on" (R975). Consequently, Dr. McClane continued, when he learned of appellant's behavior in the penalty phase, that he had refused any further help from counsel:

> ...I thought it was at least possible that this may have been a reversion back to what I thought what his motivation in the beginning of -- of simply wanting to get himself killed, not as punishment for a crime, but for basically neurotic motivation related to getting even with the girl and her mother, and motivated in part by his depression, wanting to get away from it all.

(R976)

In response to the prosecutor's query whether he would agree that there is "a difference between someone who is incompetent to assist counsel and someone who simply for his own personal reasons desires not to assist counsel", Dr. McClane replied:

> There may be, and at times there may not be. By that I mean, if someone's personal reasons were related to what I think may be going on with Mr. Pridgen, it could fill both of the points that you made. It would be his own personal reasons, but it would also be based on psychopathology.

(R977)

The proceedings were recessed until 1:00 p.m. to enable Dr. McClane to interview appellant (R978-981). When court reconvened, Dr. McClane resumed the stand, and testified that he had just spent an hour and forty-five minutes with appellant (R982-983). The interview was focused on what Dr. McClane considered the questionable areas of appellant's competency: specifically, his ability to assist his attorneys in his defense and his motivation to help himself in the legal process (R983). From this most recent encounter, Dr. McClane arrived at opinion, but stated "...I can't say it's to a criterion

of reasonable medical certainty. I still have some doubts" (R983). Dr. McClane testified:

> ...I believe it is possible under certain circumstances theoretically for a person to make a rational decision to die. But I believe that Pridgen's decision to quit trying on his own behalf during the last day or so is irrational and is the product of several factors.
>
> One, his previous obsession with his rejection by Lisa and her mother and his desire for revenge by making them feel guilty. Two, his resultant underlying rather severe and continuous, right up until the moment, of intermittently suicidal depression.

(R984)

Dr. McClane expressed the opinion that these factors were present during the guilt phase of the trial as well, and that appellant's reaction to the jury's verdict of guilty "when in fact he believes he was innocent and did not kill anyone", may have "possibly and even probably tipped this over the edge into substantial doubts about [his] competency"[8] (R984). Dr. McClane further expressed the

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[8] On cross-examination, Dr. McClane reiterated that appellant's reaction to the jury's verdict likely played a part in his present mental condition; "[n]ot just being found guilty, but being found guilty of a crime he believes he did not commit" (R991-992). In response to questioning by the trial court, Dr. McClane noted that prior to the time Darryl Meadows confessed to the murder of Mrs. Marz, appellant had steadfastly maintained his own guilt (R994). Once Meadows came forward, appellant "began to waiver back and forth about whether it was right for him to continue to -- this campaigning of letters and outbursts and maintaining his guilt" (R995). Ultimately, appellant testified at trial to the version which he had told Dr. McClane (in the April 17, 1985 interview, see R975) was the truth; i.e., that Mrs. Marz was killed by Darryl Meadows. According to Dr. MrClane, the jury's verdict "confirmed in [appellant's] mind that there was no chance, that all was over, that he had been unjustly adjudged guilty. And I think that supplied that -- the extra element to push him into total noncooperation. And, as I've said, marginal if not complete and unequivocal incompetence to be motivated to help himself and to assist his attorneys" (R995-996).

opinion that appellant had a serious mental illness, that he was badly in need of psychiatric treatment, that he was actively suicidal, and that he was "clearly civilly committable" (R985-986). Dr. McClane recommended that appellant be hospitalized for at least several weeks, for psychiatric treatment, medication, and counseling, with a further determination of competency to be made at that time (R986).

> MR. ALCOTT (defense counsel): In your opinion he is not rationally making decisions at this time?
>
> DR. McCLANE: That's my opinion, yes, sir, some kinds of decisions.
>
> Q. In decisions that would guide his attorneys in how to conduct his defense he is irrational?
>
> A. Yes, that's my opinion at this time.
>
> Q. And it is your opinion that he is probably incompetent, but you can't say to a medical certainty that he is?
>
> A. That's correct. Incompetent, I want to emphasize, I'm not talking about global incompetency. Incompetence in the sense of inadequately motivated to help himself and to assist his attorneys in his own defense on the basis of largely of mental illness.

(R986)

* * * * * *

> BY MR. ALCOTT (on redirect examination): Doctor, in other words, as I understand, it's your opinion at this time that he is probably incompetent and he is acting irrationally in terms of his decision making?
>
> A. Yes.

(R996)

Based on the testimony of Dr. McClane, defense counsel requested the trial court to continue the penalty proceedings, and to order either commitment of appellant or further psychiatric

evaluation (R1000-1001). Counsel argued:

> ...we believe there is a factual basis, expert opinion determination that my client is, one, irrational in his decision-making process at this time; and, number two, he's probably incompetent to assist counsel in his defense more likely than not. In other words, there is a probability that he is incompetent.
>
> There was an evaluation conducted under what I would term field conditions as opposed to a good clinical setting, but that's the determination that's been made on a preliminary basis. Now we have a factual basis for it.
>
> It's a very critical stage in the proceedings of this case that we're at at the present time. And I would submit to the Court that there has been a prima facie showing that my client is incompetent [to sit calmly][?].
>
> On that grounds, I am asking the Court to continue the proceedings, order the commitment of my client, or a committee of other general psychiatric persons in the community to make their evaluations and determinations so that we may proceed with the hearing when my client is competent to assist counsel.

(R1000-1001)

As a second ground for his motion to continue the proceedings, defense counsel asserted that because of appellant's "irrational behavior and medical testimony as to his incompetency and irrational decision making processes ... he does not now presently have effective assistance of counsel" (R1002), and that appellant's mental condition was operating to deny his Sixth Amendment rights (R1002). The prosecutor countered:

> The state does not believe the testimony of Dr. McClane establishes the man as incompetent, only that Dr. McClane has some doubts about his competency; and it appears to the State it's simply a case of an individual who simply has no desire to further participate in the proceedings and any further desire to assist his attorney simply because he got found guilty by the jury and not because of any great mental disease or

> mental defect that he has. And the State would request that the proceedings continue and that a recommendation be received from the jury this afternoon.

(R1002-1003)

Appellant said, "I agree with Mr. Pickard" (R1003).

The trial court thereupon announced:

> The proceedings will ensue. The proceedings will go forth with this caveat. If you wish to go forward with witnesses, we really are at that juncture, you may do so.

Defense counsel replied that he would like to go forward by presenting witnesses, but that appellant would not allow him to do so (R1003).

> That's the point where I'm at is I can no longer effectively assist. To that extent, I have conferred with Mr. Fredericks [co-counsel] and we would move to withdraw then upon the grounds that we can no longer render effective assistance of counsel because he in fact is not rational in his deliberations in conferences.
>
> THE COURT: Your motion is denied.

(R1003-1004)

After a brief recess, the trial judge inquired:

> Mr. Fredericks, what will you do?
>
> MR. FREDERICKS: Your Honor, we will be putting on no witnesses.
>
> THE COURT: No witnesses?
>
> MR. FREDERICKS: That's correct.

(R1004)

Following the prosecutor's argument to the jury seeking a recommendation of death (R1005-1013), defense counsel stated "Your Honor, at the insistence of my client and against my advice, we will offer no argument" (R1013-1014).

The jury returned a penalty recommendation of death, by an 11-1 vote (R1020,1032).

D. Post-Trial Competency-For-Sentencing Proceedings

The jury's penalty recommendation was received on May 23, 1985 (R1032). On May 28, 1985, the trial court, sua sponte, appointed three experts[9], Dr. McClane, Dr. Gary M. Ainsworth, and Dr. Henry Dee, to examine appellant with regard to his competency, prior to his being sentenced (R1033-1036).

D(1). Hearing of July 5, 1985

At the hearing on July 5, 1985, when asked if there was any reason why sentence should not be imposed, defense counsel asserted that the trial proceedings were tainted by appellant's incompetency, and therefore he had been denied due process (R1041-1042). The trial court stated that, at this point in time, he was only considering the matter of competency for imposition of sentence (R1042).

Dr. McClane testified that he first interviewed appellant on April 17, 1985 (R1046). At that time, Dr. McClane determined that appellant suffered from a major depressive disorder with suicidal thoughts and suicide attempts (R1047). These episodes began in

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9 / Dr. McClane is a psychiatrist who received his M.D. at the University of Florida and did his psychiatric residency at the University of North Carolina. From 1969 to 1980 he was a partner in the Watson Clinic in Lakeland, and thereafter has been a sole practioner in Tampa and then Lakeland (R1044-1045). Dr. Dee is a clinical psychologist who received his doctoral and post-doctoral training at the University of Iowa. He was a professor for several years, and has been practicing in Lakeland since 1973 (R1078). Dr. Ainsworth, a psychiatrist, is a graduate of the University of Michigan medical shcool, and did his three year psychiatric residency at Wayne State in Detroit (R1095-1096,1415). He served as a psychiatrist in the Army for two years, became a board certified specialist in psychiatry, and from 1975 to 1979 was chief of psychiatry at Polk General Hospital (R1096-1097). In that capacity, he did a substantial number of psychiatric evaluations in the judicial system, and has continued to do a lot of court work since entering private practice in Lakeland in 1979 (R1097-1098).

approximately April of 1984[10], when appellant became acutely depressed because of Lisa Johnson (R1047). He took half a bottle of medication, and was hospitalized for five to six days in the Winter Haven Hospital, signing out against medical advice (R1047). Within a month's time, he again attempted suicide by swallowing pills (R1047). On another occasion, at his sister's fiance's home, he pointed a pistol at his head and attempted to fire it, but it did not fire (R1047-1048). These self-destructive efforts were consistent with Dr. McClane's diagnosis of appellant's personality (R1048). In addition to the major depressive disorder, the other diagnostic impressions were "mixed personality disorder with paranoid, borderline, narcissistic, antisocial, and dependent personality traits" and "possible underlying psychosis" (R1048,1580, see R1579).

Dr. McClane next had occasion to see appellant on May 23, 1985 (in the midst of the penalty phase of the trial)(R1049). Dr. McClane was having increasing doubts about appellant's competency at the time, and was also beginning to question whether he had erred in his initial impression that appellant was competent to stand trial (R1050-1051). After interviewing appellant that afternoon, Dr. McClane testified as to his increasing doubts as to appellant's competency, and recommended that a more thorough evaluation, preferably in a hospital setting, be obtained (R1051). Subsequent to the completion of the penalty phase, pursuant to the trial

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[10] The homicide for which appellant was convicted occurred in October 1984 (R1-2,5); around the midpoint between the first suicide attempt and the interview with Dr. McClane.

court's order appointing three experts to determine appellant's competency to be sentenced, Dr. McClane re-examined appellant on June 13, 1985 (R1052). After this third interview, Dr. McClane felt pretty much the same way as he had during the second interview in the midst of the penalty phase (R1053):

> I was very concerned about his competency, I was concerned about his ambivalent ricocheting back and forth between positions declaring innocence and declaring his guilt. I was concerned about his somewhat grandiose and child-like attitude which seemed even more so than previously. And so ... my impressions of incompetence ... were somewhat intensified by the [interview].

(R1053).

When Dr. McClane was apprised of the results of the various psychological tests which were administered to appellant by Dr. Henry Dee, they "strongly supported my increasing impression that there was an underlying psychiatric process or thinking disorder going on" (R1054). Based upon all three examinations he had conducted, Dr. McClane was of the opinion that appellant was presently incompetent to stand trial (R1054). Further:

> MR. ALCOTT (defense counsel): You previously testified as to you may have erred in your original feelings of competency. At this point in time, do you feel you did?
>
> DR. McCLANE: Yes, I do.

(R1054).

As expressed in his report, it was Dr. McClane's opinion that Appellant "was probably incompetent to stand trial before and during his trial as well as now" (R1580).

The specific competency factors in which Dr. McClane found appellant to be deficient included his ability to assist his attorney in planning a defense, his ability to relate to his attorney adequately, his capacity to disclose to his attorney pertinent facts surrounding the offense, and his motivation to help himself in the legal process (R1055-1057, see R.1580-1581). Dr. McClane emphasized that appellant's deficiencies in these areas were the product of psychiatric illness, not rational decision-making (R1055-1057). McClane testified that "the most important effect of [appellant's] combination of depression, severe personality disorder, and psychosis -- marginal psychosis [a]ffected his motivation to help himself in the legal process. I think that's the one item in which he was most disfigured of the eleven" (R1057, 1581). Dr. McClane also believed that appellant's psychiatric problems led him to withold important information from his attorneys, and to distort what information he gave them (R1055-1056, 1581).

Dr. McClane concluded his testimony by recommending "that the Court give strong consideration to granting a mistrial on the basis of [appellant's] highly probable incompetence at the time of the trial. And I further recommend that he be committed so that he can have access to the psychiatric treatment he so desperately needs" (R1057, see R1582).

On cross-examination, Dr. McClane acknowledged (as he did in his testimony during the recess in the penalty phase) that the jury's guilty verdict may have had some influence on the deterioration of appellant's mental condition (R1066-1067). McClane believed that the process of the trial itself may have brought out

appellant's underlying (and pre-existing) psychiatric problems, and that particularly the depressive aspect would have been exacerbated by the jury's verdict (R1066-1067). However, Dr. McClane explained, "I don't give that paramount influence obviously or I wouldn't be expressing this opinion about his incompetence in retrospect, his competence to stand trial at the time of the beginning of the trial" (R1066). Dr. McClane testified that appellant had had problems for a long period of time, and that he [McClane] had failed to detect the full significance and intensity of these problems in his original evaluation (R1066-1067). All things considered, McClane continued, the jury's guilty verdict played " a part, but a small part" in appellant's mental condition during the penalty proceedings and thereafter (R1067). In Dr. McClane's opinion, "he was incompetent in the beginning and more so at the end of the trial" (R1067).

Referring to the original evaluation of April 17, 1985, Dr. McClane testified that one of the factors which contributed to his "slightly underplaying what I now believe was an important psychiatric process" was the fact that appellant had just been placed on medication in the jail (R1068). Appellant himself felt that he was getting a little better, and Dr. McClane thought that the medication was appropriate and that "the trend was toward improvement" (R1068-1069). However, contrary to Dr. McClane's expectation, appellant's condition appeared to get worse instead of better, and, by the time of the third interview on June 13, 1985, his grandiose attitudes had perhaps even intensified somewhat (R1069-1070). Dr. McClane explained:

> By grandiose, I'm talking about fantasies about how important all this was going to be and how he was going to show everybody by his death, most particularly Lisa and her mother, how -- how wrong they had been; grandiose in the sense that he -- I think very unrealistically by -- by the tone and the whole interview context, expected to accomplish something very important by this. It was grandiose in the sense of expected to write a book which was going to make a lot of money and have a major impact on particularly these two women, but on society in general.

(R1070, see R1518-1582).

To the prosecutor's question, "Do you feel he could assist his attorneys if he had a desire to do so", Dr. McClane replied "[T]hat comes out to be a kind of play on words --- because I think his psychiatric problem specifically impairs his desire to do so" (R1073). The prosecutor also referred to certain language in Dr. McClane's most recent report in which he referred to appellant as a "rather clever but deeply disturbed man of somewhat limited intelligence" who had manipulated various persons involved in the investigation and the trial (R1073-1074, see R1582). The prosecutor asked whether it was possible that appellant's lack of cooperation with his attorneys "is just another indication of his attempting to manipulate the system?" (R1074). In response, Dr. McClane emphasized that he was not using the term "manipulate" in the sense of a rational manipulation, but rather, appellant's behavior throughout the course of the proceedings, while it could indeed be characterized as manipulative, was "inspired by psychotic thinking" (R1074-1075).

Dr. Henry Dee first examined appellant on June 3, 1985 (R1079). He interviewed appellant for about two hours, and ad-

ministered a variety of mental and psychological tests, which took another six hours (R1080-1082). Based on the tests and interviews, Dr. Dee reached the opinion that appellant was presently incompetent, and had been incompetent at the time of the trial (R1085). Dr. Dee testified that appellant suffered from a psychotic disorder (R1084, see R1585-1587). Appellant's reality testing capacity, even under the best of circumstances, was marginal (R1083). In any situation involving emotional stress, Dr. Dee continued, appellant's reality testing capacity was defective (R1083). "Therefore, his social judgment will frequently be poor and his behavior will sometimes be inappropriate, inexplicable to those around him" (R1083). He is essentially withdrawn from social contact (R1083). His thinking is disorganized, abnormal in structure, and characterized by neurotic delusions (R1083-1085). Asked whether appellant has the capacity to rationally deal with reality and factual situations, Dr. Dee replied that he is able to do so only on the simplest level; in the sense of taking care of himself, preparing food, and "perhaps even carrying on very simple non-commanding tasks" (R1084). On the other hand, Dr. Dee continued, in terms of realistically meeting society's demand for performance, or adjusting in a normal way to the social life, or establishing any kind of intimate or realistic interpersonal relations, the answer was no (R1084). In Dr. Dee's opinion, appellant's psychological disturbance has been present since early adolescence, or perhaps even before (R1085,1587).

Dr. Dee testified that, because of their social withdrawal and peculiar behavior, people with appellant's kind of

emotional disturbance frequently have very poor occupational histories and are unlikely to maintain any reliable, gainful employment (R1086). With regard to interpersonal relationships they

> ...first of all, will be rare; and secondly, marked by a peculiar kind of intensity because they are so infrequent. That is to say, he will attach importance to the few interpersonal contacts that he has and because his judgment is defective and his reality testing is poor, he will make judgments about these relationships that are quite unrealistic.

(R1086).

Specifically, this was true of appellant's one-sided relationship with the young woman (Lisa) he was in love with; it was "marked by poor judgment, inaccurate assessment of her feelings, inappropriate feelings in a family which ultimately led to rejection of him by them" (R1086). According to Dr. Dee, appellant's relationship with Lisa was largely a fantasy to begin with (R1587). [Apparently, she never even went out with him, although appellant told Dr. Dee that they would talk for hours each day on the telephone (R1587)]. Appellant is "genuinely obsessed" by Lisa, and her continuing rejection of him is a source of intense pain (R1587). As a result he has aggressive impulses against her which he cannot admit to himself. "Thus, he tends to direct his aggressive impulses towards himself, and this is in part what underlies his desire to die. If he cannot have her, he wants to die both to end his pain and to demonstrate to her his love for her" (R1587). Dr. Dee concluded his testimony on direct examination:

MR. ALCOTT: Do you feel that he had or presently has the ability to rationally assist his counsel in any court proceedings?

DR. DEE: I believe that Mr. Pridgen does not have that capacity because of the mental disturbance, and in fact, I believe him to be motivated to do the opposite.

Q. Okay. Would his self-destructive tendency be consistent with your evaluation?

A. Oh, yes. Yes, it is -- it is quite evident. In fact, statistically speaking if you just look at the personality profiles, it shows 40 percent of these have repeated suicide attempts and that's common. He is motivated to destroy himself because of his inaccurate and peculiar assessment of his relationship with this young woman.

Q. From your evaluation and history of Mr. Pridgen, were you able to determine whether there is a pattern of suicide attempts or efforts predating the trial of the cause?

A. Yes, there have been.

Q. In your report you indicate that the mental illness presently being suffered by Mr. Pridgen is one of the most severe forms; is that correct?

A. Yes.

(R1087, see R1588).

On cross-examination, Dr. Dee stated that one aspect of appellant's incompetency is that his self-destructiveness is of such intensity to cause him to willfully destroy his own defense by changing his stories, misleading his attorneys, not correcting inaccurate impressions, and so forth (R1090). "[It] is a willful design on his part as a result of his mental disorder" (R1090).

Dr. Dee further testified that appellant, as a result of delusional thinking, has an exaggerated idea of his importance, his competence, his social skill, and an impaired understanding of how other people perceive him. "I think he thinks himself, for example, as a very sophisticated, intelligent, competent person who is effective at pulling off what he wishes in the world[11/]. Probably nothing could be further from the truth" (R1089, see R1585). Interestingly, Dr. Dee described appellant as "naive, rather artless in his approach to others, and ... unskilled in analyzing the motives of others, thus poor at manipulating them (no matter what he fancies)" (R1585-1586).

Dr. Dee expressed the opinion that, in appellant's peculiar thinking, his execution:

> ... will demonstrate to this young woman in a way that I fail to understand, but it will demonstrate to her somehow his worth about his love for her and teach her that she should have treated him differently.
>
> MR. PICKARD [prosecutor]: Sort of getting even with somebody?
>
> DR. DEE: Yes. In what -- becoming interpunitive, punishing one's self rather than punishing someone else basically because punishing the other is an unacceptable thought at times. He entertains real thoughts on punishing her.

(R1092).

11/ In this regard, note appellant's remarks to the jury in his statement in the penalty phase - "I'm not going to sit here and argue the facts about this case, this present case. I'm going to -- because you done found me guilty. As I told you before, that was my purpose" (R956). "Also, Mr. Pickard has stated that he is going to produce overwhelming evidence against me. In reality, what Mr. Pickard produced is exactly what I wanted him to produce" (R956).

On re-direct, Dr. Dee testified:

> Q. [by MR. ALCOTT]: And you feel this psychosis has been with [appellant] for some period of time?
>
> A. I do, yes.
>
> Q. Even predating the trial phase of this --
>
> A. By years.

(R1094-1095).

Dr. Gary Ainsworth initially interviewed appellant on April 10, 1985, prior to trial (R1100). At that point, he didn't feel that he had made a complete evaluation, but if pressed he would have said that appellant was incompetent (R1100). A second interview took place on April 16, and at that time appellant was able to provide what Dr. Ainsworth felt was a more realistic account of the circumstances of the case (R1101-1102,1113,1125,1127-1129). Asked whether he found any mental disorders or psychosis in the second evaluation, Dr. Ainsworth answered "Yes. The diagnostic impression did not change in the second interview" (R1102). According to Dr. Ainsworth, the closest label for appellant's psychiatric problem is that of "borderline personality disorder" (R 1102,1590). As did Dr. Dee, Dr. Ainsworth emphasized that appellant's mental disorder is a serious, and not a minor, diagnosis (R1107, 1590). According to Ainsworth, appellant "suffers from a severe mental illness which, although classified as a personality disorder, involves a distortion of reality of psychotic proportions" (R1592, see R1104).

On the basis of the April 16 evaluation, Dr. Ainsworth concluded that appellant "would be considered marginally competent

but more competent than not to appear before the Court" (R1107). At that time, Dr. Ainsworth had qualified his opinion by noting that appellant's motivation to help himself in the legal process and his capacity to manifest appropriate courtroom behavior were both questionable (R1107-1108). Dr. Ainsworth also recommended that an extra dose of anti-psychotic medication prior to appellant's giving any testimony would definitely help his behavior[12] (R1108, see R1114-1115,1127).

After the completion of the trial and penalty phase, pursuant to the trial court's order, Dr. Ainsworth evaluated appellant a third time on June 11, 1985 (R1102). Based on this examination, Dr. Ainsworth concluded that appellant was presently incompetent (R1108). Moreover, like Dr. McClane, Dr. Ainsworth came to believe that his original opinion (that appellant was marginally competent) was erroneous, and that appellant was in fact incompetent prior to trial (R1106-1108,1114-1115).

Dr. Ainsworth testified:

> [T]he diagnosis of Mr. Pridgen is not a -- a minor one. There is a tendency within -- in most people to hear the words borderline personality disorder and think, well, that's every other antisocial, passive aggressive. But it's really not.
>
> It's an increasingly common problem and it -- it involves at times regression in behavior, in effect, and other relationships to very early levels of -- of life. And at times it involves psychiatric

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12/ At the hearing, Dr. Ainsworth testified that he did not know whether this was done or not (R1108,1115).

episodes. So, it's not a minor diagnosis, but there's a tendency in the legal system to see it as such.

(R1107).

The "classic defenses of the borderline", Dr. Ainsworth testified, are splitting and projective; appellant manifested both of these (R1121, see R1590-1591). Splitting refers to the mechanism of seeing other people as either all good or all bad; "[w]e most frequently see it in our children, like, when they're throwing a temper tantrum at the age of two or three" (R1122). In healthy adults, this mechanism is no longer present, and they are able to see shades of gray in people (R1122). When Dr. Ainsworth examined appellant, for example, "he virtually idolized this particular girl that he was seeing. On the other hand, he had painted all black the girl's mother". (R1122). Projective identification is an ability and propensity of borderline individuals, partly on an unconscious basis, to manipulate other people to cause them to respond emotionally (R1123). "An example might be the patient who in numerous and subtle ways basically says, help me. And then, on another level, says, but I'm not going to let you help me because anything you say is wrong" (R1123). In the legal context, a client acting in this manner may frustrate or impair his attorney's ability to act in the client's best interests (R1123-1124). Appellant's ability to assist counsel was also impaired by his self-destructive tendencies (R1116-1118,1120); his instability of mood and affect (R1120-1121); and his "acting-out" behavior, for example, the various outrageous or threatening letters appellant sent to the

judge, to his attorneys, and others during the time he was incarcerated prior to trial[13] (R1117)

In his report, Dr. Ainsworth stated:

> The defendant continues to maintain (basically a delusion) that he is "using the system for his own purposes". Specifically, the defendant remains convinced that his death would obtain revenge for his unrequited love for a young girl as well as revenge at the legal system, "To be proven guilty by executing a man who had confessed but was not guilty."
>
> In fact, the defendant already fancies himself to be residing on death row and vows that when there, he "will write to Governor Graham - say, I'm the one who fucked your wife two days before I was jailed". Mr. Pridgen's grandiosity has increased if anything, and has been fed by newspaper publicity. Unlike in my second interview with the defendant, he again is not able to appreciate the finality of his own death and at least on one level views his participation in the legal process as an exciting game.

(R1590).

Dr. Ainsworth testified that, prior to the hearing, Drs. McClane, Dee, and himself had contacted both attorneys and asked if they could have a joint meeting; "[we] had hoped that we could get both attorneys present and discuss our concerns with them because we all had the same concerns" (R1119, see R1580 (McClane's report)). Each of the three experts had reached his opinion independently, before the meeting took place (R1119-1120).

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[13] See, for example, R715-716 (the so-called "Hitler" letter to Judge Green); R658-661 (letters from appellant to jail nurse Nancy Gandy). See also R72-74 (appellant's obscene outburst at pre-trial hearing of January 21, 1985), and compare with R69-70 (written pro se motion to dismiss Public Defender, dated January 17, 1985, and notable for its relative calmness and restraint).

Following Dr. Ainsworth's testimony, appellant's mother, Velma Julian[14/], was called to the stand. She testified that in April of 1984 (six months prior to the homicide, and a year before the trial and penalty phase) appellant was hospitalized after a suicide attempt (R1134). His condition was bad; "[t]he doctor said if we hadn't been there, he would have died" (R1134). This was not the only occasion on which appellant had attempted suicide (R1135).

Ben Fredericks, appellant's lead trial counsel, testified that during the sentencing portions of the trial, appellant would not communicate with him at all (R1136-1137). Asked by the prosecutor if he knew whether appellant's refusal to communicate with him was due to mental problems or "just simply a lack of desire on his part", Fredericks answered that he would be speculating as a layman if he tried to answer that question (R1137).

At the conclusion of the hearing, the trial court denied the motion to set aside the verdict and the penalty recommendation, and specifically found that appellant was competent for purposes of both the trial and the penalty phase (R1146,1151). However, the trial court continued:

> Be that as it may, having ruled that he was competent during these proceedings, the sole evidence before me is that he has deteriorated. Dr. McClane gave a stronger offering about deterioration at the first proceedings. In fact, it was this trend of deterioration that

[14/] Transcribed inaccurately as Bella Julian.

> persuaded me not to reopen or to open up or extend, whichever might be correct, the bifurcated proceedings.
>
> Be that as it may, my present order is that he be transferred to Florida State Hospital and then --
>
> DEFENDANT PRIDGEN: For what?
>
> THE COURT: -- and there examined with appropriate reports being sent here and that he be treated if treatment is necessary and predictably following treatment, sentenced.
>
> DEFENDANT PRIDGEN: Come back and be killed.
>
> THE COURT: Mr. Alcott, I'm not certain whether this is an appealable disposition.
>
> DEFENDANT PRIDGEN: There's not going to be no appeals, Clone.

(R1146-1147)

Interspersed with further remarks by appellant, the trial court announced that he was finding appellant incompetent to be sentenced, primarily on the basis of his inability "to consult with his attorney with a reasonable degree of rational understanding to assist in his own defense ... at sentencing" (R1147-1149,1152).[15]

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[15] In his order committing appellant for treatment at the Florida State Hospital at Chattahoochee, the trial court set forth the sequence of events, in pertinent part, as follows:

> 3. The case proceeded to trial and defendant was found guilty of all counts. In the penalty phase of the trial the jury recommended the death penalty.
>
> 4. Prior to sentencing, the Court was advised by defense counsel that he had a concern as to the defendant's present

FOOTNOTE CONTINUED ON NEXT PAGE

Appellant closed the proceedings with the following statement:

> DEFENDANT PRIDGEN: Remember, in a letter I wrote about three days ago, there ain't nothing you can do about it, Mr. Pickard knew about it, Mr. Grady Judd knew about it. And when it happens and when the newspapers pick up on it, I'm going to send you a copy of it. You remember that, Mister. You remember that. That makes you accessory to murder because I told you about it.

(R1149)

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15 / FOOTNOTE CONTINUED FROM PREVIOUS PAGE

> competency. The Court appointed Dr. Ainsworth, Dr. McClane and Dr. Henry Dee to examine the defendant for competency to be sentenced.

(R1151)

In actuality, the Court was repeatedly advised of defense counsel's concern as to appellant's present competency during the penalty phase (R966-968),998,1000-1002,1003-1004), before the jury retired to deliberate. In support of his motion to continue the penalty proceedings for a full evaluation of appellant's present competency (R1001, see Fla.R.Cr.P. 3.210,3.211), defense counsel presented the testimony of Dr. McClane to the effect (1)that appellant was probably incompetent at the present time (i.e., the time of the penalty phase), though McClane could not at that point say so to a medical certainty (R983-986,992,996), and (2)that, perhaps as a consequence of his reaction to the jury's verdict, coupled with his underlying long-standing suicidal depression and his obsession with making Lisa and her mother feel guilty for rejecting him, appellant's mental condition appeared to have deteriorated between the end of the trial and the beginning of the penalty phase, and possibly pushed him over the edge into incompetency (R972-973,984-985,991-992,995-996).

The trial court's order, entered less than a week after completion of the penalty phase and reception of the jury's death recommendation, appointing the three experts to examine appellant for his competency to be sentenced appears to have been entered sua sponte (R1033).

D(2). Hearing of November 12, 1985

At the next competency hearing, held on November 12, 1985, the court heard the testimony of the same three doctors (each of whom had re-examined appellant within two weeks of the hearing), as well as that of Debra Roman, a master's degree psychologist employed by the Florida State Hospital (R1166-1167,1178,1187-1188,1197-1198). Dr. Dee testified that appellant's mental condition was essentially unchanged (R1168). His mental processes are chaotic and contradictory; he is delusional about his importance and his impact on society; and he is impaired in his ability to relate to reality (R1168-1169). Dr. Dee stated that appellant continues to suffer from "a very severe disorder which I think would be characterized as psychotic, specifically a paranoid schizophrenic type" (R1169).

Appellant, according to Dr. Dee, is not only unmotivated to help himself in the legal process, but in fact is motivated by his mental disorder to do just the opposite (R1169,1172-1173). Dr. Dee pointed out that appellant "continues to be obsessed with -- rather than the case that's before the Court -- the same issues that he was obsessed with before" (i.e., Lisa and her mother), "and he's even contradictory about that" (R1169). "He tells me that he wants to die then tells me he wants to live to write this book to show the legal system he's competent. In short, no change. I find no difference than four months ago" (R1170). Dr. Dee was of the opinion that the most relevant treatment for appellant would be psychotropic medication (R1173-1174). Up to the present time, while at Chattahoochee, appellant either had not been given, or had refused to take, such medication (R1173).

On both direct and cross-examination, Dr. Dee was asked whether he agreed with the findings in the report from Florida State Hospital, signed by Debra Roman, M.S. (P1168-1171,1175-1176). Dr. Dee stated that he agreed with the diagnosis contained in that report (major mental disorder, specifically, schizophrenia, paranoid type), but that he did not agree with Ms. Roman's conclusion regarding competency (R1169-1171,1175-1176). In addition, Dr. Dee did not agree with Ms. Roman's description of appellant as an "intelligent, cunning individual" (R1170,1175). While appellant gives the appearance of being more intelligent and resourceful than he actually is, his IQ (based on two separate tests administered by Dr. Dee) was in the range of 75-76, placing him in the lowest eight or nine percent of the general adult population (R1170,1174-1175). Dr. Dee did not believe that appellant was feigning his mental disability; in fact, appellant himself has insisted from the beginning that he is competent and always has been (R1171, see R1170).

Dr. Ainsworth testified that, in his opinion, appellant's competency to be sentenced might depend on whether or not the eleven factors enumerated in Fla.R.Cr.P. 3.211 (for determining competency to stand trial) remained applicable in determining competency to be sentenced (under Fla.R.Cr.P. 3.720(a)(1) and 3.740) (R1180-1185). If the eleven points were considered, then the factors relating to appellant's ability to assist his attorneys would be somewhat doubtful, and "[his] ability to look out for his own best interest in the legal system ... would be questionable because of his obvious psychopathology" (R1181-1182). Conversely, if the test were a cognitive one - whether appellant is aware of what is occurring, of what he's charged with, of what the possible penalties are - then, in Dr. Ainsworth's opinion,

he was more likely than not competent to be sentenced (R1183-1184). Dr. Ainsworth was inclined to agree with Ms. Roman that the latter standard was more appropriate at this point in the proceedings (R1183). However, he did not agree with Ms. Roman that appellant is an "intelligent, cunning individual", though he did not believe he was retarded (R1185-1186). Dr. Ainsworth believed that appellant's intelligence was probably in the average range, but that his psychological problems tended to interfere with the results of objective testing, causing him to score below average (R1185). According to Dr. Ainsworth, appellant

> ... does consciously usually try to do the best thing for himself. The problem is that very often Mr. Pridgen's psychopathology gets in the way of that such as when he goes into tirades, dwells on obsessive thoughts that are designed to irritate other people. He's not always doing that consciously.

(R1186).

Dr. Ainsworth was of the opinion that appellant's mental condition was unlikely to improve, given his refusal to take psychotropic medication; and wondered aloud why the hospital officials had not applied to the Court for an order authorizing them to give medication to appellant involuntarily (R1182).

Dr. McClane, like Dr. Dee, agreed with the hospital's psychiatric diagnosis, but disagreed with their conclusion that appellant was competent to be sentenced (R1188-1191,1193-1195). In Dr. McClane's most recent interview with appellant, as previously (but with even more vehemence and hostility), appellant was preoccupied with the girl (Lisa) and her mother, threatening at one point to kill them, and then, retreating, saying "I couldn't really kill them, but I can have it done, but I wouldn't want to be present" (R1191-1192).

Dr. McClane noted that, in Ms. Roman's report, she indicated that for the first several weeks appellant was compliant in taking psychotropic medication, but then began to refuse it (R1192-1193). In McClane's opinion, such medication was appropriate and necessary to possibly restore appellant to competency, and appellant probably should have been forced to continue the medication (R1192-1193).

Debra Decker Roman is a psychologist at Florida State Hospital[16] (R1197). In that capacity, she is responsible for doing the initial psychological assessments for all new patients in one of the hospital's two admission wards (R1198-1199). She works with a multidisciplinary team in developing and implementing treatment strategies for patients, and she is also responsible for doing court ordered evaluations (R1199). Ms. Roman has conducted an average of five or six competency evaluations per week during the 21 months she has been employed at Florida State Hospital; she has submitted written reports to courts in 15 to 20 counties throughout the state, and has testified as an expert witness in three counties (R1199-1200).

During appellant's hospitalization, Ms. Roman met with him on some 10 to 15 occasions, for a combined total of about 10-15 hours (R1204-1205). Asked her opinion of appellant's mental condition, she replied that that gets very complicated because appellant suffers

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[16] Ms. Roman received her bachelors and masters degrees from the University of Central Florida (R1198). While in school, she worked full time as a psychiatric technician in a general hospital, and interned in a family counseling center and a drug rehabilitation program (R1198). Before taking her current position at Florida State Hospital, she spent a year as a treatment counselor in a work release center in Orlando (R1197-1198).

from not one disorder, but from "a conglomeration of psychopathology" (R1208). According to the results of the MMPI[17] which was administered to appellant, "it indicates rather strongly that he does have a psychotic disorder, namely schizophrenia, which is characterized by paranoid and grandiose delusions, poor reality testing, perturbability, and impulsiveness" (R1208,1595). Similarly, the Rorschach test strongly indicated a psychotic disorder (R1210,1595). The form quality on the Rorschach was very poor, "suggesting a rather tenuous grasp on reality and an inability to perceive the environment the way others do" (R1210,1595). At various points in her testimony, Ms. Roman made it clear that appellant "definitely" suffers from a psychotic condition, and that his mental illness is both serious and genuine[18] (R1208,1211,1215,1217,1225,1234-1236).

However, according to Ms. Roman, the tests indicated that appellant not only meets the diagnostic criteria for the psychotic disorder of paranoid schizophrenia, he also has two pre-existing personality disorders; specifically, antisocial personality disorder and borderline personality disorder (R1208-1209,1211-1216,1596). Ms. Roman testified that, with people who are "grossly" or "floridly" psychotic, the psychosis essentially obliterates their pre-existing personalities, but that this was not the case with appellant (R1209). The fact that appellant's "premorbid character comes shining on through" in the test results indicated to Ms. Roman that appellant

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[17] Minnesota Multiphasic Personality Inventory

[18] She testified, inter alia, "Well, I believe -- first of all, Mr. Pridgen has a genuine mental illness. There's no doubt about that; and I don't think he's malingering that at all, and, in fact, he would deny that he has that mental illness (R1234).

is "a well organized paranoid schizophrenic" whose underlying character is still very much present and influencing many aspects of his behavior (R1209-1210). This circumstance, Ms. Roman continued, was significant in her ultimate conclusion that appellant was competent to stand trial (R1210).

Ms. Roman described appellant's obsession with Lisa Johnson as a "classically borderline reaction" to her rejection of him (R1214). It is characteristic of persons with borderline personality disorder that they form very intense (if one-sided) interpersonal relationships, and they perceive other people in black and white terms. (R1214):

> He formulates very intense feelings towards her that don't seem to have any basis in reality. He decides that she is the answer to all of his dreams. She is the one person that can help him put his life together. She becomes almost a saint to him. Then when she rejects him after what appears to be a rather casual relationship to begin with, Mr. Pridgen reacts in typical borderline fashion which is now she's all bad. She's terrible. She doesn't even deserve to live.
>
> Mr. Pridgen's reaction to the rejection by Ms. Johnson is also caused in part by his psychotic disorder, namely, the paranoia that is associated with that psychotic disorder. He perceives her as not only -- he doesn't see it realistically. The reality being that it was a fairly casual relationship to begin with, and she simply didn't want to have anything more to do with him.
>
> He perceives this as an attack on his manhood. He perceives other individuals as plotting against him, conspiring to make him look foolish. He really blows it out of proportion which

> is partially due to the borderline features of his character, but they are also partly due to the psychosis.

(R1215-1216).

When first interviewed by Ms. Roman following his admission to the hospital, appellant

> ... readily volunteered information regarding his legal situation, informing me that he did not commit the crimes but confessed to them hoping that he would get the death penalty, thus attracting attention to his plight and making his would be girlfriend (Lisa Johnson) feel guilty about her rejection of him. He seemed to relish the publicity that his case had generated thus far and he offered to share newspaper clippings on his case with me on several occasions. There was both a paranoid and grandiose flavor to many of his observations. He clearly felt as though he had been mistreated [by] Ms. Johnson and his animosity towards her was inappropriately intense. Ego inflation was seen in his assertions that he would gain national attention by writing a book exposing the inadequacies and injustices of the legal system to the world. In short, although Mr. Pridgen appeared superficially well organized, his highly unrealistic and illogical perceptions strongly suggested the presence of an underlying psychotic disorder.

(R1595)

Similarly, in his most recent interview with Ms. Roman, appellant "likened himself to such notorious criminals as Gary Gilmore and Son of Sam, asserting that it was reasonable to expect his case to generate the same extensive publicity as these cases. He noted that many attorneys in the Polk County area were clammering (sic) to handle his case as such an honor was sure to bring them publicity and thus financial success." (R1597). Appellant showed Ms. Roman a newspaper clipping about the murder of a red-

headed woman in Tennessee, and told her he intended to confess to this crime (and others) when he returned to jail, as this would be a good way to attain additional publicity which would help him in his cause (R1597). "In fact he seemed to be of the belief that he was already a very important individual and his desire to attract attention and appear important seemed to be at the root of many of his plans" (R1597).

In Ms. Roman's opinion, appellant was competent to be sentenced (R1216-1217,1224-1226). While she agreed with the community examiners (McClane, Ainsworth, and Dee) that appellant has a serious mental illness (R1235), she felt that much of his behavior was the product of his antisocial character disorder more so than the psychosis (R1210-1211,1234-1237,1241). For example, with regard to appellant's inability or refusal to cooperate with counsel, Ms. Roman testified:

> It is only partially because of mental illness. It is largely because of his character disorder. Certainly his mental illness has some fact, namely that he is very grandiose and arrogant, and that's a result of his paranoid schizophrenia, but I think largely the reason that he behaves as he does is because of his character disorder which is not a mental illness per se.

(R1236).

Ms. Roman also noted that "because [appellant] is psychotic, he has a tendency -- he has a very exaggerated opinion of himself in his ability to handle his case himself." (R1217).

While she did not believe that appellant was feigning or malingering his mental illness (R1234), Ms. Roman was of the opinion that much if not all of appellant's behavior, including his non-cooperation with his attorneys, his outbursts and tirades, and his

insistence on receiving the death penalty, was calculated with the intention of delaying the proceedings, provoking a mistrial, setting up issues for appeal, getting placed in a hospital rather than prison, etc (R1218-1220,1224-1225,1233, see R1598). And, Ms. Roman added, in her opinion appellant had been largely successful in those efforts (R1218-1220,1233,1235-1236,1598). Moreover, Ms. Roman was of the opinion that, notwithstanding his "adamant insistence that he be given the death penalty", appellant does not really wish to die (R1221-1223,1239-1241). If appellant had truly wanted to kill himself after his rejection by Lisa, he had ample opportunity to do so (R1221-1222,1239,1598-1599). In Ms. Roman's opinion, appellant's reported suicide attempts, including the one where he was hospitalized in Winter Haven, were attention getting devices designed to make people -- particularly Lisa -- feel sorry for him (R1221-1223,1239-1241,1599). Similarly, Ms. Roman continued, appellant had failed to take advantage of available opportunities to kill himself in the jail or in the hospital (R1222-1223). What appellant really wants is anything that will reaffirm his delusional beliefs, and to attract attention to himself (R1223). "If you look at Mr. Pridgen's behavior in the hospital, he, as you all realize, is prone to bombastic outbursts, and he frequently made threats that he was going to kill himself. He was going to starve himself. He was going on a hunger strike. Typically all he did was refuse breakfast" (R1222-1223, see R1596).

Ms. Roman described appellant as an intelligent person, who is articulate, writes well, and has a good vocabulary (R1228,1243-1245). By the same token, while she felt that Dr. Dee had estimated appellant's intelligence too low, Ms. Roman stated that she believed appellant to be of low average intelligence, and "assuming that he were properly

medicated and his thought disorders were under better control than it is", his actual IQ would be in the range of mid-eighties to mid-nineties (R1229-1230). The fact the tests conducted by Dr. Dee indicated an even lower score than that was explained by Ms. Roman:

> ... certain individuals who are suffering from a thought disorder, namely something like schizophrenia, their performance on these tests can be impaired not because they do not have the native intelligence to perform well on them, but because their thought processes are being impaired by the consistence of a psychotic disorder.

(R1229).

Ms. Roman testified that her conclusions about appellant were based in part on conversations she had with Major Grady Judd of the Polk County Sheriff's Department concerning appellant's behavior in the jail; and with Mr. Pickard, the prosecutor in this case, concerning his behavior at trial (R1230-1233,1238-1239,1598). Major Judd called to inform her about an escape plan; apparently appellant "had boasted about his upcoming transfer to the hospital and had mentioned to the other inmates that he was going to escape from the hospital" (R1230,1232). According to the information she received from Major Judd, appellant had also told many of the inmates that he had confessed to a crime he didn't commit in order to obtain the death penalty (R1232,1598).

In response to the trial court's question, Ms. Roman expressed the opinion that psychotropic medication would be an appropriate treatment procedure for appellant (R1249). Under such medication, there was a good chance that appellant's psychotic symptomatology would improve, though it would not have any effect on his antisocial and borderline personality disorders (R1248).

At the completion of the testimony, the prosecutor argued that appellant was competent, and that he had to a great extent manipulated those people he felt he could manipulate, including the community examiners, and to a certain extent the Court (R1246):

> The State feels that Mr. Pridgen's efforts were --
>
> MR. PRIDGEN: In other words, what you're saying, I make Judge Green look like a damn fool.
>
> MR. PICKARD: -- were to a certain extent calculated, and it's the State's position that Mr. Pridgen is competent to be sentenced.

(R1247).

The trial court announced that he was inclined to agree with the opinion of Ms. Roman, but "because of the extreme possible penalty involved here, and in light of the opinion evidence presented by three other capable witnesses"[19], he would order appellant to be returned to the Florida State Hospital for further treatment (R1249, 1253). The court specifically found, based on the testimony, that appellant was in need of psychotropic medication, and he ordered that such medication be administered involuntarily if necessary (R1249,1253).

D(3). Hearing of May 1, 1986

The next competency hearing took place on May 1, 1986; the witnesses were Drs. McClane, Ainsworth, and Dee[20], Ms. Roman, and another psychologist from the Florida State Hospital, Vaughn Tooley.

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[19] The trial court noted that Dr. Ainsworth's opinion was "somewhat distinguishable" from those of Drs. McClane and Dee (R1249,1252).

[20] McClane and Ainsworth had each re-interviewed appellant about two weeks prior to the hearing, while Dee had reevaluated him about seven weeks earlier (R1264,1279,1292).

Dr. McClane testified that, in his most recent interview he found appellant to be "somewhat calmer and less agitated" (R1264). McClane attributed this to the fact that for the last three months appellant had been receiving 700 mg. per day of the antipsychotic medication Thorzine (R1265-1266,1601). According to Dr. McClane, appellant was "still psychotic, probably suffering from a paranoid schizophrenic illness manifested by delusions and grandiosity" (R1267,1602). Appellant's "ability to tolerate such high doses of antipsychotic medication without being grossly sedated tends to confirm that diagnosis" (R1267,1602). Dr. McClane was of the opinion that appellant continued to be incompetent to be sentenced (R1265-1267,1602-1603).

Dr. McClane's diagnosis of appellant's mental illness was virtually identical to that of Ms. Roman (see R1268,1596); his major diagnosis was paranoid schizophrenia, and he also has traits of several personality disorders, including "borderline" and "anti-social" (R1268). McClane, like Roman, thought that these personality traits "incline him to be a rather manipulative person."[21] McClane described appellant as a "psychotic delusional man who nonetheless maintains a veneer of, a facade of cleverness"(R1268).

Dr. McClane testified that appellant still had "all the delusions related to the girlfriend previously and her mother"[22]

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[21] While McClane and Roman agreed that appellant is "manipulative", it is fascinating to note that McClane believed that appellant was incompetent but had "manipulated" the hospital psychologist into thinking him competent (R1268-1269,1270-1272), while Roman believed that appellant was competent but had "manipulated" the community psychiatrists into thinking him incompetent (R1226-1227,1233-1235,1237-1238).

[22] McClane's most recent session with appellant took place two years after his "break-up" with Lisa, a year and a half after appellant's confession to the murder of Anne Marz, and nearly a year after the trial.

(R1274), as well as the grandiose and delusional belief "that he can have great impact and manipulate the media and that he can get even with the girl and her mother by being publicly put to death midst great publicity" (R1274). Dr. McClane acknowledged that it is conceivable for a capital defendant to make a rational decision to invite the death penalty, but, in his opinion, this was not the case with appellant (R1275). According to McClane, there is considerable other evidence that appellant is psychotic in unrelated areas, and that his preference to be put to death has been "seriously colored" by his delusional thinking related to the girl and her mother, related to the legal process, and related to his own self-importance. (R1275-1276).

Dr. Ainsworth testified that appellant, when last seen by him, was calmer and more lucid, with less delusional or magical thinking than he had previously displayed. (R 1279-1280). He attributed the improvement to antipsychotic medication[23/] (R1289).

Dr. Ainsworth was now of the view that several of the eleven factors which are considered in determining competency to stand trial are no longer applicable in determining competency to be sentenced (R1281,1285-1287,1609-1610). Of the six factors which Dr. Ainsworth considered applicable, he rated appellant acceptible in four (appreciation of the charges, appreciation of the penalties, understanding of the adversarial process, and ability to cope with the stress of incarceration), and questionable in two (ability to relate to his attorney and ability to manifest appropriate courtroom

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23/ According to Dr. Ainsworth's report, appellant told him that he was started on 900 mgs. per day of Thorazine in December, 1985. In January, 1986, the dosage was reduced to 700 mgs. daily, which continued through the date of evaluation (April 16, 1986)(R1607).

behavior)(R1281,1609-16 10). Appellant's motivation to help himself in the legal process was also rated by Dr. Ainsworth as questionable, but Dr. Ainsworth did not consider this category to be applicable to the sentencing stage (R1610). In the interview, appellant indicated that he had been studying his legal situation in the hospital law library, and had had conversations with his attorney [trial attorney?] in which the possibility of an appeal was discussed (R1282,1609). Also, appellant was no longer making remarks like he had previously, to the effect that any attorney who touched his case would be disbarred or dead (R1282). However, was still making statements like "I manipulated the system to get the chair", and that he wanted to be the first execution on television (R1285,1610). At one point in the interview, appellant said he'd learned his lesson and would behave in court, yet at another point he said he was likely to be disruptive, in order to get his name in the newspapers (R1280,1610). Over all, Dr. Ainsworth concluded that appellant was more competent than not to be sentenced (R1281,1611).[24]

Dr. Ainsworth agreed with the psychologists from Chattahoochee that many of appellant's actions and statements were the product of conscious manipulation (which he defined as "the art of verbal deceit to gain one's own ends") more than genuine depression (R1285). On the other hand, Dr. Ainsworth indicated that appellant lacked a rational understanding of what that manipulation was likely to bring about:

> It is one thing for a Defendant to say to you that they want to die. But it is another thing for a Defendant to really want to die. As it turns out, the statement that a person wants to die is

24 /Dr. Ainsworth was subsequently recalled by the defense, and testified that if the factors relating to ability to assist counsel, and if appellant's motivation to help himself, were considered applicable to the sentencing proceeding, he would revise his opinion, and would say that appellant remains incompetent (R1345-1350).

> usually clouded by what we as psychiatrists call denial. It's a little bit like fantasizing yourself in a canoe going over a waterfall. It's one thing to fantasize it, it's another thing to experience it.
>
> And the realization of death is something that Mr. Pridgen has not completely felt. So therefore, in the evaluation, I usually ask the Defendant, "Do you know what you're really saying to me, that you're really going to die over this?" And I have said that to Mr. Pridgen two or three times. And I don't think yet he has a good appreciation on an emotional level of what that means but he has an acceptable intellectual appreciation of what that means.
>
> I would, I would say this. That much of Mr. Pridgen's manipulation, if you will, or his bad acting, is not occurring with an acceptable emotional appreciation of what could happen to him. It's like a game to him. And that is unfortunately why we're here the third and fourth and fifth time.
>
> Q [by Mr. Pickard]: What do you mean by "a game"?
>
> A. It's, it's not real. It's getting the attention that he wanted from other people, important people, and it's displaced from the reality of a legal factfinding reality-based Court. In a way, Mr. Pridgen is not appreciating the fact that we're dealing with reality here, not his fantasies.

(R1284).

On cross-examination, Dr. Ainsworth acknowledged that the major weakness in appellant's competency is his inability to assist his attorneys in planning a defense; if this were the trial phase of the case he [Ainsworth] would find it unacceptable (R1288).

> Q. [by Mr. Alcott]: Does that tie in with his again I believe the motivation to assist himself which you find to be questionable?

A. Yes, it does tie in with that.

Q. And his motivation to assist himself does tie into the sentencing, what possible sentences or ranges of sentence that could be imposed?

A. Yes. And the way that ties in -- and I, you know, and I would say this: That I think it would tax the wisdom of Solomon -- and that is that Mr. Pridgen's actions and his behavior, although largely on an unconscious basis, have been such that it would provoke the Court to be harsher with him than ordinarily would be the case.

Q. Do you attribute the change in behavior that you have noted basically to the amount of thorazine that he's been given?

A. I would, I hate to say it, but I think that primarily the amount of thorazine is the major change in Mr. Pridgen.

Q. Given a reduced dosage, you'd probably be back in the same state you were before?

A. Probably.

(R1289)

Dr. Dee, like Dr. Ainsworth, observed that appellant seemed "a bit calmer" in the most recent interview, and attributed the change to antipsychotic medication (R1292,1604). As stated in Dee's report, "The fact that he is currently taking 700 mgs. of Thorazine with obvious beneficial results would appear to support previous impressions that he was psychotic"(R1604). [According to Dr. Dee, this is a "somewhat heroic dosage" of the medication, and the fact that appellant had responded favorably to it confirmed that the initial impression that he was schizophrenic was undoubtedly correct (R1298). "To a normal individual, that level of medication would probably render them unconscious for a considerable period of time. All it does is

calm him [appellant] down. You know, give milligrams of thorazine would probably put most of us in a virtually immobile state for a couple of days. 700 milligrams is a very high dosage level -- except for a very excited schizophrenic" (R1301)].

Dr. Dee was of the opinion that appellant remained incompetent to be sentenced; "I believe that he is calmer but his mental condition remains otherwise unchanged" (R1293).

According to Dr. Dee, appellant remained actively psychotic, though his behavior was under better control with the drugs (R1293-1294). Dr. Dee reported the following findings:

> Mr. Pridgen's performance on the personality tests continues to indicate defective reality testing. There is continuing evidence of a thought disorder, considerable inerpersonal avoidance and hedonia as well as both neurotic paranoid delusions and delusions of grandeur. He continues to be quite psychotic, specifically schizophrenic, paranoid type. His thought processes are peculiar and make little sense to anyone who attempts to follow them closely. His mental output is remarkable in terms of its volume and quality and on the structure personality tests, he endorses numerous items with psychotic (delusional and hallucinatory) content. Interestingly enough, however, this test does not represent a "fake bad"; the instability and inconsistency so prevalent in psychotic individuals, particularly schizophrenics, is clear and unmistakeable here. 25 /

(R1605, see R1294-1295,1302-1303).

Dr. Dee further noted that the psychotic disorder which appellant suffers from, i.e. paranoid schizophrenia, "is not a condition which develops suddenly or rapidly, typically having a long

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25 / Dr. Dee explained that "faking bad" means an attempt to make oneself appear psychotic or in worse condition than one is (R1302). In Dee's opinion appellant is not faking bad, but is genuinely psychotic (R1302).

and insidious onset, usually beginning in adolescence, and sometimes even earlier" (R1604, see R1302-1303). During the year prior to trial, and even before that, appellant, in Dee's opinion, was suffering from this mental illness, and had a diminished mental capacity (R1303).

According to Dr. Dee, appellant was still experiencing "erotic paranoid delusions" about "[the] young woman who has been so often mentioned in this case". (R1294). During the interview, appellant was angry because Lisa was "prancing around town like nothing has happened", while at another point appellant "triumphantly reported that he now felt that [Lisa] was a social outcast, that almost no one will talk to her around the flea market" (R1604). Appellant felt that this is so because he has "quite a few friends around Auburndale"[26] (R1604). Asked by the prosecutor "How is that relevant to whether he's competent to be sentenced?", Dr. Dee replied that this was the determining factor - or one of the determining factors - in appellant's continuing insistence that he be put to death (R1294-1295):

> In some fashion, that's difficult for a normal person to understand, including me, the winning out against the State by convincing them to put him to death would somehow vindicate him, magnify his importance, demonstrate to her and her mother that he's somehow a competent and worthwhile human being.
>
> And at the same time it serves another purpose, to get revenge against the State against whom he has some very angry and delusionly paranoid feelings.

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[26] Note the testimony of virtually every expert witness in this case that it is characteristic of persons with appellant's psychosis and/or personality disorder to have almost no friends or social contacts at all.

> The second type of delusion, of course, has to do with the grandiosity of his feelings with regard to his own importance. He talked at some length with me about the public outcry that would come because he was going to be, he somehow fancied himself as being comparable to Gary Gilmore, that there would be great public outcry, great public movement should he be executed and that this would some someway vindicate him.

(R1295, see R1605).

In Dr. Dee's report, he states that "while [appellant] is clearly facing the immediate danger of a death sentence, he is more concerned about impressing the young woman ... continually fantasizing about how to cajole her, how to win her affection, that she will run away for his sake, and yet within these fantasies also fears that he will not be able to keep her because of her mother's influence and obstruction. His capacity for delusion and distortion is quite remarkable no matter how superficially intact he may appear" (R1606).

Deborah Roman and Vaughn Tooley[27] of the Florida State Hospital filed a joint report (R1612-1617) and each testified at the hearing. In their report, they noted that appellant "continues to display some symptoms of psychosis despite receiving fairly substantial doses of an antipsychotic medication over a three month period"[28] (R1616). "His psychosis is manifested as unrealistic beliefs which

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[27] Tooley has been a psychological specialist at the hospital since June, 1982. He holds a bachelor's degree in psychology from Florida A&M, a masters in clinical psychology from Florida State, and is working on his dissertation for a Ph.D. from the latter university. He has conducted between 200-300 competency examinations, and has testified as an expert on four occasions (R1330-1334).

[28] In her testimony, Ms. Roman characterized the 700 mg. daily which appellant was receiving as a "moderate" dose of Thorazine "for a young healthy male who is actively psychotic" (R1324, see R1310).

reach delusional proportions" (R1616). Roman and Tooley noted that delusional beliefs can be quite resilient and impervious to psychotropic medications and other forms of treatment (R1616). On the other hand, appellant's tendency to become easily agitated, which was another product of his psychosis, appeared to have been helped somewhat by the medication (R1616, see R1310). Emphasizing that "the issue to be addressed (per order from the committing court) is not simply whether or not Mr. Pridgen is mentally ill, but whether or not his mental illness interferes with his competency for sentencing" (R1616), Ms. Roman and Mr. Tooley concluded that appellant was indeed competent to be sentenced (R1323,1339-1340,1614-1617).

Upon his admission to the hospital, appellant was diagnosed as "schizophrenic with premorbid character disorders (antisocial and borderline types)" (R1612); psychological testing revealed "the presence of a psychotic disorder characterized by paranoid mentation, psychomotor acceleration, and impaired reality contact" (R1613). In contrast to his earlier period of hospitalization, appellant's current hospitalization was "essentially uneventful"; he basically kept to himself, complied with the rules, and presented no management problem (R1613,1615-1616, see R1312-1313,1337). His "more subdued behavior" was partially attributable to the medication he was receiving (R1613, see R1310). The fact that appellant was able to maintain appropriate behavior in the hospital contributed to Roman and Tooley's belief that he had the capacity (though maybe not the desire) to control his behavior in the courtroom (R1317-1318,1615-1616). Interestingly, Mr. Tooley believed that appellant was deliberately behaving himself in order to achieve his desired result, i.e. the death penalty:

MR. PICKARD [prosecutor]: One of the questions that have been asked or raised in the past concerns Mr. Pridgen's desire or motivation to help himself. In other words, his expressed desire to get the death penalty. Do you have an opinion on that aspect of his competency?

A. I feel like what he's doing now is that he is, he is helping himself to get what he states that he wants.

Q. Okay

A. And he did that partly by his behavior in the hospital. I think he understood that if he were very disruptive and bizarre at the hospital -- in other words I think he could have feigned a more pathological mental illness in order to stay at the hospital or come here and be sent right back. And he didn't attempt to do that.

(R1340-1341)

On the other hand, Ms. Roman continued to believe, as she had expressed in the earlier hearing, that appellant's death wish and depression were not genuine (R1318-1320). She noted that appellant had spent a great deal of his time in the hospital doing legal research; he was very familiar with the workings of the legal system, and with cases similar to his own (R1314-1315,1614-1615). Ms. Roman continued to believe that appellant's character disorders played a much more active role than did his mental illness in his behavior in the court process (R1322-1323). Appellant's paranoid delusions, she testified, "are much milder than most schizophrenics that you see" (R1322); "[a] lot of patients with grandiose delusions believe they're the president or believe that they're God" (R1322). In contrast to most schizophrenics, appellant impressed Ms. Roman as being well-organized and coherent (R1310-1311,1321-1322). Moreover, he has never reported any hallucinatory experiences (R1311).

At the conclusion of the testimony, the trial court announced that he was favorably impressed with each of the expert witnesses, including Ms. Roman and Mr. Tooley, and had no criticism of the ability or work performed by any of them (R1352-1354). Nevertheless, the trial court ordered that appellant be returned to the hospital for further treatment and evaluation under the primary direction of one, or preferably two, psychiatrists (R1353-1355,1361). The court further ordered that appellant continue to receive whatever psychotropic medication is felt necessary by the psychiatrists, even on an involuntary basis[29/] (R1355,1361).

D(4). Hearing of October 31, 1986

A week before the next competency hearing was to take place, defense counsel filed a motion to set aside the penalty recommendation of the trial jury, on the ground that appellant had been incompetent and unable to assist counsel in the penalty phase of the trial, and on the ground that the jury's death recommendation no longer had any viability in light of the extensive expert testimony concerning appellant's mental condition and his hospitalization (R1387-1388).

29/ Defense counsel objected to appellant being required to take "such heavy doses of Thorazine as would be a deprivation of his due process rights and rights of privacy" (R1355). The trial court replied that he was requiring that he be medicated because that was the consensus of medical opinion; the dosage would be purely within the discretion of the psychiatrists (R1355).

In the October 31, 1986 hearing, Drs. McClane, Ainsworth, and Dee again testified for the defense[30/], and Drs. Earl Hahn and James Phillips, as well as Mr. Vaughn Tooley, testified for the state.

Dr. McClane testified that appellant was still psychotic, still delusional, and essentially unchanged (R1400,1620). He believes that Lisa Johnson has always been in love with him, and still is; "[he] is obsessed about this and clings to this belief tenaciously" (R1400,1619). He still believes that the publicity from his trial and from his death in the electric chair will have a profound impact on Lisa and her mother (R1400-1401,1619). He also continues to believe that his being put to death by the state will gain national attention and make him famous forever (R1401,1407-1408,1619). In Dr. McClane's opinion, the administration of Thorazine[31/] had made appellant calmer and somewhat less depressed, but that it had not been effective in altering his thinking processes so that he would no longer be delusional (R1403-1406,1411). Dr. McClane expressed the belief that appellant's behavior throughout the trial process, and specifically his efforts "to get himself killed in the electric chair", were largely the product of his delusional thinking in these two primary areas (R1407-1410).

Dr. McClane was of the opinion that appellant remained incompetent to be sentenced, primarily on the basis of the factors regarding motivation to help himself in the legal process (which Dr. McClane described as "grossly deficient") and those relating to

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30/ Each of the three community experts re-interviewed appellant during October, 1986 (R1400,1420,1433-1434).

31/ The dosage of Thorazine appellant was receiving had been reduced from 700 mg. to 300 mg. and then to 200 mg. (R1403-1404).

his ability to assist his attorneys (because of his grandiosity and delusional thinking)(R1401-1403,1620). As a result of the medication, appellant's ability to maintain appropriate courtroom behavior and to cope with the stress of incarceration were now probably acceptable (R1402-1403,1620).

Dr. Ainsworth's assessment of appellant's competency, as before, depended largely upon whether the requirements for competency to be sentenced are as strict, and whether they involve all of the same eleven criteria, as competency to stand trial (R1420,1428-1429, 1628-1630). Dr. Ainsworth's "bottom-line" opinion was that, assuming the same criteria apply, appellant would be considered incompetent for sentencing (R1420,1630). According to Dr. Ainsworth, appellant's appreciation of the charges, appreciation of the penalties, and understanding of the adversarial nature of the legal process were, and always had been, acceptable (R1428,1628). His ability (though perhaps not his motivation) to disclose pertinent facts was acceptable (R1428-1429,1628). The remaining seven criteria were rated by Dr. Ainsworth in his report as questionable, less than questionable, or unacceptable (R1628-1629). For example:

> 5. In my opinion the defendant's ability to relate to his attorney has, if anything, deteriorated and would be rated as unacceptable. The defendant's irrational ideas based upon psychopathology have changed little and interfere with his ability to relate to his counsel.
>
> * * * * * *
>
> 10. In my opinion the defendant's motivation to help himself in the legal process

> remains questionable or less than questionable. The defendant continues to make statements that he is "using the system for his own purpose-he wants to be the first execution on television". This kind of statement is the product of psychopathology and serves only to enhance the defendant's grandiosity, which is his immediate goal. Only on a superficial level would these statements may be seen as intentional, deliberate, and voluntary.

(R1628-1629).

According to Dr. Ainsworth, appellant's recent suicide attempt in the hospital [he apparently attempted to hang himself, but was taken down by another patient (R1426,1627)], and his many statements either threatening to kill himself or demanding his execution by the state, are more manipulative and attention-seeking than they are indicative of genuine suicidal ideation (R1426-1427, 1627). Dr. Ainsworth opined that "... a lot of that stems from Mr. Pridgen's psychopathology" (R1427).

Dr. Ainsworth was still of the opinion that it was highly likely that appellant was incompetent during the jury trial phase of the proceedings (R1429).

Dr. Dee testified that after a total of eight hours interviewing and 32 hours testing, appellant's "results have always remained the same. He is grandiose and delusional, his reality tests defective, and he tends to show the same personality profile as he did when he was originally evaluated" (R1434-1435, see R1622-1624). According to Dr. Dee's report, appellant

> is obviously a person whose reality testing is consistently defective. He cannot really distinguish what is true from what he wants to be true,

> something which has contributed materially to his current situation. He imagines himself for example, as a person of great power, intellectual facility and maturity who can successfully manipulate judges, prosecutors, doctors, and society generally, but it is not difficult to see beneath this facade the very insecure, inadequate feeling young man who consistently has expected to be rejected by other people, including the opposite sex. He feels, as he has in the past, that dying is the only solution to his problems.

(R1624).

Dr. Dee noted that appellant's mental problems antedate his legal situation, and are not a consequence of it (R1624). According to Dee, appellant's "capacity to aid his attorneys in his defense has consistently been inadequate", and remains so (R1624).

Dr. Earl Hahn[32/], a psychiatrist and medical director of Florida State Hospital, interviewed appellant on three occasions, all during the first week of July, 1986 (R1446,1448). Appellant's speech was "clear, coherent, relevant" (R1446). Dr. Hahn found no evidence of hallucinations, delusions, or tics (R1446-1447). Appellant understood Dr. Hahn's questions clearly, and his responses were appropriate (R1447). Appellant volunteered the information that he

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32/ Dr. Hahn graduated from medical school in the Dominican Republic, and practiced surgery there. He received his post-graduate training in psychiatry at the University of Oklahoma, McGill University of Montreal, Johns Hopkins, and Columbia. He practiced psychiatry at Spring Grove State Hospital in Baltimore (a large institution described as Maryland's equivalent to Chattahoochee), then went into private practice in Miami, and since 1973 has worked in Florida's state hospital system, first in Miami and later in Chattahoochee. He is presently the medical director of the latter institution, and supervises the clinical work of the psychiatrists in the forensic division of the hospital (R1437-1445).

wished to be electrocuted (R1447-1448). In Dr. Hahn's opinion, at least as of July 1st, 5th and 6th, 1986[33/], appellant was competent with regard to all eleven criteria (R1448-1449,1635-1636). Among Dr. Hahn's findings were:

> 5) ABILITY TO RELATE TO ATTORNEY: As above, subject capable to communicate relevantly with attorney if he chooses to do so. The subject says he trust his attorney and will follow his advice. However, says he will object to agree for less than a death sentence. In my view, subject's choice, although contrary to the natural instinct of perseveration is not necessarily irrational. - Acceptable.
>
> 6) ABILITY TO ASSIST ATTORNEY IN PLANNING A DEFENSE: Again, subject is able to cooperate with counsel in planning a defense, except that he will not cooperate if his attorney would try to persuade him to accept less than the death penalty. - Acceptable.
>
> * * * * * *
>
> 10) MOTIVATION TO HELP HIMSELF IN THE LEGAL PROCESS: The subject has no motivation to help himself in the legal process against him, that is to say, to try to succeed in obtaining the least severe sentence. This attitude and behavior is by design and conceived in an intentional, deliberate, and voluntary basis. Underlying emotional or psychological processes do affect his capacity for what is ordinarily considered self-help. - Acceptable.

(R1636)

On cross-examination, Dr. Hahn stated that while he did find appellant to have a mental disorder, he never saw him as being

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33/ Dr. Hahn was not willing to express an opinion as to appellant's competency as of the time of the hearing (October 31, 1986) "because mental condition sometime lurk [?] twice. I see that from one week to the other and from one day to the other" (R1456).

psychotic (R1449). Rather, his diagnosis was that appellant has an antisocial personality disorder coupled with an obsessive/compulsive disorder (R1450,1635,1636). The latter disorder was described by Dr. Hahn as "characterized by an obsessive rumination or preoccupation involving a deeply experienced sentiment of love/hate[34] associated with a persistent wish to die" (R1635).

Since Dr. Hahn did not find any evidence of psychosis, he asked Dr. Phillips why he was using Thorazine. Phillips informed Hahn that appellant had been diagnosed as psychotic, but had improved and was in remission (R1454). Consequently, appellant was receiving a low dosage of Thorazine (100 mg.) as a preventative measure, and also to try to calm him (R1454). Asked whether appellant was earlier on a dosage as high as 700-800 mg, Dr. Hahn replied "I don't remember. But he was on a high dosage, yes" (R1455).

In his report, Dr. Hahn wrote, inter alia:

> When questioned about the treatment and care received at this hospital for his psychiatric problems, he replied that he has been taking his medication as prescribed by his psychiatrist, but in general he feels that he is not receiving the treatment required to help him to overcome his main problem which is to "get out of his mind the girl he is in love with" and understand the reason why this is so. He was referring to a Lisa Johnson, whom he had known and shortly thereafter fell dearly in love and was unexpectly rejected by her after he had written a letter in which he made it various critical remarks. He expressed that when this feeling of rejection hits him hard, he feels terrible, cannot eat, sleep and wish he would be free to kill her and her witch mother. When I asked him if he felt that they may have casted a spell upon him, his answer was "no" and remarked

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[34] As is clear from Dr. Hahn's report, the object of appellant's obsession is Lisa Johnson (R1632-1634).

that he fell in love and did not realize it until it was too late. He would become emotional and tense when referring to this girl and mother and the tone, tempo and pitch of his voice became always markedly increased. He complained that he sent her a 15 page letter apologizing and she would not accept it. He feel that her attitude is making him miserable, depressed but could come out of it if she would write to him. She has been the only person I have loved, he said and without her love I have nothing to live for. This is why I want to be electrocuted. Mr. Pridgen's affective responses were appropriate to his ideational content. He did not appear depressed, at time would smile when the subject under discussion would stimulate a pleasing response. He did not become angry, sad or cheerful at all while communicating with me...

(R1632)

* * * * * *

He also expressed to dream quite often about his enamoror and witch mother. He revealed that he is prepared to obtain his wishes by being ready to confess his killing of sixteen women and would go into detail at the time of the trial if necessary. On the other hand, he relates that his confession of killing a 79 year old woman for which he has been convicted of murder was false and made with the expressed intention of getting the death penalty. When asked why he wish to sacrifice himself for the crime of others, he responded that he will obtain a sort of enjoyment by making the girl and her mother feel guilty for the rest of their life, also by relieving his mother and family of all the problems and shame he has caused them through life and finally, to get the last laugh by knowing the State have executed an innocent person. He remarked that he does not see himself as crazy for wishing to die and quote the examples of people willing to die for love, religion and other reasons.

(R1632-1633).

* * * * * *

> His insight in regard to the nature and quality of his illness is limited. He recognizes that he has emotional problems, namely his obsession with that girl and associated mental torment such as a great deal of anger, wish for revenge, insomnia, inability to find peace with himself and resolution to die. He does not accept his mental condition as a well defined mental illness. He does not see his problems as being caused by his girl rejection but by his own fault by allowing himself to fall in love when it was too late to change. He cannot see his condition as being the result of a longstanding emotional disequilibrium or mental disorder.

(R1634)

Dr. Hahn testified that the procedure used at Chattahoochee, where treatment is provided by the psychiatrists but competency evaluations are handled by psychologists is a "very extrodinary system"; it is the only hospital he knows of in which psychologists are assigned competency evaluations (R1452-1453). The reason, he explained, is "they can't get enough psychiatrists to work in Chattahoochee. They claim they have no choice. They use whoever" (R1453).

Dr. James Phillips is a senior psychiatrist at the Florida State Hospital at Chattahoochee.[35] Appellant was Dr. Phillips'

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[35] Since defense counsel took exception to Dr. Phillips' qualifications as an expert (R1473-1474, see R1508-1509), it is necessary to describe his circuitous career path to Chattahoochee in some detail:

While he is a licensed psychiatrist, Dr. Phillips has neither an M.D. nor a four year undergraduate degree (R1459-1465,1472). He is a doctor of osteopathic medicine, which he described as kind of a cross between a medical doctor and a chiropractor (R1458,1465). [As defined by Webster's Dictionary, osteopathy is "a system of medical practice based on a theory that diseases are due chiefly to loss of structural integrity which can be restored by manipulation of parts supplemented by therapeutic measures (as use of medicine or surgery)"].

Dr. Phillips graduated from high school at what he called the "University of Normal, Normal, Illinois" (R1461). He attended Manuel

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patient during his three periods of hospitalization (R1475). Dr. Phillips would typically come in contact with a patient perhaps once

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35/ Missionary College in Berrien Springs, Michigan from 1952-1953, studying theology (R1460-1461). After deciding to change his major to nursing, he attended Sierra College in California for a year and a half (R1460-1461). He then returned to Hinsdale, Illinois, and got his diploma in nursing from Hinsdale Sanitarium (R1460-1461). He then joined the army (R1462). "I served as an enlisted man because my commission was supposedly on the way. But then my commission did not come till seven months after I was in the Army, and I turned my commission down and decided to get out and go to medical school" (R1462). Phillips was in the army, altogether, for two years before being honorably discharged (R1462).

He then attended Walla Walla College in Walla Walla, Washington for two years (R1463). However, "I'd had a little hard time with physics, so I decided -- this was in my pre-med course -- so I decided that I would take nursing anesthesia" (R1463). Accordingly, he went to Madison, Tennessee, where he studied anesthesia at Madison Hospital, while working part time in the emergency room, "[a]nd besides that I was finishing up my pre-med over in George Peabody College in Nashville, Tennessee" (R1464). However, Phillips did not receive a degree from Peabody either (R1464). After Madison Hospital, he went to Kansas City Osteopathic College, spent four years there, and received his doctorate in osteopathic medicine in 1965 (R1457,1464-1465).

Following a one year rotating internship at Corpus Christi (Texas) Osteopathic Hospital (R1457,1465), Dr. Phillips moved to Knoxville, Tennessee, where he began a general practice and partnership (R1458,1465) The partnership lasted for one year, after which Dr. Phillips went into practice by himself, and began giving anesthesia as a "nurse anesthetist" (R1466). After 7 1/2 years in Knoxville, he decided to move to Jacksonville, Florida (R1458,1466). "The purpose for the move was that I didn't like the Smokey Mountains very well because they were constantly overcast and I'm a sunshine type person" (R1466). For the next 4 1/2 years, Dr. Phillips worked in the emergency room at Jacksonville General Hospital, an osteopathic institution (R1467). In addition to administering drugs, he "would do minor lacerations, remove foreign objects from under the skin, or tape things up, bandage wounds, things like this. But nothing advanced except for life-saving measures" (R1468). Dr. Phillips worked under an M.D. surgeon who was the emergency room director and who held a contract to take care of the emergency cases that came into the hospital (R1468). Then "[t]he director lost the contract to the emergency room, and so I had no where to work" (R1468). Dr. Phillips did not know why the director lost the contract, although he had a suspicion (R1469). At any rate, he found himself "basically unemployed", so he went into the Navy (R1469).

In the Navy, Dr. Phillips trained as a flight surgeon in Pensacola (R1469). [A flight surgeon, he explained, "practices basically general medicine. The term surgeon is kind of misleading" (R1470)] After six months in Pensacola, he spent eight months in Sicily (R1470). Asked

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a week or once every two weeks, on such occasions as when they come in for initial evaluation, when problems arise in the ward, when he [Phillips] feels the need to change their medication or dosage, when he seeks the patient out if he has a question, and for once a month meetings between the patient and his treatment team (R1475-1476). Based on his examination of and his contact with appellant, Dr. Phillips was of the opinion that appellant was competent to be sentenced (R1473-1474,1477,1640-1641). Dr. Phillips rated appellant as acceptable with respect to all eleven criteria for determining

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35 /why he left the Navy, Dr. Phillips replied:

> Why did I leave the Navy? All right. I had some family problems in the Navy. My daughter was running all over Sicily with some of the local sons around there, and basically the commander called me in and said, you know, we can't put up with this.
>
> Q. In other words, you found your family life incompatible with your Navy life?
>
> A. That's correct.

(R1470).

Upon leaving the Navy, Dr. Phillips decided to take a residency in psychiatry (R1458,1471). Accordingly, he entered a three year program at Austin (Texas) State Hospital, which he described as "a combination of classroom training, on-the-job training, and also we pulled what they called night O.D., or officer of the day". (R1471). He emerged with a diploma and a degree in psychiatry (R1471-1472). Dr. Phillips then accepted a position with the Florida State Hospital at Chattahoochee (R1459,1472). He has been there a little over two years, and is presently a senior psychiatrist at the institution (R1457, 1472). "My basic duties are to interview patients as they are brought in for admission, to work up their psychiatric evaluations, to place them on anti-psychotic medications or other psychotropics, and to monitor them closely clinically during their entire stay" (R1457).

Prior to the instant hearing, Dr. Phillips had never testified as an expert witness (R1472-1473).

competency (R1474,1477,1640-1641).

Dr. Phillips states in his report:

> Since it has been my impression that there is no evidence of psychosis, I have gradually decreased his major tranquilizer (Thorazine) to its present level of 300 mg. daily (a fairly minimal dosage) and have recently added a minor tranquilizer (Ativan) 4 mg. daily to aid in anxiety control. He has also been receiving Cogentin 1 mg. daily which will be discontinued in the near future most likely.

(R1641).

Dr. Phillips' "Final diagnosis" of appellant's condition was "Chronic Mixed Substance Abuse", "Chronic Episodic Alcohol Abuse", "Antisocial Personality Disorder with Multiple Mixed Personality Disorder Traits", and "Chronic Hearing Impairment of the left ear" (R1641).

Vaughn Tooley testified that appellant was assigned to the unit (of the hospital) in which he [Tooley] is in charge of ward management, treatment, and evaluation (R1486, see R1493). Tooley saw appellant, on an individual basis, at least once a week, or more frequently than that (R1486). Also, during the last five weeks before he came back to court, appellant had been attending group therapy sessions (R1486-1487). Based on his contact and communication with appellant, and based on the eleven statutory criteria, Tooley was of the opinion that appellant was competent to be sentenced (R1490-1491). Asked to explain his conclusion, Tooley replied:

> Okay. I think he is cognitively aware of what charges he has been convicted of; he is aware of the possible sentence in that regard; he is able to talk to his attorney about the different aspects of the case. He can relate in that aspect; he can identify any kind of distortions

> that would go on the record regarding his case.
>
> He could testify okay. As far as his motivation to help himself in the legal process, he is mindful of what he is doing in this case.

(R1492).

Tooley did not think that appellant's expressed desire to receive the death penalty rendered him incompetent "[b]ecause it's a solution on his part, it's his desire, what he wants. If he wanted otherwise, he could help his lawyers do something else, to pursue another option" (R1492).

Tooley stated that he did not find appellant to be "frankly delusional", although his feelings regarding Lisa were, in Tooley's opinion, "somewhat exaggerated" (R1497).

At the conclusion of the testimony and the argument of counsel regarding the competency issue, defense counsel argued in support of his motion to set aside the jury recommendation and to impanel a new jury (R1513-1514). Counsel contended that the jury's death recommendation was invalid, as a matter of due process, because (as a consequence of appellant's mental illness, and his resulting conduct in the penalty phase) the jury had never heard any of the testimony "in regards to his mental condition and his state of psychosis, and/or how chronic that was, even relating back to the time of the offense" (R1513-1514).

E. Sentencing

The trial court denied the motion to set aside the jury recommendation, and found appellant competent to be sentenced (R1515). Defense counsel (with the consent of the prosecutor, but over appellant's protest) then presented the testimony of Susan Willingham, appellant's sister (R1515-1516). She stated that from April, 1984 until the time of his arrest, appellant was depressed and emotionally distraught over the girl, Lisa, and twice tried to kill himself by taking pills (R1516-1518).

> Q. [by Mr. Alcott]: Was he hospitalized on either one of those occasions?
>
> A. Yes.
>
> Q. Did you attempt to communicate with him or talk to him about his problems?
>
> A. Yes, sir.
>
> THE DEFENDANT: I hate you.
>
> (Defendant throws attorney's file).
>
> Q. Would he communicate at all with you about them?
>
> A. No.

(R1519).

Just prior to the imposition of sentence, defense counsel contended that the two statutory mental mitigating circumstances (extreme mental or emotional disturbance, and substantial impairment of the capacity of the defendant to appreciate the criminality of his conduct) applied in this case, and that the proper sentence was life (R1519-1520). Counsel also reasserted that appellant was incompetent at this time to be sentenced (R1521).

The trial court announced the imposition of a death sentence as to Count I (R1521,1524-1526), consecutive 15 year sentences as to Counts II and III[36] (R1521,1527-1532), and appointed attorneys Alcott and Fredericks to represent appellant on appeal (R1521). [To which appellant replied, "There ain't going to be no god-damned appeal. I told you that months ago" (R1521)]. The judge observed that he needed to prepare written sentencing orders, as to both the death sentence and the guidelines departure sentence on the other counts, and asked:

> Can any of you think of anything else we might have done?
>
> THE DEFENDANT: Yeah, I have got something. The next time you go out to the flea market you tell Carmen-- [37]
>
> MR. PICKARD: I am not sure if the clerk has got copies of all the doctors' reports.
>
> THE COURT: He has.
>
> Mr. Alcott, do you have anything?
>
> MR. ALCOTT: Your Honor, during the course of these proceedings the defendant has a couple of times indicated a desire to make a statement. We should give him an opportunity.

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[36] The latter sentences represented a departure from the sentencing guidelines (R1530). One of the trial court's stated reasons for the departure was "the nature of the defendant's criminal history" (R1531). The court emphasized that "the departure sentence is not based on the prior criminal record, but on the circumstances upon which the defendant was previously convicted and sentenced" (R1532). [The order does not indicate what those circumstances may have been (R1531-1532)]. The trial court stated "It is the intention of the Court that the Departure Sentence in this case be affirmed whether or not less than all of the reasons herein are sufficient." (R1532).

[37] Carmen (who is also referred to in other parts of the record as Carla) is Lisa Johnson's mother.

THE DEFENDANT: I got what I want. Forget it. Good-bye, Old Man, it's been nice knowing you. I still think you are full of shit.

(Thereupon, the proceedings were concluded). (R1522).

In his sentencing order, the trial court stated, "A substantial majority of the jury advises that the penalty of death be imposed upon the Defendant, Charles Lamond Pridgen. This advisory sentence is supported by sufficient aggravating circumstances which are outweighed by any possible mitigating circumstances"[38/] (R1524). The court found the following as aggravating circumstances:

(a) While the Defendant was not imprisoned at the time of the offense, he had previously served time in prison, and was, at the time of the offense, on probation. (R1524)

(b) Prior conviction of a felony involving the use or threat of violence to the person; to wit, the Defendant was convicted of attempted robbery and grand larceny in Lake County, Florida. The defendant has been previously convicted of the following crimes:

11/15/76	Attempted Robbery, Grand Larceny
09/10/81	Grand Theft
11/18/82	Dealing in Stolen Property
06/23/82	Trespass, Littering

(R1524).

(c) Capital felony committed while the Defendant was engaged in the commission of a robbery and burglary (R (R1525).

(d) Capital felony committed for the purpose of avoiding or preventing a lawful arrest (R1525).

38/ In the context of the rest of the order, this appears to be a typographical error or a misstatement on the part of the trial judge.

(e) Capital felony committed for pecuniary gain, i.e., the commission of a burglary and robbery (see Factor C) (R1525).

(f) Capital felony was especially heinous, atrocious, or cruel (R1525).

(g) Capital felony was committed in a cold, calculated, and premeditated manner. (R1525).

The trial court found that "[n]one of the mitigating circumstances provided by F.S. 921.141 apply to the circumstances of this case" (R1525), and stated:

> This court is aware of the anti-social mental condition of the defendant. The defendant's propensity for anti-social behavior forms an essential part in the commission of these crimes. Said differently, normal people do not murder helpless, elderly women. The point is that the defendant committed these crimes, including his efforts in avoiding arrest, in a manner which was for him prudent, as opposed to his acts being a product of extreme mental or emotional disturbance. Earl R. Hahn, M.D., summarized Mr. Pridgen's mental condition by stating:
>
> > "Mr. Pridgen has been affected and is still suffering from a manifested mental disorder which is diagnosed in accordance with to the DSM-III of the American Psychiatric Association as: 1) 301.70 Antisocial Personality Disorder; 2) 300.30 Obsessive Compulsive Disorder. Neither condition is considered to constitute a major mental disorder, that is to say, a psychosis."
>
> The defendant was legally competent at the time of the commission of these subject crimes; he was legally competent at the time of the trial, including the sentencing phase, and he is legally competent to be sentenced.
>
> It is, therefore, the conclusion of this court that the supreme penalty of death be imposed.

(R1526).

SUMMARY OF ARGUMENT

The issues in this appeal were to a great extent generated by the evidence concerning appellant's mental condition, as presented through the testimony and reports of seven psychiatrists and psychologists. It is appellant's contention that the totality of the evidence demonstrates that he was actually incompetent to stand trial during the guilt-or-innocence phase of the trial, and still more so during the penalty phase. Consequently, these proceedings violated (substantive) due process. See Lokos v. Capps, infra [Issue III]. In addition, however, the trial judge in the penalty phase failed to accord appellant the procedural due process protections of Pate v. Robinson [Issue II]; or the constitutional protections of Faretta v. California [Issue IV (parts A and B)]; and Westbrook v. Arizona [Issue IV (part C)].

The trial court erred in denying appellant's motion to suppress his tape recorded confession to Major Grady Judd, as the evidence (even taken in the light most favorable to the state) shows that the statement was the product of "confession-bargaining", and Judd's taking advantage of appellant's emotional state and his attachment to his family. See e.g. Bram v. United States, infra; M.D.B. v. State, infra; Rickard v. State, infra [Issue I].

In imposing the death sentence, the trial judge considered numerous aggravating factors which were either unproven or invalid as a matter of law [Issue X]. In addition, his failure to find the existence of any statutory or non-statutory mental mitigating circumstances, in the face of overwhelming evidence which established that appellant suffers from a serious mental illness (paranoid schizophrenia) severe enough to require the involuntary administration of antipsy-

chotic drugs, and that he was under the influence of extreme emotional disturbance at the time of the offense, was not fairly supported by the record, and thus violated the Eighth and Fourteenth Amendment standards of reliability and channelled discretion in capital sentencing. Magwood v. Smith, infra; Rogers v. State, infra [Issue IX].

ARGUMENT

ISSUE I

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

"[C]onfessions (unlike pleas) can not be bargained for." M.D.B. v. State, 311 So.2d 399, 401 (Fla.4th DCA 1975). Where a confession is induced by a promise of a benefit, however slight, the confession cannot stand. Bram v. United States, 168 U.S. 532 (1897); Shotwell Manufacturing Co. v. United States, 37 U.S. 341 (1963); see Brewer v. State, 386 So.2d 232, 235 (Fla. 1980); M.D.B. v. State, supra; Jarriel v. State, 317 So.2d 141 (Fla.4th DCA 1975); Fillinger v. State, 349 So.2d 714 (Fla.2d DCA 1977); Fullard v. State, 352 So.2d 1271 (Fla.1st DCA 1977); Bradley v. State, 356 So.2d 849 (Fla.4th DCA 1978); Fex v. State, 386 So.2d 58 (Fla.2d DCA 1980); Foreman v. State, 400 So.2d 1047 (Fla.1st DCA 1981); Brockelbank v. State, 407 So.2d 368 (Fla.2d DCA 1981); Henthorne v. State, 400 So.2d 1081 (Fla.2d DCA 1982); Brown v. State, 413 So.2d 414 (Fla.5th DCA 1982); Interest of K.H., 418 So.2d 1080 (Fla.4th DCA 1982); Rickard v. State, 508 So.2d 736 (Fla.2d DCA 1987). In addition, an accused's emotional state when giving such statements may have an important bearing on their voluntariness. Rickard v. State, supra, at 737; see also Hawthorne v. State, 377 So.2d 780 (Fla.1st DCA 1979).

In the present case, at the hearing on appellant's motion to suppress his in-custody confession to Major Judd[39], the state and defense witnesses were in agreement on some matters[40], and in conflict on others[41]. While the evidence conflicted as to whether Judd had engaged in interrogation up to that point, appellant and Judd both testified that there came a time when appellant agreed to talk to Judd without a lawyer (R188,213). At that point, discussions took place which led up to appellant making a phone call to his aunt in the Florida Keys (R188-189,213-214). [Appellant testified that he wanted to call his aunt so she could come up and get his mother out of Polk County (R176,183)]. According to appellant, Major Judd promised him that if he confessed, he would be allowed to call his aunt (R183,189). According to Judd, on the other hand, it was appellant who first broached the subject (R214,217,223-224). Judd testified that appellant was concerned about his mother, and that he said he "had a deal for me that I couldn't refuse" (R214). Appellant told

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39/ Judd held the rank of Captain at the time of appellant's arrest (R207).

40/ For example, the police officers acknowledged that appellant invoked his right to consult with an attorney before being interrogated (R168-171),173,179,201,203-205,208). See Edwards v. Arizona, 451 U.S. 477 (1981).

41/ For example, Major Judd's testimony would indicate that he scrupulously honored appellant's request for counsel, and did not question him further until appellant himself re-initiated the dialogue (R208-213,219-223), while appellant's testimony would indicate that Judd continued to prod him, and to make remarks (about the evidence, and about his mother and his ex-girlfriend) designed to elicit an incriminating response, before appellant finally agreed to talk to him without a lawyer (R173-175,178,180-181,188). See Edwards v. Arizona, supra.

Judd that if he would get his Aunt Mildred to come up and be with his mother, then he would give him a confession (R214,217,223-224). The officers determined that Mildred was in the Keys, and that it would take five or six hours to get her to Polk County (R214,217)[42] "So we went back and said, 'Well how about if we allow you to talk to Mildred' And he said that was fine" (R214,see R224).

The police officers obtained Mildred's phone number[43], and set up a tape recorder to record their end of the conversation. Judd dialed the number, identified himself, and told appellant's aunt that her nephew was charged with burglary, robbery, and murder; and that "he desperately needs to talk to you, because he wants to help his mother"[44] (R223,1559-1560). Appellant began by saying to his aunt:

> How's the weather up there? Huh? Little late isn't it? It is for me. Well that's one reason I called you, look here, it's all over for me. But, would you do me one favor, come down here and get mom and take her back up there. Cause I don't have the heart to tell her. That's it. (Inaudible) far as I know, can't come in here, for violation of probation --- but uh, alright, that's one of the agreements would be him to call you and him, that my life's over with, uh,

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[42] According to Officer Kurt Bradley, it was he who suggested to Judd that possibly a phone call instead would suffice (R233).

[43] The police investigators obtained the aunt's phone number by calling appellant's mother, which alerted her to the fact that appellant was under arrest, and defeated the purpose of having the aunt break the news to her to soften the blow (R197-198,214-215).

[44] The transcript of the tape recording of Judd's and appellant's end of the conversation with appellant's aunt is at pages 1559-1561 of the supplemental record.

I gave up on life (Inaudible) and I want you to know that I really (Inaudible) ... 45 /

(R1560)

45/ Regarding the tape recording, Judd testified on cross-examination:

Q. [by Mr. Alcott]: Right. Do you recall in the conversation with Mrs. Mitchell? You predicated that conversation, isn't that correct? You made the phone call and lined it up?

A. That's correct.

Q. And did you not tell her that "he," meaning Chuck, "desperately needs to talk to you"?

A. That's correct.

Q. And you used the word "desperately"?

A. If that's what's in there.

Q. And then Chuck said that's one of the agreements with him to call you -- in him?

A. Mr. Pridgen told me, "If you will allow me to bring my aunt up here, then I will give you a confession." And then we said "How about calling her so she can start up here?" He agreed to that.

His agreement was, the Defendant's agreement--

Q. Your deal with him was that you had promised to put him in touch with his aunt if he would promise to give you a statement?

A. No, sir. He says if I will put him in contact with his aunt, he would give me a statement.

Q. Did he use the word "agreement"?

A. I don't recall the specific words. But he is the one that said, "I've got a deal for you that you can't refuse," or words to that effect.

Q. And you came back to him with a counter offer--

A. What's that?

Q. -- "what if we get her on the phone, would that be good enough?"

A. What if we get her on the phone?

Q. And he accepted that counter offer?

A. Yes, sir.

(R223-224)

Appellant told his aunt that he had gone to the house of an older lady whom he had done some work for in the past, intending only to take a few things. The lady started screaming and hollering, and he put a pillow to her mouth, tied her up, and taped her mouth. She kept hollering, and finally she just quit (R1560). Appellant asked his aunt if she would tell his mother what had happened, and bring her back to the Keys with her (R1560). He then put Major Judd back on the phone. Judd assured appellant's aunt that he would not say anything to the mother until she got there, but suggested that she come on up that night, so that appellant's mother wouldn't wake up and read about it in the newspaper (R1560-1561, see R197-198).

Immediately after the phone conversation was concluded, appellant said to Judd "What do you want to know?", and Judd asked appellant if he could put his statement on tape so he wouldn't have to write it all (R1561, see R215). Judd then readvised appellant of his Miranda rights (R1561-1562), and appellant gave the confession which was played to the jury at trial (R215,673,1563-1571).

The foregoing evidence, even resolving all conflicts in the light most favorable to the state, establishes that the telephone call to appellant's aunt was a quid pro quo for his statement. Regardless of who first broached the subject, the fact remains that Major Judd engaged in "confession-bargaining" with appellant. [See M.D.B. v. State, supra, at 401]. When (or if) appellant said he had a deal Judd couldn't refuse, Judd should have refused it, not come back with a counter offer. He should have told appellant that

he could make a statement if that was what he wanted to do, without any "deals" or "agreements". As far as the phone call, Judd should have let appellant call his aunt, or else (if there was some good reason) not let him call his aunt. But under no circumstances should the phone call have been used as an inducement to confess, even if it was done as a counter offer to a proposal made by appellant. See Bram; Brewer; M.D.B.; Jarriel; Fillinger; Rickard. This is particularly true in light of appellant's obviously distraught emotional state (see R210,214,224,1545-1573), and his concern for his mother - a concern which Judd was well aware of, and which he played upon (well before the negotiations over the phone call began) in his effort to persuade appellant to confess (R214, 224,1547,1549,1550,1553,1555, see R175,178,180-181,183). See Rickard v. State, supra; see also Ware v. State, 307 So.2d 255 (Fla.4th DCA 1975) (condemning police use of "family approach", to soften up defendant during interrogation, as violative of the rule of law set forth in Bram).

The trial court's error in refusing to suppress the tape recorded confession obviously cannot be written off as "harmless", because (a) while there was evidence of other incriminating statements made or letters written by appellant, none were anywhere near as detailed as his tape recorded statement to Judd [see Felder v. McCotter, 765 F.2d 1245,1250-1251 (5th Cir. 1985)]; (2) the trial boiled down to the credibility question of whether the jury was going to believe appellant's out-of-court confession or Darryl Meadows' in-court confession, and (3) the fact that the tape played a role in the jury's deliberations is demonstrated by their request (which was granted) in the midst of deliberations to hear the confession tape again (R935-936). See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Appellant's conviction and death sentence must be reversed and the case remanded for a new trial.

ISSUE II.

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 constitutional right of an accused against being tried while incompetent contains both a substantive and a procedural element. See Lokos v. Capps, 625 F.2d 1258 (5th Cir. 1980). The substantive principle is that a defendant's right to due process is violated if he is tried while incompetent. See Bishop v. United States, 350 US 961 (1956); Dusky v. United States, 362 US 402 (1956); Lokos v. Capps, supra, at 1261; Reeves v. Wainwright, 600 F.2d 1085, 1090-1091 (5th Cir. 1979); Wheat v. Thigpen, 793 F.2d 621, 629 (5th Cir. 1986); Lane v. State, 388 So.2d 1022 (Fla. 1980); Mason v. State, 489 So.2d 734 (Fla. 1986). The corollary, but separate, procedural guarantee is the requirement that the State maintain adequate procedures to ensure the defendant's right to be tried while competent. See Pate v. Robinson, 383 US 375 (1966); Drope v. Missouri, 420 US 162 (1975); Lokos v. Capps, supra, 1261-1264; Reese v. Wainwright, supra, at 1091; Wheat v. Thigpen, supra, at 629; Lane v. State, supra, at 1025; Scott v. State, 420 So.2d 595, 597-598 (Fla. 1982); Hill v. State, 473 So.2d 1253 (Fla. 1985). "[F]ailure to observe procedures to protect a defendant's right not to be tried or convicted while incompetent deprives him of his due process right to a fair trial." Drope v. Missouri, supra, 420 US at 172, Wheat v. Thigpen, supra,

at 629. In the present case, it is appellant's position[46] that the trial court's denial of defense counsel's motion to continue the penalty phase of the trial, and his failure to afford appellant a hearing as provided by Fla.R.Cr.P. 3.210 and 3.211 when a number of different factors (including the testimony of Dr. McClane) pointed to the strong probability that appellant's mental condition had deteriorated to the point where he was no longer competent to stand trial, violated both the substantive and procedural due process guarantees against being tried while incompetent.

The test for determining competency, under both Florida and federal law, is (1) whether the defendant has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and (2) whether he has a rational as well as factual understanding of the proceedings against him. Dusky; Lane; Scott; Hill; Lokos; Wheat. This constitutional standard has been implemented in Florida by the adoption of Fla.R. Cr.P. 3.210 and 3.211. See Lane (at 1025); Scott (at 597); Hill (at 1257). Rule 3.210(b) states:

> If before or during the trial the court of its own motion, or upon motion of counsel for the defendant or for the State, has reasonable ground to believe that the defendant is not mentally competent to

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[46] In using the term "it is appellant's position", here and elsewhere in the brief, undersigned counsel is indulging in a legal fiction. Appellant, personally, has repeatedly insisted that he is competent, maintained that there isn't going to be any appeal, and demanded that he be put to death in the electric chair.

In contrast to the course of action he pursued in Hamblen v. State, (case no. 68,843), undersigned counsel has not filed a motion to withdraw in the instant case, because of the overwhelming evidence that appellant's motivations for demanding the death penalty are irrational, delusional, and the product of his mental illness.

> stand trial, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days after the date of the filing of the motion, and shall order the defendant to be examined by no more than three nor fewer than two experts prior to the date of said hearing. Attorneys for the State and the defendant may be present at the examination.

In Lane v. State, supra, this Court addressed the question of what constitutes "reasonable ground" to believe that a defendant is not mentally competent to stand trial, so as to activate the trial court's responsibility to order a competency hearing pursuant to Rules 3.210 and 3.211:

> The United States Supreme Court in Dusky restated the historical rule that a person accused of a crime who is incompetent to stand trial shall not be proceeded against while he is incompetent. The law is now clear that the trial court has the responsibility to conduct a hearing for competency to stand trial whenever it reasonably appears necessary, whether requested or not, to ensure that a defendant meets the standard of competency set forth in Dusky. The United States Supreme Court reiterated this directive in Drope and said:
>
> > 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, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further

> inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.... [420 U.S. at 180-181, 95 S.Ct. at 908]
>
> * * * * * *
>
> This requirement for a competency hearing was addressed by us in Fowler v. State, where we held that it is obligatory on the trial court to fix a time for a competency hearing if there are reasonable grounds to believe that the defendant is not competent to stand trial.

Lane v. State, supra, at 1025.

"[A] judge's responsibility to guard against the possibility that an accused person may have become incompetent does not end when the trial begins". Pouncey v. United States, 349 F.2d 699,700 (DC Cir. 1965); State v. Bauer, 245 NW.2d 848, 857 (Minn. 1976); State v. Spivey, 319 A.2d 461, 471 (N.J. 1974). Cf. Atwell v. State, 354 So.2d 30, 37 (Ala.Cr.App. 1977)(prior competency determination, while evidence as to the defendant's condition, is by no means conclusive in light of new or additional evidence; trial court's responsibility to prevent trial of a defendant unable to assist in his defense is an ongoing one). As stated by the U.S. Supreme Court in Drope v. Missouri, supra, 420 U.S. at 181, and by this Court in Lane v. State, supra, at 1025, "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial". See especially, Holmes v. State, 494 So.2d 230, 232 (Fla.3d DCA 1986); State v. Bauer, supra, at 852-857; cf. Pericola v. State, 499 So.2d 864,867 (Fla. 1st DCA 1986).

In determining whether to call for a hearing pursuant to Rule 3.210(b), the test is "whether there is reasonable ground to believe that the defendant may be incompetent, not whether he is incompetent" Scott v. State, 420 So.2d 595, 597 (Fla. 1982); Walker v. State, 384 So.2d 730, 733 (Fla. 4th DCA 1980); Kothman v. State, 442 So.2d 357, 359 (Fla. 1st DCA 1983) [emphasis in opinions]. The competency rule is mandatory, and states that "upon reasonable ground the court shall fix a time for a hearing. Fla.R.Crim.P. 3.210 (a)(2)(1979)." [47] Scott v. State, supra, at 597 [emphasis in opinion]. As the appellate court explained in Kothman v. State, supra, at 359:

> Once the judge is presented with reasonable grounds to believe a defendant may not have sufficient present ability to consult with his attorney and aid in the preparation of his defense with a reasonable degree of understanding ... he must order a hearing and examination pursuant to Rule 3.210. ... The issue in this case is not, as [the State] contends, whether there was competent, substantial evidence from which the judge could conclude Kothman was competent to stand trial.

Among the factors (any one of which may be sufficient) to give rise to a reasonable doubt as to a defendant's present competency include evidence of a defendant's irrational behavior, his demeanor at trial, and prior medical opinion regarding his competency and mental condition. Drope, (420 U.S. at 180); Lane (at 1025); Bauer

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47 / Regarding the mandatory nature of Rules 3.210 and 3.211, and the the importance of strict compliance with these rules, see also Livingston v. State, 415 So.2d 872 (Fla.2d DCA 1982); Marshall v. State, 440 So.2d 638 (Fla.1st DCA 1983).

(at 855). [Clearly, also, if prior medical opinion is a relevant consideration in determining whether there is a bona fide doubt as to a defendant's present competency, then, a fortiori, any new or revised medical opinion, based on subsequent developments in the trial process or on changes in the defendant's mental condition, is also a relevant factor. See State v. Bauer, supra]. Other factors which have been recognized as bearing upon whether reasonable grounds existed to order a competency hearing include a defendant's suicidal behavior [Drope v. Missouri, supra]; his insistence on a course of action clearly not in his best interests [Scott v. State, supra [48/]]; and the representations of the defendant's lawyer [Drope; Scott]. While the trial judge is not required to accept at face value the lawyer's representations concerning his client's competency, "an expressed doubt in that regard by the one with 'the closest contact with the defendant' is unquestionably a factor which should be considered". Scott v. State, supra, at 597 (quoting from Drope v. Missouri, supra, 420 U.S. at 177-178, n.13).

The substantive claim that a defendant was denied due process by being tried while incompetent is fundamental, and can be raised at any time. See Lokos v. Capps, supra, at 1261; Mason v. State, supra. Any medical or psychiatric evidence (even if it came to light long after the trial was concluded, and even if neither the judge nor the attorneys were aware of the need for a competency

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[48/] In Scott (at 597), an agreement had been reached between defense counsel and the prosecutor, with the consent of the judge, that the state would waive the death penalty if Scott would agree to be tried by a six person, rather than a twelve person, jury. Scott, personally, "overrode his lawyer's recommendation and rejected this eminently-favorable bargain". This Court found Scott's behavior in this regard as a significant factor which (in combination with other occurrences) should have alerted the trial judge that a competency hearing was necessary.

hearing at the time of trial) which tends to establish that the defendant was actually incompetent during his trial may be considered. Lokos v. Capps, supra, at 1261, 1262, 1264-1269; Mason v. State, at 735-737. To sustain the substantive due process claim, the defendant must prove by a preponderance of the evidence that he was incompetent at the time of the trial. Lokos v. Capps, supra, at 1261. In the present case, appellant submits that he has demonstrated by overwhelming evidence[49] that he was, in fact, incompetent during the penalty phase of his trial.[50]

On the other hand, the claim of error based on procedural due process, and on Rules 3.210 and 3.211, must be evaluated on the basis of the information which was available to the trial court at the time. Lokos v. Capps, supra, at 1261; see also Drope; Lane; Scott; Hill; Wheat; Bauer. Thus, in the present case, the question is whether there was a bona fide doubt regarding appellant's present competency at the time the trial court denied defense counsel's motion to continue the penalty phase and to order further psychiatric evaluation. The information and circumstances which the trial court was, or should have been, aware of at the time included:

Prior medical opinion. The two psychiatrists who had examined appellant over a month before the trial both concluded at

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49/ Due to the length of this brief, appellant will rely on, but will not attempt to recapitulate, the evidence of incompetency set forth in the Statement of the Case and Facts.

50/ Appellant is also raising a separate issue of substantive incompetency as to the guilt-or-innocence phase of the trial in Issue III, although he is not arguing a Pate violation as to the guilt phase. While appellant submits that the preponderance of the evidence demonstrates that he was incompetent during the guilt phase as well, he further submits that the evidence of incompetency in the penalty phase was even stronger, to the point of being overwhelming. Therefore, the two claims of substantive incompetency must be evaluated separately.

that time that he was, on balance, competent; but both also expressed reservations about his competency. Dr. Ainsworth had noted that appellant's motivation to help himself in the legal process and his ability to manifest appropriate courtroom behavior were both "questionable", and had recommended that appellant be given an extra dose of antipsychotic medication prior to any testimony he might give (R1107-1108). Dr. McClane had doubts about appellant's motivation to help himself, his ability to maintain appropriate behavior, and his ability to cope with the stress of incarceration (R1578-1579). Dr. McClane also reported that appellant suffers from a major depressive disorder with suicidal thoughts and previous suicide attempts, from a "mixed personality disorder" with paranoid, borderline, narcissistic, antisocial, and dependent personality traits, and from a possible underlying psychosis (R1579). McClane observed, in his pre-trial report, that appellant may become "overtly psychotic" when under stress (R1579). Perhaps most significantly, appellant's depression over - and obsession with - Lisa, and his wish to be put to death in the electric chair so that she and her mother "would read about it in the newspapers and feel guilty", was emphasized in Dr. McClane's pre-trial report (R1575-1578). According to Dr. McClane, appellant had told him he had planned to hang himself on Lisa's birthday, but changed his mind because "going to the electric

chair would be more dramatic and have more effect on them"[51] (R1578) Dr. McClane's report further states "He [appellant] is also somewhat grandiose when talking of the book he is writing about the legal system and his case. He says it will be entitled Not Guilty and have a picture of the electric chair on the front of it. In the book he will tell 'what these 2 women have done' to him" (R1578).

Dr. McClane's updated medical opinion. In the penalty phase of the trial, appellant refused to allow defense counsel to put on any evidence of mitigating circumstances or to make any argument against a death sentence. Appellant addressed the jury himself, and told them that since they had found him guilty (which, he said, was his intention from the beginning), they had to put him in the electric chair. He also told the jury "I guess you are wondering what the purpose of this is all about. You see, to make a long story short, I fell in love with a girl named Lisa Johnson. Her mother didn't like me. She told - she told Lisa a bunch of lies about me, made the girl hate me. Together they teamed up and ruined my life." (R962). Then, as if speaking to Lisa, he continued, "Yes, I made a

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[51] Note that this statement was made a month before trial, and that at the same time appellant was telling McClane he wanted to die in the chair, he was also maintaining that he did not kill Anne Marz; Darryl Meadows did (R1574-1575). The significance of this is that it rebuts the prosecutor's argument that appellant's behavior in the penalty phase was merely that of a "sore loser", angry because he was convicted. It is conceivable (albeit barely) that an already convicted defendant could simultaneously claim innocence, carp about the evidence, and demand the electric chair out of spite, and still be termed "rational". But, here, before trial (and with at least some prospect of an acquittal, in light of Darryl Meadows' confession and upcoming testimony that he, not appellant, killed Anne Marz), appellant was maintaining that he did not commit the crime, and at the same time looking forward to committing state-assisted suicide in the electric chair, to impress a girl. That, by anybody's definition, is irrational.

fool out of myself; but always remember, Lisa, when you lie about something, you always have got to remember what you lied about, or just hope that the person that you lied to has a bad memory" (R962).

When Dr. McClane learned of appellant's behavior, he thought it might have been a reversion back to what had been his motivation in the beginning, "of simply wanting to get himself killed, not as punishment for a crime, but for basically neurotic motivation related to getting even with the girl and her mother, and motivated in part by his depression, wanting to get away from it all" (R976). After interviewing appellant during a lunchtime recess, Dr. McClane reached the opinion that appellant had indeed crossed over the line into incompetency, but "I can't say it's to a criterion of reasonable medical certainty. I still have some doubts" (R963). [See Lane v. State, supra, at 1025-1026].

Dr. McClane acknowledged that it is possible, under certain circumstances, for a person to make a rational decision to die, but that appellant's death-seeking behavior was irrational and was the product of (1) his "obsession with his rejection by Lisa and her mother and his desire for revenge by making them feel guilty" and (2) his severe (and pre-existing) depression and suicidal tendencies (R984). Dr. McClane was of the opinion that these factors were present during the guilt phase of the trial as well, and that Appellant's reaction to the jury's guilty verdict[52/], "when in fact he believes he was innocent and did not kill anyone", may have "possibly and even probably tipped this over the edge into substantial doubts about his competency" (R984).

52/ Note Dr. McClane's observation, in his pre-trial psychiatric report, that when under stress appellant may become "overtly psychotic" (R1579).

Dr. McClane further expressed the opinion that appellant had a serious mental illness, that he was badly in need of psychiatric treatment, that he was actively suicidal, and that he was "clearly civilly committable" (R985-986). Dr. McClane recommended that appellant be hospitalized for at least several weeks, for psychiatric treatment, medication, and counseling, with a further determination of competency to be made at the time (R986).

> MR. ALCOTT (defense counsel): In your opinion he is not rationally making decisions at this time?
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> DR. MCCLANE: That's my opinion, yes, sir, some kinds of decisions.
>
> Q. In decisions that would guide his attorneys in how to conduct his defense he is irrational?
>
> A. Yes, that's my opinion at this time.
>
> Q. And it is your opinion that he is probably incompetent, but you can't say to a medical certainty that he is?
>
> A. That's correct. Incompetent, I want to emphasize, I'm not talking about global incompetency. Incompetence in the sense of inadequately motivated to help himself and to assist his attorneys in his own defense on the basis of largely of mental illness.

(R986)

* * * * * *

> BY MR. ALCOTT (on redirect examination): Doctor, in other words, as I understand, it's your opinion at this time that he is probably incompetent and he is acting irrationally in terms of his decision making?
>
> a. Yes.

(R996)

Based on the testimony of Dr. McClane, defense counsel requested the trial court to continue the penalty proceedings, and to order either commitment of appellant or further psychiatric evaluation (R1000-1001). The prosecutor replied "The state does not believe that the testimony of Dr. McClane establishes the man as incompetent; only that Dr. McClane has some doubts about his competency ... "(R1002-1003). The prosector argued that appellant's behavior was "simply a case of an individual who simply has no desire to further participate in the proceedings and any further desire to assist his attorney simply because he got found guilty by the jury and not because of any great mental disease or mental defect that he has" (R1003). He asked that the proceedings go forward, and that a recommendation be received from the jury that afternoon. The trial court ruled accordingly.

Representations of counsel. As a second ground for his motion to continue the penalty phase, defense counsel asserted that because of appellant's irrational behavior and irrational decision-making process, he was not receiving effective assistance of counsel (R1002). When the trial court denied the motion for a continuance, he announced:

> The proceedings will ensue. The proceedings will go forth with this caveat. If you wish to go forward with witnesses, we really are at that juncture, you may do so.

(R1003)

Defense counsel replied that he would like to go forward by presenting witnesses, but that appellant would not allow him to do so:

> That's the point where I'm at is I can no longer effectively assist. To that extent, I have conferred with Mr. Fredericks [co-counsel] and we would move to withdraw then upon the grounds that we can no longer render effective assistance of counsel because he in fact is not rational in his deliberations in conferences.

(R1003-1004).

The trial court denied the motion to withdraw.

Evidence of irrational behavior. In addition to the testimony of Dr. McClane, and the lay opinion of attorney Alcott, that appellant was presently irrational in his behavior and thinking, there were other warning signals which (in combination with everything else) should have put the trial court on notice that there existed a genuine doubt as to appellant's present ability to consult with his lawyer with a reasonable degree of rational understanding, sufficient to trigger the procedural requirements of Rules 3.210 and 3.211 and the constitutional mandate of Pate v. Robinson. First of all, as the judge was well aware, appellant had a history of irrational outbursts and diatribes, interspersed with periods of relative calm, throughout the pre-trial proceedings. In January, 1985, appellant had filed a rather mild (at least for him) motion to discharge the Public Defender on Thursday, apologized for it on Friday, and then on Monday in open court launched into a torrent of vile obscenities and unrealizeable threats, demanding to be put into the electric chair right now, the way a spoiled three year old might demand a new toy (see R69-74). Also, for example, there is the so-called "Hitler letter", written to Judge Green by appellant during his pre-trial incarceration, and introduced by the state at trial (see R113-114,715-716). As previously

mentioned, Dr. McClane's pre-trial report indicated a "possible underlying psychosis" as part of his diagnosis of appellant's mental condition, and noted that he may become overtly psychotic under stress. Similarly, Dr. Ainsworth had recommended an extra dose of antipsychotic medication prior to appellant's giving any testimony in court.

With the foregoing background, the trial court should have been aware, when he attempted to inquire into the voluntariness of appellant's decision to dispense with the services of counsel [see Issue IV, infra], that appellant had reverted to his previous irrational thinking:

> THE COURT: -- Why do you not wish to have witnesses called?
>
> MR. PRIDGEN: What for? For somebody to beg for my damn life?
>
> THE COURT: Pardon?
>
> MR. PRIDGEN: Your Honor, I'm going to use this system for my own purposes just like I've been saying for the last eight months. That's all. No. Kill me.
>
> THE COURT: All right. If--if you change your decision, you will be permitted to proceed without request to the Court, of course.
>
> Now, Mr. Pickard, do you have--well, let me back up. Mr. Pridgen, I'm not sure there's any rule of law that governs this situation. The closest thing I can----
>
> MR. PRIDGEN: Kill me.
>
> THE COURT: Wait now, hear me out. The closest parallel that I can imagine would be not being represented at all, and under those circumstances it's necessary for me to determine whether you truly understand the consequences of your actions.

MR. PRIDGEN: Now you're concerned with the consequences of my actions?

THE COURT: Yes, you should be concerned with----

MR. PRIDGEN: I remember writing you a three-page letter stating that I did not want Larry Shearer as my attorney. Gave you some very good reasons why I did not want Larry Shearer as my attorney. You made a copy of that letter, sent it back with a little note attached to it stating that I want you two to kiss and make up: and now you're concerned about me? Kill me. I demand it.

THE COURT: Do you understand that your attorneys believe it would be in your interest to call favorable witnesses and for them to make argument in your behalf?

MR. PRIDGEN: No, I don't want nobody coming in here.

THE COURT: I know that's what you want to do, but I'm asking if you understand that that's what they believe? That they believe it would be best for you to take this approach?

MR. PRIDGEN: Right.

THE COURT: And the other side of that coin is obviously they believe your position will be worsened if you do not call witnesses in your behalf, and if they are not permitted to make argument in your behalf. Do you understand that?

MR. PRIDGEN: Your Honor, I was found competent by three doctors. I don't need a doctor no more. I asked for a goddamn doctor for the last 14 months. Kill me. I demand it.

(R941-943)

After defense counsel profferred that witnesses (Dr. McClane and appellant's mother, stepfather, and brother) were available to testify in mitigation regarding appellant's mental

condition, his emotional state during the past year, and his background, the "inquiry" continued in the same vein as before:

> THE COURT: Mr. Pridgen, do you still wish for these witnesses not to be called?
>
> MR. PRIDGEN: Kill me.
>
> THE COURT: Pardon me?
>
> MR. PRIDGEN: Kill me.
>
> THE COURT: All right. Mr. Pickard, do you have your instructions?

Not only was this a seriously defective Faretta inquiry [IssueIV], it should have been a red flag that there was reasonable ground to believe appellant was incompetent. And if that wasn't enough, then appellant's address to the jury (set forth verbatim at p. 13-17 of this brief) should have erased whatever belief remained that appellant might be capable at that point of rational decision-making. Virtually from the very beginning, appellant was contradicting himself from sentence to sentence and phrase to phrase:

> I'm not going to sit here and argue the facts about this case, this present case. I'm going to-- because you done found me guilty. As I told you before, that was my purpose.
>
> The question is: Did I really and truly murder Anne E. Mars? If I'm permitted, I'd like to go over some of this stuff real quick; and y'all can go ahead and sentence me to the chair and go home...

After telling the jury he was not going to argue the facts of the guilt-phase, he proceeded to do just that (R957-963). The thrust of his statement seems to be that he did not kill Anne Marz, the witnesses against him were lying, the police and the

prosecution did a lousy job of investigating the case, etc. The tone of the speech is one of complaint, even carping. Such an approach and such an attitude would not necessarily be unexpected from a convicted defendant who claims he's innocent. What is unexpected - and patently irrational - is a convicted defendant who (a) claims he's innocent and (b) insists that it was his purpose all along to be found guilty; who (a) complains about the evidence and (b) says that he's the one who orchestrated it[53]; who (a) tells the jury that, while sure he was depressed and suicidal, he could never actually brutally murder anyone, and (b) demands that they put him in the chair; and who further tells the jury that "what the purpose of all this is about" is a girl named Lisa and her mother, who "teamed up and ruined my life" (R956-963).

Pre-existing suicidal behavior and thinking. Dr. McClane testified, during the break in the penalty phase, that it is possible for a person to make a rational decision to die, but that he believed that appellant's desire to receive a death sentence was irrational, and was the product of his obsession with Lisa and his desire for revenge against her and her mother, as well as his pre-existing depression and suicidal ideation. In Drope v. Missouri, supra, the U.S. Supreme Court held that the defendant's suicide attempt during his trial, combined with other information which was available, gave rise to a reasonable doubt as to his competency sufficient to require further inquiry. The Court noted the suicide attempt was

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[53] "Also, Mr. Pickard has stated that he is going to produce overwhelming evidence against me. In reality, what Mr. Pickard produced is exactly what I wanted him to produce" (R956).

an "act which suggests a rather substantial degree of mental instability contemporaneous with the trial" (420 U.S. at 181), but also recognized " 'the empirical relationship between mental illness and suicide' or suicide attempts is uncertain" and that "a suicide attempt need not always signal 'an inability to perceive reality accurately, to reason logically and to make plans and carry them out in an organized fashion.'" Drope v. Missouri, supra, 420 U.S. at 181, n.16 [emphasis supplied by appellant].

In Drope, the defendant actually attempted suicide during the trial, while in the present case, according to Dr. McClane's report (see R1575-1576,1579), appellant's suicide attempts (including the one which required nearly a week's hospitalization) preceded the trial. More signifcantly, appellant's suicide attempts also preceded, by several months, the crime for which he was on trial. Therefore it is clear that appellant's suicidal feelings were not primarily motivated by the outcome of his trial.

It should also be emphasized that the instant case (unlike Drope) is a capital case. A defendant's suicidal tendencies, especially if they are the product of mental illness, may have particular impact on his competency in the context of a death penalty trial. In the penalty phase of a capital trial, where you have a defendant whose suicidal urges are completely or substantially independent of his legal situation, and where that defendant is not only permitted to stand trial, but also to dispense with the assistance of counsel and the presentation of mitigating evidence and argument, the penalty phase itself amounts to nothing more and nothing less than a suicide attempt.

Presumably, as Dr. McClane recognized, it is possible that a convicted defendant may prefer a death sentence to life imprisonment without necessarily being irrational or incompetent. He may acknowledge his guilt of a murder, and feel that death is the only atonement for the crime, or the only way to stop himself from killing again. Or he may feel that life in prison is so horrible that death would be a less objectionable alternative. Conceivably, he may refuse to ask for a life sentence based on deeply held religious or philosophical principles. Cf. Muhammad v. State, 494 So.2d 969, 975-976 (Fla. 1986). In the present case, all of the information which was available to the trial judge at the time he denied defense counsel's motion to continue the penalty proceedings pending further psychiatric evaluation was that appellant has a serious mental illness; that he was, at the present time, "actively suicidal" and "clearly civilly committable"; that he was irrational in his decision-making; that he was incompetent "in the sense of inadequately motivated to help himself and to assist his attorneys in his own defense on the basis largely of mental illness; and that his death wish was the product of his "obsession with his rejection by Lisa and her mother and his desire for revenge by making them feel guilty", as well as his pre-existing "[m]ajor depressive disorder with suicidal thoughts and previous suicidal attempts" (see R976-977,983-986,996,1579).[54]

The trial court recognized that there were reasonable grounds to believe that appellant might be incompetent, but waited to order a competency hearing until it was too late to do any good.

54 / See Fulford v. Maggio, 692 F.2d 354, 361 (5th Cir. 1982)("The State urges that Fulford had the capability to assist his attorney but simply refused to do so. But if this refusal was based on his paranoid delusions, it cannot be successfully urged that Fulford was actually capable of assisting counsel).

Of all of the factors previously discussed, this one may be the most telling. Not only should the totality of the circumstances have alerted the trial judge that appellant might be incompetent to stand trial in the penalty phase; the judge's own actions and statements demonstrate that he was alerted to appellant's possible incompetency, yet intentionally waited until after the jury's penalty recommendation was received before taking any steps to protect appellant's right against being tried while incompetent. A more classic example of locking the barn door after the horses have run off[55/] would be hard to find.

Because the trial court allowed appellant to dispense with the assistance of counsel, and denied defense counsel's motion to continue the penalty phase for further psychiatric evaluation, the jury did not hear any evidence or argument in mitigation, did not hear any expert testimony concerning appellant's mental condition or about the possible applicability of statutory or non-statutory mental mitigating circumstances, but did hear appellant demand to be put in the chair. Not surprisingly, under the circumstances, the jury returned a recommendation of death. Five days later, the trial court, sua sponte, appointed three experts, Drs. McClane, Ainsworth, and Dee, to examine appellant for his competency to be sentenced. The record does not indicate that any additional information came to the trial court's attention in the interim. To the contrary, it appears that all of the evidence concerning appellant's possible incompetency was either already before the court when he refused to continue the penalty phase (see p.10-24 of this brief) or else was presented in

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55/ And after being thoroughly warned in advance that the barn door was wide open.

the reports and testimony in the four subsequent hearings on competency to be sentenced which took place as a consequence of the trial court's sua sponte order of May 28, 1985.

The obvious question is, if the trial court did not feel there was a reasonable doubt as to appellant's competency on May 23, when he refused to further inquire into appellant's competency to stand trial - and if nothing of significance came to light during the next five days - then why on May 28 did he develop a doubt as to whether appellant was competent to be sentenced. While the sentencing proceeding in a capital case is important, and while the defendant's input and cooperation may still be beneficial to counsel at that stage, the penalty phase of the trial demands a much higher degree of personal participation by the defendant. The penalty proceedings before the jury is functionally equivalent to a trial on the question of guilt. See Bullington v. Missouri, 451 U.S. 430 (1981). Ordinarily, both the state and the defense may present evidence and testimony, cross-examine witnesses, request and/or object to jury instructions, and make a final summation to the jury.[56/] Moreover, the ultimate sentencing decision by the trial judge is largely dictated by the evidence of aggravating and mitigating circumstances presented in the penalty phase, and by the jury's recommendation of life or death. Clearly, a capital defendant's right not to be proceeded against while incompetent is not adequately protected by ensuring only his competency to be sentenced, unless equal (if not greater) care is taken to ensure his competency to stand trial in the penalty phase.

56/ In the four hearings on appellant's competency to be sentenced, Dr. Ainsworth, in particular, expressed much concern about whether the standards for competency were as strict, and whether they involved the same eleven criteria, as competency to stand trial, given the differences in the character of the proceedings, and the differences in the degree of personal participation required of the defendant.

The explanation for the trial court's course of action became apparent at the end of the first hearing on competency to be sentenced, which took place on July 5, 1985 (some six weeks after the completion of the penalty phase). After hearing the testimony of Drs. McClane, Ainsworth, and Dee, as well as the testimony of attorney Fredericks that in the penalty portion of the trial appellant would not communicate with him at all, the trial court found (contrary to the opinion of all three doctors) that appellant had been competent for both the guilt phase and penalty phase. The court continued:

> Be that as it may, having ruled that he was competent during these proceedings, the sole evidence before me is that he has deteriorated. Dr. McClane gave a stronger offering about deterioration at the first proceedings. In fact, it was this trend of deterioration that persuaded me not to reopen or to open up or extend, whichever might be correct, the bifurcated proceedings.
>
> Be that as it may, my present order is that he be transferred to Florida State Hospital and then -- and there examined with appropriate reports being sent here and that he be treated if treatment is necessary and predictably following treatment, sentenced.

(R1146-1147)

In other words, the trial court took Dr. McClane's testimony in the recess of the penalty phase that appellant's mental condition had deteriorated, and used that "trend of deterioration" as a reason not to conduct any further inquiry into appellant's competency before proceeding with the penalty phase; as a reason not to order a hearing as mandated by Rules 3.210 and 3.211 when there is reasonable ground to believe the defendant lacks the present ability to rationally

consult with his attorney. Instead, standing the principle of Pate v. Robinson on its head, the trial court opted to go forward and get a penalty recommendation from the jury that afternoon, apparently fearing that if he continued the penalty phase for a competency hearing, appellant's mental condition might deteriorate even further. Unfortunately, the resulting jury death recommendation was both unreliable[57/] (since the jury had not heard any of the available mitigating evidence regarding appellant's mental illness, his emotional state during the period of time when the crime was committed, or his background) and obtained in violation of due process (because of the trial court's failure to observe the applicable procedures to ensure against his being tried while incompetent). The trial court's decision to proceed with the penalty phase without further inquiry into appellant's competency - in light of the totality of the information that was available to him at the time (including the uncontradicted testimony of Dr. McClane that appellant was irrational, suicidal, and probably incompetent as a result of mental illness), and especially in light of the court's recognition that appellant's mental condition had deteriorated between the time of the guilt phase and the penalty phase - clearly violated the due process mandate of Pate v. Robinson [see Drope; Lokos; Wheat; Hill; Bauer][58/], and the constitutionally based procedural requirements of Rules 3.210 and 3.211 [see Lane; Scott; Hill; Marshall; Kothman; Holmes].

57/ See e.g. Caldwell v. Mississippi, ___ US ___, 105 S.Ct. 2633 (1985); People v. Deere, 710 P.2d 925 (Cal. 1985) (Eighth and Fourteenth Amendments require reliability in capital sentencing proceedings).

58/ See also Fulford v. Maggio, 692 F.2d 354 (5th Cir. 1982); Bundy v. Dugger, 816 F.2d 564 (11th Cir. 1987).

The case of State v. Bauer, 245 NW.2d 848 (Minn. 1976) is remarkably similar, in many respects[59], to the instant case. In Bauer, the defendant shot and killed a police officer who had come to serve commitment papers.[60] At his arraignment, the court ordered a pre-plea psychiatric examination to determine Bauer's competency to stand trial. The court psychologist found that Bauer operated under a paranoid delusion that other people (including lawyers and psychiatrists) are not to be trusted; they would only pretend to help him or defend him. "The question", wrote the psychologist, "seems to be one of whether he is unwilling or unable to participate with counsel in the preparation and implementation of his defense." The psychologist did not offer an opinion as to Bauer's competency, noting that that issue would be addressed by Dr. Malmquist, a psychiatrist.

Dr. Malmquist interviewed the defendant twice. Bauer was generally uncooperative in these interviews, as he had been with the court psychologist[61]. After the first interview, Dr. Malmquist concluded, on the basis of the information then available,

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59/ The most important difference between the two cases is that Bauer is not a death penalty case.

60/ The Minnesota probate court had granted a petition for judicial commitment, which appears to be the equivalent of Florida's "Baker Act" procedure -- i.e., involuntary civil commitment for psychiatric treatment.

61/ In contrast, in the instant case, appellant was interviewed, over a period of a year and a half, maybe two dozen times by at least seven different psychiatrists and psychologists, and was never accused of refusing to cooperate. The only one of these professionals who expressed the opinion that appellant's death wish was merely a ploy or an attention getting device was Ms. Roman, and even she agreed that his mental illness was genuine (R1234, see R1208,1211,1215,1217,1225,1234-1236).

that Bauer was merely unwilling to discuss the shooting incident, but added the caveat that "a more extensive psychological history and examination might reveal a delusional basis for the defendant's uncooperative attitutde which would render him incapable of participating in his defense." Following the second interview, Dr. Malmquist concluded that Bauer was not incapable of cooperating in his defense, but only unwilling to do so, and therefore was competent to stand trial. The trial judge ruled accordingly.

A month later, Dr. Malmquist interviewed Bauer a third time, at the latter's request. Bauer was "markedly more communicative" about the details leading up to the shooting, though he still refused to discuss the actual events of the shooting. Dr. Malmquist did not expressly revise his prior opinion of competency, but cautioned:

> It is my impression that at this point Mr. Bauer is still insistent on wanting a trial to present his version of the events. There is the danger of this individual having episodes where he may not be able to function adequately in court. That is a very difficult thing to predict given the unknowns that can occur during the course of a trial. He again states that it is a matter of his not wishing to discuss further details with a lawyer. At this time I could only offer the opinion that he may regress during a trial so that at those times procedures would be interfered with. He does not view his state now as one of needing hospitalization, nor does he want it at this time. He is opposed now, as he was the first time I saw him, to medical, or legal, attempts to certify him as incompetent so that the story he wishes to present would not come forth. He is on no medications at this time to my knowledge. It will be a matter of assessing what degree of competency he must have, to not

only cooperate with an attorney (which he does not wish to do), but to also conduct his own defense. 62 /
[Emphasis in original]

During the pre-trial hearings, Bauer asserted his right to proceed pro se. The trial court appointed the public defender to act as standby counsel. Shortly before trial, Bauer filed an affadavit of prejudice against the trial judge, and as a result a different judge presided over the trial. Bauer renewed his demand to proceed pro se at trial. Apparently because of Bauer's refusal to participate, the trial court allowed the public defender to conduct certain stages of the defense, but Bauer was also permitted to participate directly in his defense whenever he would assert his right to do so. 63 / "A result, in part, of this dual representation was that no defense was offered on behalf of the defendant" 64 / [State v. Bauer, supra, at 851].

62 / Compare the instant case, where both Dr. McClane and Dr. Ainsworth qualified their pre-trial findings of competency with express reservations about several of the criteria, most signifcantly appellant's motivation to help himself in the legal process. Note also Dr. McClane's observation that appellant may become overtly psychotic under stress; McClane's discussion of appellant's grandiosity, his obsession with Lisa, and his motivation for wanting to die in the electric chair despite his claim of innocence; and Dr. Ainsworth's recommendation that appellant be given an extra dose of antipsychotic medication prior to any testimony he might give.

63 / For example, Bauer made the closing argument to the jury. Like appellant's statement to the jury in the instant case, the argument was fraught with the defendant's personal demons, and did not really present a defense at all. See 245 NW.2d at 852, n.4.

64 / Compare the instant case, in which the trial court allowed appellant to proceed pro se in the penalty phase, refused to allow defense counsel to withdraw despite their assertion that they were unable to render effective assistance because of appellant's irrationality and his refusal to communicate, and as a result of this dual (or, more accurately, non-) representation, no mitigating evidence or argument (i.e., no defense) was offered in the penalty trial.

On the fourth day of the trial, at the close of the state's case, the public defender moved the court to suspend the trial for further inquiry into Bauer's competency to stand trial [245 NW.2d at 851].

> The public defender advised the court, both in his capacity as court-appointed defense counsel and friend of the court, that it was impossible for the defendant to act as his own counsel or to participate in his own defense through counsel. He credited this impossibility to two things: First, the defendant's paranoid distrust of anyone connected with the judicial system; and, second, his delusional thinking regarding a defense. It was the latter ground that the public defender believed was the most serious, for it prevented the defendant from availing himself of the one good defense he had--not guilty by reason of insanity. 65/

(245 NW.2d at 852)

In support of his motion for further psychiatric evaluation, the public defender offered the testimony of a Dr. Swartz, who expressed the opinion (based on the prior competency evaluation reports of the court psychologist and Dr. Malmquist, a letter written by the V.A. hospital psychiatrist synopsizing Bauer's history of mental illness and his need of treatment, and his own observation of Bauer's behavior in court) that Bauer was presently incompetent to stand trial.

65/ Compare the instant case, where the pre-trial report and penalty phase testimony of Dr. McClane (not to mention the overwhelming weight of the post-trial expert testimony) indicate that appellant's delusional, and probably psychotic, thinking concerning his revenge against Lisa and her mother, and his grandiose delusions about the nationwide fame he was going to achieve (like Gary Gilmore and Son of Sam), are what destroyed his motivation to defend himself against the death penalty.

Dr. Swartz expressed the opinion that it would be "clinically mandatory" for the defendant to have a "battery of psychological tests" in order to determine the extent of his thinking disorder.[66] Swartz attributed Bauer's past and present refusal to cooperate in any testing as a classic reaction of a paranoidally psychotic individual. The trial court denied the motion for further inquiry into Bauer's competency, on the basis of (1) the pre-trial finding of competency made by Dr. Malmquist, and the order entered by the predecessor trial judge, and (2) the defendant's expressed unwillingness to submit to further examination. The public defender renewed his request on two more occasions, but the trial court replied that

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[66] In the present case, Dr. McClane stated during the penalty phase that appellant had a serious mental illness, was actively suicidal, and was badly in need of psychiatric treatment; and recommended that he be hospitalized for at least several weeks for psychiatric treatment, medication, and counseling, with a further determination of competency to be made at that time (R985-986). The trial court refused to grant the requested continuance, but subsequently appointed three experts (including Dr. Dee, a clinical psychologist) to evaluate appellant's competency to be sentenced. Dee administered a battery of psychological tests. McClane, Ainsworth, and Dee unanimously agreed that appellant had been incompetent at trial and in the penalty phase, and was presently incompetent to be sentenced. The trial court rejected the former conclusion but accepted the latter and ordered that appellant be hospitalized. At the hospital, more psychological tests, including the MMPI, were administered. Both Dr. Dee's testing and the hospital's testing (as interpreted by Ms. Roman) strongly indicated that appellant is psychotic (specifically, paranoid schizophrenia), that he suffers from paranoid and grandiose delusions, that his ability to perceive reality is very poor, and that his mental illness is genuine and not feigned (R1080-1095,1585-1588,1294-1295,1302-1303,1605,1208-1211,1215,1217,1225,1234-1236,1595-1596). Had the trial court followed Dr. McClane's recommendations and continued the penalty phase for a full competency evaluation and hearing pursuant to Rules 3.210 and 3.211, he might have had the benefit of this crucial information before it was too late to protect appellant's right against being tried while incompetent.

he had seen nothing at trial to overcome Dr. Malmquist's original determination that Bauer was competent.[67] The judge stated "I think Mr. Bauer's remarks, his questions and so forth, show that irrespective of his mental state he has sufficient competency to cooperate in his defense if he wants to. It is apparent that he does not want to."

On the foregoing facts, the Minnesota Supreme Court held that the trial court had committed error of consitutional proportions by failing to make further inquiry into Bauer's present competency:

> The controlling authorities are the United States Supreme Court decisions in Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), and Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L. Ed.2d 815 (1966), and our decision in State v. Jensen, 278 Minn. 212, 153 N.W.2d 339 (1967).[68] While these decisions fall short of providing complete guidance in resolving the specific problem with which we are confronted, their underlying rationale, which is readily discernible, commands the result we reach.
>
> The essence of the authorities cited is that throughout the course of criminal proccedings a trial judge must be vigilant in ensuring that the defendant is competent to stand trial and that, when a sufficient doubt of the defendant's competence arises, he must observe procedures adequate to ensure the defendant's competency.

State v. Bauer, supra, at 854.

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[67] Dr. Malmquist declined to offer an opinion as to Bauer's present competency, because he had not had an opportunity to view his behavior in the courtroom.

[68] In Florida, the controlling state-law authorities are Scott v. State, supra; Hill v. State, supra, and especially Lane v. State, supra.

The Minnesota Supreme Court concluded that, on the basis of the information which was available to the trial court, further inquiry into Bauer's competency was constitutionally required. The court said, "[The] prior finding of competence and the defendant's demeanor during trial, while properly considered, cannot foreclose further inquiry in the face of "uncontradicted testimony" suggesting incompetence."[245 NW.2d at 856]. The court continued, "Drope [v. Missouri] recognizes the possibly transient nature of an individual's competency and impliedly rejects reliance on prior findings of competency to foreclose further inquiry in light of present evidence suggesting incompetency. As therein stated: 'Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial'" [245 NW.2d at 856, n.9][69/]. The Bauer court concluded:

> In our view, the significant evidence before the trial court relevant to the defendant's mental condition was (1) the public defender's judgment as friend of the court that the defendant was incapable of participating in or making a legal defense, (2) Dr. Malmquist's cautionary opinion of

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69/ See also Lane v. State, supra, at 1025 (in which this Court quoted the same language from Drope); Holmes v. State, supra, at 232 (in which the Third DCA determined that even though the trial court had "employed every possible precaution to assure that [the defendant's] due process rights were protected prior to the commencement of trial", nevertheless, events during the trial raised a bona fide doubt as to his present competency and required the trial judge to conduct another competency hearing); Pouncey v. United States, supra (discussed in Bauer at 857).

> April 20, 1972 that the defendant might regress and be unable to function adequately, and (3) Dr. Swartz's medical opinion the the defendant was paranoidally psychotic, rendering him incapable of standing trial. We believe that the trial court gave that evidence of incompetency too little weight. Had it been given proper consideration, we are convinced that the constitutionally required procedure would have been to suspend the trial and conduct further inquiry.

State v. Bauer, supra, at 858.

In the present case, the evidence suggesting incompetency which was before the trial court was as strong as, if not stronger than, the evidence in Bauer. The relevant information included (1) the opinion of attorneys Alcott and Fredericks that appellant was irrational in his conferences with them; (2) the substantial reservations expressed by both Dr. McClane and Dr. Ainsworth when they made their original findings of competency, and McClane's warning that appellant may become overtly psychotic under stress; (3) the fact that appellant's mental condition was considered to be sufficiently serious that he was receiving antipsychotic medication (as evidenced by Dr. Ainsworth's recommendation that he be given an "extra dose" at trial; (4) the trial court's awareness, from the pre-trial proceedings, that appellant is prone to irrational outbursts and behavior; (5) appellant's pre-existing suicidal state of mind, and its relationship to his obsession with getting revenge against Lisa and her mother; (6) appellant's responses to the trial court's attempted Faretta inquiry (which largely consisted of "Kill me" or "Kill me. I demand it", as well as a statement that he was "going to use this system for my own purposes just like I've been saying for

the last eight months"), and his bizarre argument to the jury[70], and (7) the expert opinion of Dr. McClane that appellant's mental condition had deteriorated to the point where he was irrational in his decision making and was probably[71] no longer competent to stand trial.

In view of all of the foregoing, there was unquestionably a reasonable doubt as to appellant's present competency to stand trial, and the trial court should have ordered a competency hearing pursuant to Rules 3.210 and 3.211. Because the court failed to take adequate measures to ensure appellant's right not to be tried while incompetent, the ensuing proceedings (including the jury's penalty recommendation) violated due process. Pate; Drope; Lane; Scott; Hill; Holmes; Lokos; Wheat; Bauer. See also Bundy v. Dugger, 816 F.2d 564 (11th Cir. 1987).

Rather than attempting to argue that there was no reasonable doubt as to appellant's competency at the point in the penalty phase when the judge denied defense counsel's motion for continuance, appellant anticipates that the state will contend that Dr. McClane's field interview with appellant during the recess, and his testimony

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[70] As discussed at p. 103-104 of this brief, the content of appellant's statement to the jury is highly corroborative of the psychiatric opinion that he suffers from a thought disorder, and is grandiose, delusional, and (for pre-existing reasons produced by his mental illness) suicidal. See Lokos v. Capps, supra, at 1267 ("Having the benefit of [Lokos'] medical history in 1954 and 1955 together with the opinion of one of his treating doctors as well as an additional psychiatrist who examined him in 1977, we regard the unnatural testimony he gave to the jurors who were in the process of deciding his fate as being indicative of one who is not operating in the world of reality").

[71] The fact that Dr. McClane was unable, on the basis of his field interview with appellant, to state this conclusion to a reasonable medical certainty is all the more reason why further inquiry should have been made. See Lane v. State, supra.

in support of defense counsel's motion, amounted to sufficient "further inquiry" to satisfy the trial court's obligations under Pate and Rules 3.210 and 3.211. The Minnesota Supreme Court in Bauer pointedly rejected a similar contention by the state:

> The state advances the argument that by taking the testimony of Dr. Swartz, offered in support of the public defender's motion for a suspension of the trial for further psychiatric evaluation, the trial court observed procedures adequate to ensure the defendant's continued competency to stand trial, and that our review should accordingly focus on whether the trial court correctly determined that the defendant was competent. We are unwilling to engage in such sleight of hand. Dr. Swartz's testimony was offered by the public defender solely for the purpose of establishing the need for further inquiry into the defendant's continued competency to stand trial, and not to establish his incompetency. The two determinations are wholly different, the former involving only the question of whether there is a "sufficient doubt" of competency. It was that question which was before the trial court and which he ruled on.
>
> Moreover, assuming arguendo that we were to regard the hearing as a further procedure, it is highly doubtful that the procedure would be adequate. In Dusky v. United States, 271 F.2d 385 (8 Cir. 1959), the court upheld a finding of competency based on two psychiatric reports and the testimony of an examining psychiatrist, all of which concluded that the defendant was not competent. The testimony of the psychiatrist, however, was apparently somewhat ambiguous. The Court of Appeals concluded that the trial court was free to reject the expert testimony if it was not credible. The United States Supreme Court granted review and in a per curiam opinion concluded: "Upon consideration

> of the entire record we agree with the Solicitor General that 'the record in this case does not sufficiently support the findings of competency to stand trial,' for to support those findings under 18 U.S.C. §4244 [statutory authority requiring competency hearing] the district judge 'would need more information than this record presents.'" 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824, 825 (1960).
>
> In the instant case the only expert opinion regarding the defendant's competency to stand trial at the time the motion was made was that he was incompetent. It is not clear to us that the trial court was free to disregard that testimony without further expert opinion.

State v. Bauer, supra, at 855, n.8

In the present case, following Dr. McClane's testimony that appellant had probably become incompetent (and his recommendation that appellant be hospitalized for psychiatric treatment and further evaluation), defense counsel argued:

> ...we believe there is a factual basis, expert opinion determination that my client is, one, irrational in his decision-making process at this time; and, number two, he's probably incompetent to assist counsel in his defense more likely than not. In other words, there is a probability that he is incompetent.
>
> There was an evaluation conducted under what I would term field conditions as opposed to a good clinical setting, but that's the determination that's been made on a preliminary basis. Now we have a factual basis for it.

(R1000-1001)

Defense counsel asked the trial court to continue the proceedings and order either that appellant be committed "or a committee of other general psychiatric persons in the community

to make their evaluations and determinations so that we may proceed with the hearing when my client is competent to assist counsel" (R1001). [In other words, if somewhat inartfully, he was asking for the hearing mandated by Rule 3.210(b)]. The prosecutor, interestingly, commented "The state does not believe the testimony of Dr. McClane establishes the man as incompetent, only that Dr. McClane has some doubts about his competency"[72] (R1002-1003) and requested that the proceedings go forward, to obtain a recommendation from the jury that afternoon. The trial judge's ruling was clearly focused on the question of whether to suspend the proceedings, not on the substantive question of appellant's competency:

> The proceedings will ensue. The proceedings will go forth with this caveat. If you wish to go forward with witnesses, we really are at that juncture, you may do so.

(R1003)

Thus, as in Bauer, it is clear that the purpose of Dr. McClane's testimony was to show that there was a reasonable doubt as to appellant's continued competency, and to establish the need for further inquiry; "[it] was that question which was before the trial court and which he ruled on" [245 NW.2d at 855, n.8].

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[72] See Scott v. State, supra; Walker v. State, supra; Kothman v. State, supra (test is whether there are reasonable grounds to believe that the defendant may be incompetent, not whether he is incompetent; latter question to be determined after a hearing pursuant to Rules 3.210 and 3.211).

Thus, Dr. McClane's testimony, offered to show reasonable doubt as to appellant's present competency and to establish the need for further inquiry, cannot, except by "sleight of hand", be characterized as being, itself, a constitutionally acceptable "further inquiry" within the meaning of Pate. State v. Bauer, supra, at 855, n.8.

Nor can it be construed as a "hearing", within the meaning of Rules 3.210 and 3.211. Subsection (b) of Rule 3.210 provides that "[i]f before or during the trial the court of its own motion, or upon motion of counsel for the defendant or for the State, has reasonable ground to believe that the defendant is not mentally competent to stand trial, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days after the filing of the motion, and shall order the defendant to be examined by no more than three nor fewer than two experts prior to the date of said hearing."[73]

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[73] Prior to the amendment which became effective July 1, 1980, the Rule required the appointment of one or more experts, not exceeding three; while the present Rule requires at least two experts and no more than three. Compare Chapman v. State, 391 So.2d 744 (Fla.5th DCA 1980) with Livingston v. State, supra. When a statute or rule of procedure has been amended, it is a basic principle of construction that the Legislature or Supreme Court intended to accomplish some purpose by the change. See Tascano v. State, 393 So.2d 540, 541 (Fla. 1980)(recognizing that to interpret Rule 3.390(a) as directory rather than mandatory "would mean that the amendment was meaningless and accomplished nothing); see also Reino v. State, 352 So.2d 853, 861 (Fla. 1977); Arnold v. Shumpert, 217 So.2d 116, 119 (Fla. 1968)(it is to be presumed that the Legislature intended an amendment to serve a useful purpose; "[l]ikewise, when a statute is amended, it is presumed that the Legislature intended it to have a meaning different from that accorded to it before the amendment"). A useful purpose was intended when the Supreme Court amended Rule 3.210 to increase the minimum number of experts needed to examine a defendant whose competency is in question; that purpose is to get a "second opinion".

Rule 3.211 provides that the experts shall report their findings to the court in writing, and shall specifically address each of the eleven statutory criteria in determining whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational, as well as factual, understanding of the proceedings against him. As this Court emphasized in Fowler v. State, 255 So.2d 513, 514-515 (Fla.1971), "In construing this rule[74], we attach prime significance to the words "shall" and "immediately".

> The mandatory verb "shall" makes it obligatory on the court to fix a time for a hearing if there are reasonable grounds to believe that the defendant is insane. Brock v. State, supra. Moreover, the mandatory "shall" is followed by the word "immediately" which lends urgency and significance to the duty of the judge to conduct the required hearing. The framers of the rule (which tracks the language of former Fla.Stat. §917.01, F.S.A.) obviously did not regard lightly the necessity for a hearing.

Fowler v. State, supra, at 515.

See also Livingston v. State, 415 So.2d 872 (Fla.2d DCA 1982); Marshall v. State, 440 So.2d 638 (Fla.1st DCA 1983), recognizing the importance of strict compliance with the rules for determining competency.

Dr. McClane's testimony in the recess of the penalty phase obviously met few, if any, of the requirements of the rules governing competency hearings(which lends further support for appellant's position that his testimony was offered to establish the need for a hearing; not to take the place of a hearing).

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[74] Criminal Rule 1.210(a), the predecessor to current Fla.R.Cr.P. 3.210(b).

Finally, as in State v. Bauer, supra, the only expert testimony as to appellant's present competency at the time the trial court denied defense counsel's motion was that he was irrational and in all probability incompetent. The trial court was not free to disregard that uncontested expert testimony [see Lane v. State, supra; Trucci v. State, 438 So.2d 396,397 (Fla.4th DCA 1983); Poynter v. State, 443 So.2d 219, 220 (Fla.4th DCA 1983); Fulford v. Maggio, 692 F.2d 354 (5th Cir. 1982)][75/], particularly in light of appellant's history of irrational behavior, his actions and statements up to that point in the penalty phase, and the reservations expressed in Dr. McClane's and Dr. Ainsworth's pre-trial reports. See State v. Bauer, supra, at 855, n.8. The trial court was not necessarily required to find appellant incompetent based solely on Dr. McClane's testimony [indeed,

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75/ "Although not absolutely bound by expert opinion as to competence, courts should not ignore uncontested expert testimony". Poynter v. State, supra, at 220. This is particularly true when the uncontested expert testimony is "strongly supported by other relevant evidence" Trucci v. State, supra, at 397. In the instant case, there was no evidence contradicting Dr. McClane's opinion as to appellant's present competency. The evidence that he may have been competent a month earlier is not controlling [Drope; Bauer], especially in view of the strong reservations expressed in those reports, and in view of Dr. McClane's testimony that (a) appellant's mental condition had deteriorated since then, and (b) he [McClane] now had doubts about his own pre-trial finding of competency. When there is conflicting expert testimony on the issue of competency, it is within the trial court's discretion to resolve the factual disputes. Fowler v. State, supra, at 514; Pressley v. State, 261 So.2d 522, 525-526 (Fla.3d DCA 1972); McKnight v. State, 319 So.2d 647, 648 (Fla.3d DCA 1975); King v. State, 387 So. 2d 463, 464 (Fla.1st DCA 1980); Morejon v. State, 394 So.2d 1100, 1101 (Fla.3d DCA 1981). However, the trial court's decision must be supported by the record. Pressley; McKnight; King; Morejon; Poynter; see Fulford v. Maggio. In the present case (even assuming arguendo that the trial court's refusal to suspend the proceedings for further inquiry on the issue of competency could be construed as a ruling on the merits that appellant was presently competent), there was no competent, substantial evidence to support such a ruling, and it would amount to an abuse of discretion.

that was not the purpose of McClane's testimony], but he was required to make further inquiry - at least to get a "second opinion" as provided by Rule 3.210[76] - before rejecting it out of hand. See Fulford v. Maggio, supra.[77]

In addition to the Pate violation and the trial court's failure to comply with rules 3.210 and 3.211, the evidence, by much more than a preponderance, shows that appellant was actually incompetent in the penalty phase, so a substantive due process violation occurred as well. See Lokos v. Capps, supra; Mason v. State, supra. Appellant's death sentence must be vacated, and the case remanded for a new penalty trial, before a newly impaneled jury, if and when

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76/ Contrast Ross v. State, 386 So.2d 1191, 1195-1196 (Fla. 1980), in which this Court found that the trial judge did not abuse his discretion in denying the defendant's request to appoint an additional expert to further evaluate his mental condition. Ross' trial was governed by the former version of Rule 3.210 which required the trial judge to appoint "up to three" experts to examine the defendant. The trial court appointed one expert, a psychologist, who stated unequivocally that Ross was competent, and who did not indicate any need for further testing or evaluation. Appellant's trial, on the other hand, was governed by the present version of the rule which requires the judge to appoint no fewer than two and no more than three experts. In support of defense counsel's motion for a continuance of the penalty phase, Dr. McClane testified that appellant was mentally ill, irrational, suicidal, and (although he could not at that point say so to a medical certainty) probably incompetent. Dr. McClane specifically recommended psychiatric treatment, medication, and further evaluation. Under these circumstances, both due process and the Rules of Procedure clearly required, at the absolute minimum, that the trial court appoint a second expert to examine appellant before proceeding with the penalty phase.

77/ Significantly, when the other psychiatrist who had examined appellant before trial, Dr. Ainsworth, had an opportunity to re-examine him shortly after the completion of the penalty phase, he not only found that appellant was incompetent to be sentenced, but also, like Dr. McClane, acknowledged that he now believed that his pre-trial finding of competency was erroneous, and that appellant was in fact incompetent even before the trial (R1106-1108,1114-1115).

appellant becomes competent to stand trial.[78]

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.

The only two experts who had seen appellant prior to trial[79] (McClane and Ainsworth) both ultimately concluded that their original findings of competency were wrong (R1054,1580,1108, 1114-1115). The only three experts who, during the post-trial hearings on competency to be sentenced, expressed an opinion as to whether appellant had been, in fact, competent during the guilt phase of the

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[78] As this Court recognized in Scott v. State, supra, at 598; Hill v. State, supra, at 1259; and State v. W.S.L., 485 So.2d 421, 422 (Fla. 1986), the failure to hold a competency hearing when one is constitutionally required deprives a defendant of a fair trial, and the remedy is a new trial. A nunc pro tunc competency hearing is not a sufficient alternative remedy because "due process rights would not be adequately protected" by such a procedure. Drope v. Missouri, supra; Scott; Hill; W.S.L.. To the extent that Mason v. State, supra, recognizes a limited exception to this principle, such exception clearly would not apply here, since the only expert who observed appellant contemporaneous with the trial (McClane), and the only experts who, during the subsequent hearings on competency to be sentenced, offered an opinion of appellant's mental condition at the time of trial (McClane, Ainsworth, and Dee), were unanimously of the opinion that he was not competent at that time. Under the circumstances of this case, the trial court's failure to meet the requirements of Pate v. Robinson and Rules 3.210 and 3.211 irreparably destroyed the fairness of the penalty phase, the reliability of the jury's death recommendation, and the reliability of the death sentence itself. A retrospective competency hearing would neither repair the harm nor satisfy due process. Drope.

[79] And, in McClane's case, during the penalty phase of the trial.

trial (McClane, Ainsworth, and Dee) each stated that he probably was not (R1054,1057,1067,1085,1108). The overwhelming weight of the evidence (including the report filed by the Florida State Hospital psychologists Roman and Tooley, and the testimony of Ms. Roman) demonstrates that appellant suffers from a severe mental illness of psychotic proportions, which likely had its onset during or before adolescence, and which is characterized by delusional thinking and very poor capacity to perceive reality.[80] Based on the totality of the evidence summarized in the Statement of the Case and Facts, appellant submits that he was actually incompetent during the guilt phase of the trial as well, and the proceedings violated due process.[81] See Lokos v. Capps, 625 F.2d 1258, 1261,1264-1268) (5th Cir. 1980); cf. Mason v. State, 489 So.2d 734 (Fla. 1986).

80/ The only two experts who did not agree that appellant was psychotic, Drs. Hahn and Phillips of the Florida State Hospital, were the two whose contact with appellant was farthest removed from the time of the trial. According to Hahn, he had asked Phillips why appellant was receiving the antipsychotic medication Thorazine, and Phillips had replied that appellant had been diagnosed as psychotic but that he had improved and was in remission (R1454). During much of his stay in the hospital, prior to his being seen by Hahn, appellant was on high dosages of Thorazine (R1265-1267,1601-1602,1289, 1298,1301,1604,1210,1324,1455). Dr. Hahn was careful to limit his opinion that appellant was competent to the time frame of July 1-6, 1986 (over a year after trial), because he recognized that a patient's mental condition can change from one week to the next (R1448,1456).

81/ Even assuming arguendo that this Court does not find a substantive due process violation, it should still consider the testimony of Drs. McClane, Ainsworth, and Dee that appellant was in all probability incompetent during the guilt phase, coupled with the highly unusual circumstance of another person (Darryl Meadows) having testified against his interest, at trial and under oath, that he, not appellant, committed the charged murder, as a reason to find that the interests of justice require a new trial on all issues, and not merely a new penalty trial. See Fla.R.App.P. 9.140(f).

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.

A. The Trial Court Failed To Conduct An Adequate Faretta Inquiry

Fla.R.Cr.P. 3.111(d), which implements the constitutional mandate of Faretta v. California, 422 U.S. 806 (1975), provides:

> (2) A defendant shall not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into accused's comprehension of that offer and his capacity to make that choice intelligently and understandingly has been made.
> (3) No waiver shall be accepted where it appears that the defendant is unable to make an intelligent and understanding choice because of his mental condition, age, education, experience, the nature or complexity of the case, or other factors.

In Johnston v. State, 497 So.2d 863, 868 (Fla. 1986), this Court recognized that the above rule "contemplates that a criminal defendant will not be allowed to waive assistance of counsel if he is unable to make an intelligent and understanding choice because of, inter alia, his mental condition." In construing the requirements of Rule 3.111(d) and Faretta, the courts of this state have held that, before a defendant will be permitted to represent himself, the trial court must make the defendant aware of the benefits he must relinquish, and the dangers and disadvantages of self-representation. Thereafter, the trial court must ascertain whether [the] de-

fendant has made his choice voluntarily and intelligently; determine whether unusual circumstances exist which would cause the defendant to be deprived of a fair trial if permitted to conduct his own defense; and make inquiry into matters bearing upon these determinations, including, but not limited to, the defendant's age, mental derangement, education, and lack of knowledge or experience in criminal proceedings. See e.g. Johnston v. State, supra, at 868; Cappetta v. State, 204 So.2d 913, 918 (Fla.4th DCA 1967); Robinson v. State, 368 So.2d 674, 675 (Fla.1st DCA 1979); Mitchell v. State, 407 So.2d 1005, 1007 (Fla.5th DCA 1981); Costello v. Carlisle, 413 So.2d 834, 835 (Fla.1st DCA 1982); Keene v. State, 420 So.2d 908, 910 (Fla.1st DCA 1982); Williams v. State, 427 So.2d 768, 771 (Fla.2d DCA 1983); Kimble v. State, 429 So.2d 1369, 1371 (Fla. 1983); Tucker v. State, 440 So.2d 60, 61-62 (Fla.1st DCA 1983); Smith v. State, 444 So.2d 542, 545 (Fla.1st DCA 1984); McCall v. State, 481 So.2d 1231, 1233 (Flalst DCA 1985).

In the present case, the trial judge, correctly, realized that the course of action appellant was insisting upon (making a pro se statement to the jury demanding that he be sentenced to the electric chair, and preventing defense counsel from putting on any evidence or making any argument against a death sentence) was tantamount to no representation at all, and that under those circumstances "it's necessary for me to determine whether you truly understand the consequences of your actions" (R942). Unfortunately, the inquiry which followed was utterly inadequate to satisfy the constitutional requirements of Faretta and the Florida decisions construing it.

The trial court made no inquiry whatsoever with regard to appellant's education, mental condition, or knowledge of criminal proceedings. See Mitchell v. State, supra, at 1007; Tucker v. State, supra, at 62; Smith v. State, 444 So.2d at 546. While it is true that after the trial court permitted appellant to conduct his own defense (and after he had made his statement to the jury), the court heard expert testimony from Dr. McClane concerning appellant's present mental condition, that testimony only demonstrated that appellant was probably not even competent to stand trial, much less conduct his own case. McClane testified that appellant had a serious mental illness, that he was badly in need of psychiatric treatment, that he was actively suicidal and "clearly civilly committable", that he was irrational in his decision making, and, perhaps most importantly, that his insistence on taking a dive in the penalty phase was based largely on his psychopathology and his obsession with and depression over Lisa (R976-977,984-986, 996).[82/]

Rather, the trial court's inquiry was essentially confined to warning appellant that his attorneys felt that it would be in his best interest for him to allow them to call favorable witnesses and make argument on his behalf (R941-943, 944-945). In response to the limited questions asked him by the trial judge, appellant six times stated "Kill me" or "Kill me. I demand it." (R941-943, 944-945). When the trial court said "... it's necessary for me to determine

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82/ Even Ms. Roman, in one of the post-trial competency-for-sentencing hearings, made the observation about appellant that "... because he is psychotic, he has a tendency ... he has a very exaggerated opinion of himself in his ability to handle his case himself" (R1217)

whether you truly understand the consequences of your actions", appellant replied "Now you're concerned about the consequences of my actions?" and added:

> I remember writing you a three-page letter stating that I did not want Larry Shearer as my attorney. Gave you some very good reasons why I did not want Larry Shearer as my attorney. You made a copy of that letter, sent it back with a little note attached to it stating that I want you two to kiss and make up: and now you're concerned about me? Kill me. I demand it.

(R942-943)

The entire interchange between the judge and appellant (R941-943, 944-945) falls far short of the thorough inquiry required by Faretta and Rule 3.111(d)(2), to demonstrate on the record that appellant had the capacity to make an intelligent and understanding choice, and reversal is required for this reason alone. Johnston; Robinson; Mitchell; Williams; Kimble; Tucker; Smith.

B. Under the Totality of the Information Available to him, the Trial Court Abused his Discretion in Failing to Recognize that Special Circumstances Existed which would Cause Appellant to be Deprived of a Fair Penalty Trial if Allowed to Conduct his own Defense.

In light of the pre-trial psychiatric reports (which, inter alia, expressed reservations about several aspects of appellant's competency to stand trial; warned that he may become overtly psychotic under stress; recommended that he be given an "extra dose" of anti-psychotic medication prior to any testimony he might give before the jury; detailed his pre-existing suicidal behavior and thinking; and commented on his desire [notwithstanding his claim of innocence] to make Lisa and her mother feel guilty by his being put to death in the electric chair); in light of appellant's intermittent out-of-control behavior throughout the pre-trial proceedings; and in light of appellant's responses to the limited questions the trial judge did ask, undersigned counsel submits that, even apart from the inadequacy of the Faretta inquiry, the trial judge abused his discretion in allowing appellant to conduct his own defense in the penalty phase, because it is abundantly clear that appellant was unable, due to his mental illness, to make an intelligent and understanding choice. Fla.R.Cr.P. 3.111(d)(3); see Johnston v. State, supra;

Cappetta v. State, supra.[83] Clearly, special circumstances existed in this case which would cause [and did cause] appellant to be deprived of a fair penalty trial if permitted to conduct his own defense. See Johnston (at 868); Cappetta (at 918); see also State v. Doss

83/ In Johnston (at 868), after noting that the determination of whether a defendant has knowingly and voluntarily waived his right to counsel requires inquiry into, among other things, his age, mental status, and lack of knowledge and experience in criminal proceedings, this Court went on to hold that the trial judge in that case had made the proper inquiry "and correctly concluded that the desired waiver of counsel was neither knowing nor intelligent, in part, because of Johnston's mental condition.... Clearly the trial court was correct in concluding that Johnston would not receive a fair trial without assistance of counsel."

In Cappetta (at 918), it was said:

> In determining unusual circumstances, included but not limited thereto is whether the accused by reason of age, mental derangement, lack of knowledge, or education, or experience in criminal procedures would be deprived of a fair trial if allowed to conduct his own defense, or in any case, where the complexity of the crime was such that in the interest of justice legal representation was necessary. The right of an accused to represent himself without assistance of counsel is not so absolute that it must be recognized when to do so would jeopardize a fair trial on the issues.
>
> The determination of whether unusual circumstances are evident is a matter resting in the sound discretion granted to the trial judge in conducting the trial in a cause and will not be disturbed unless an abuse is shown [Citation omitted].

In the present case, the evidence that appellant was making decisions irrationally was compelling. He was mentally ill, he was in need of treatment and medication, he was actively suicidal for reasons having little or nothing to do with the court proceedings, and he was probably incompetent to stand trial. The trial court's failure to recognize that appellant would be deprived of a fair penalty trial if allowed to conduct his own defense was a palpable abuse of discretion.

568 P.2d 1054, 1058 (Ariz. 1977) ("[T]here was compelling evidence that the defendant was too emotionally disturbed to make a knowing waiver [of counsel]"; therefore the trial court correctly decided that he should not represent himself). Subsequent events, such as appellent's statement to the jury[84/], defense counsel's representation that appellant was irrational in conferences, and, especially, Dr. McClane's testimony during the recess[85/], further confirmed this fact.

C. The Trial Court Made No Inquiry, and No Determination, as to Whether Appellant was Mentally Competent to Waive the Assistance of Counsel.

This sub-issue is related, but not identical to, the issues regarding the trial court's failure (a) to conduct further inquiry as to appellant's present competency to stand trial, as required by Pate and Rule 3.210, and (b) to make an adequate Faretta inquiry pursuant to Rule 3.111(d)(2).

As this Court implicitly recognized in Johnston v. State, supra, the fact that a defendant may be mentally competent to stand trial does not necessarily mean that he is mentally competent to

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84/ See p. 13-17 of this brief.

85/ In addition to his opinion that appellant was, at that point in time, probably incompetent to stand trial, Dr. McClane made it clear that appellant's lack of motivation to defend himself was based largely on his mental illness (R977,986), his pre-existing suicidal depression (R976,984), and his obsessive fantasy of revenge against Lisa and her mother (R976,984).

conduct his own defense.[86] This recognition is in accord with decisions of the United States Supreme Court. In Massey v. Moore, 348 U.S. 105 (1954), the Court observed:

> One may not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel. The difference in those issues and the importance of that difference to the petitioner make manifest that grave injustice might be done, if the finding in the earlier proceedings [i.e., that the petitioner was competent to stand trial] were allowed to do service here.

In Westbrook v. Arizona, 384 U.S. 150 (1966), the Court said "Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense." The Westbrook Court continued that the constitutional right to be represented by counsel invokes, of itself, the protection of the trial court. "This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused" Westbrook v. Arizona, supra, 384 U.S. at 150 (quoting Johnson v. Zerbst, 304 U.S. 458 (1938)). The Supreme Court remanded the case to the Supreme Court of Arizona, to re-examine whether this "protecting duty" was fulfilled, in light of the then-recent decision in Pate v. Robinson.

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[86] The requirement that a defendant be mentally competent to rationally make a choice to waive the assistance of counsel and conduct his own defense should not be confused with competence (i.e., skill, ability, legal knowledge) to do a good job of conducting his defense. The latter ability is not required by either Faretta or Westbrook. See e.g. Smith v. State, 407 So.2d 894, 900 (Fla. 1981); People v. Burnett, 234 Cal.Rptr. 67, 73 (Cal.App. 1987).

In Evans v. Raines, 705 F.2d 1479, 1480 (9th Cir. 1983), it was observed:

> We now examine the issue of competency to waive counsel. In Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966), the Supreme Court held that a higher degree of competency was required to waive counsel than to stand trial. Here there was neither a hearing nor a finding on the issue of Evans' competency to waive counsel. The district court in this case found that "there was before the trial judge substantial evidence of petitioner's inability to make a reasoned choice in waiving counsel" and that, under the law of this circuit, a hearing on that issue was required. We agree.

Other decisions recognizing these principles include Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973); United State ex rel Konigsberg v. Vincent, 526 F.2d 131, 133 (2d Cir. 1975); Government of the Virgin Islands v. Niles, 295 F.2d 266 (D.C.V.I. 1969); Barnes v. Housewright, 622 F.Supp. 82 (D.C. Nev. 1985); State v. Kolocotronis, 436 P.2d 774, 780-781 (Wash. 1968); State v. Renshaw, 347 A.2d 219, 225 and n.3 (Md. 1975); Mann v. State's Atty. for Montgomery County, 468 A.2d 124, 128-129 (Md. 1983); State v. Bauer, 245 NW.2d 848, 858-860 (Minn. 1976)[87]; State v. Williams, 621 P.2d 423, 429 (Kans 1980); Curry v. Superior Court, 75 Cal.App.3d 221, 227, 141 Cal.Rptr. 884 (1977); People v. Wolozon, 138 Cal.App. 3d 456, 188 Cal.Rptr. 35, 38-39 (1982); People v. Burnett, 234 Cal. Rptr. 67, 69-78 (1987); People v. Kessler, 447 NE.2d 495, 499-500 (Ill.App. 1983); Commonwealth v. Wertheimer, 472 NE.2d 266,267-268 (Mass.App. 1984). Cf. Commonwealth v. Barnes, 504 NE.2d 624, 627-628 (Mass. 1987)("We ... view Westbrook as necessitating a competency

87/ The Bauer case is the same one discussed in detail in Issue II.

hearing or inquiry to waive counsel only where there is some indication of mental disorder or impairment sufficient to create a 'bona fide doubt' as to the defendant's ability to make an informed decision to proceed without counsel").[88/]

88/ To the extent that certain language in Muhammad v. State, 494 So.2d 969, 974-976 (Fla. 1986) suggests that the standards of competence to stand trial and mental competence to waive counsel are the same, that dictum was implicitly retreated from in the later case of Johnston v. State, supra (in which a capital defendant who was competent to stand trial was nevertheless correctly found by the trial judge to be incapable of a knowing and intelligent waiver of counsel, on account, in part, of his mental condition). Moreover, this Court in Muhammad (at 974) did recognize the Westbrook holding that, despite a prior determination of competency to stand trial, inquiry must be made as to whether the defendant is competent to waive counsel. Muhammad is also distinguishable from the instant case on many grounds including, inter alia: (1) Judge Chance, in Muhammad, conducted "a lengthy and detailed" Faretta inquiry (at 974), and determined (without reliance on the challenged pre-trial finding of competency to stand trial made by Dr. Amin) "that Muhammad was competent to waive counsel." In the present case, the trial court did not conduct an adequate Faretta inquiry - made no inquiry at all into such critical matters as age, education, or, most importantly, mental status - and made no determination, express or implicit, that appellant was competent to waive counsel and conduct his own defense. At most, he ascertained that appellant understood that his attorneys felt it would be in his best interest for him to let them call witnesses and make argument in mitigation. He made no attempt to determine whether appellant's decision to reject this advice and conduct his own defense was knowing and intelligent, or whether it was based on mental illness. [See Johnston v. State, supra, at 868]. (2) A major factor in Muhammad's case was his consistent refusal to cooperate with the experts who were appointed to examine him. On appeal, his counsel contended that the trial court erred in failing to make further inquiry into both his competence to stand trial (494 So.2d at 972-973) and his competence to waive counsel (at 975). This Court rejected both contentions, observing that "[t]here is no duty for the court to order a futile attempt at further examination. A defendant may not thwart the process by refusing to be examined" (at 973, see 975). In the present case, appellant never refused to cooperate with any expert's examination. (3) Most importantly, in Muhammad, this Court emphasized "... the Faretta hearing occurred less than a month after the prior determination of competency to stand trial and nothing in the record suggests that Muhammad's mental condition had changed in the interim necessitating another, most likely futile, attempt at expert evaluation" (at 975). In the present case, the record is replete with evidence showing that appellant's mental condition had changed in the interim - that it had deteriorated to the point where even his competence to stand trial had gone from "borderline" to unacceptable - and that he was not presently capable of rational decision making due to his mental illness.

See also B. Winick & T. DeMeo, Competence to Stand Trial in Florida, 35 U.Miami L.Rev. 31, 72 (1980)(standard of competence to waive counsel is generally considered stricter than the standard for competence to stand trial).

The applicable standard governing the validity of a waiver of the right to counsel has been held to require a finding that the defendant is "free from mental disorder which would so impair his free will that his decision to waive counsel would not be voluntary." Curry v. Superior Court, supra, 75 Cal.App. 3d at 227; People v. Wolozon, supra, 188 Cal.Rptr. at 38; State v. Williams, 621 P.2d 423, 429 (Kans. 1980) (each citing Westbrook v. Arizona).

Three decisions on the subject deserve further comment: State v. Bauer, supra; Evans v. Raines, supra; and Goode v. Wainwright, 704 F.2d 593, 597-598 (11th Cir. 1983). In Evans, the Arizona defendant was examined prior to trial by psychiatrists, who diagnosed him as paranoid schizophrenic, but at least one of whom found him to be competent to stand trial. State v. Evans, 610 P.2d 35,37 (Ariz. 1980). The trial court, on the basis of what appears to have been conflicting evidence, ruled that Evans was competent to stand trial. At trial, Evans elected to represent himself, and was allowed to do so. On appeal, the original determination of competency to stand trial was not challenged, but it was contended that the trial court did not conduct a proper hearing to make a determination of Evans' mental competency to waive counsel. The Arizona Supreme Court disagreed, saying "In summary, a careful examination of the psychiatric reports and the testimony adduced at the hearing on his competency to stand trial reveals that [Evans] was competent to make the decision to waive counsel; further, there is no indication in the record, nor was there any complaint by advisory counsel of any

deterioration in [Evans'] mental condition from the time of the competency hearing to and including the trial of the case"[89] State v. Evans, supra, at 37. On Evans' petition for habeas corpus, the federal District Court and the Ninth Circuit Court of Appeals, citing Westbrook v. Arizona, supra, stated that a higher degree of competency is required to waive counsel than to stand trial, and noted that the state trial judge had neither held a hearing nor made a finding on the issue of competency to waive counsel. Evans v. Raines, supra, at 1480. The Ninth Circuit agreed with the District Court that there was substantial evidence before the trial court of Evans' inability to make a reasoned choice in waiving counsel, and "under the law of this circuit, a hearing on that issue was required". Evans v. Raines, supra, at 1480.

The question may arise as to how the Eleventh Circuit, closer to home, has interpreted Westbrook v. Arizona. In Goode v. Wainwright, supra, a Florida death penalty case, that court recognized, expressly and in the organization of its opinion, that a defendant's competence to waive counsel is a separate (though obviously related) issue from the question of whether he knowingly and intelligently waived his right to counsel. Goode v. Wainwright, supra, at 597 and 598. On the facts of the case, the court resolved both issues against Goode. With regard to the competency to waive counsel issue, the court said:

> Goode contends that the trial court improperly failed to conduct a separate hearing on his competence to waive trial counsel, in addition to the hearing on his competence to stand trial. Goode also argues that the test for competence to waive counsel differs from the test for competence to stand trial, and that the trial court applied the wrong test. We

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[89] Contrast the instant case.

> conclude that the trial court conducted an adequate inquiry into Goode's competence to waive counsel under the very test urged by Goode.
>
> Contrary to Goode's assertions, the trial court was not required to conduct a separate and distinct hearing on Goode's competence to waive trial counsel. In Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966), the Supreme Court observed that
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> > Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense. [Emphasis added by Goode court].

Three of the four psychiatrists who had examined Goode specifically addressed his desire to discharge his attorney and conduct his own defense. The trial court personally questioned one of the psychiatrists as to, inter alia, "whether Goode's desire to waive his right to trial counsel and to represent himself was a 'rational, logical judgment' that was not 'substantially affected by any mental illness or mental disorders.'"

> Essentially the trial court inquired into whether Goode's mental condition permitted him to make an informed judgment as to whether he should waive his right to counsel, and as to how to conduct his own

> defense. The psychiatrist responded affirmatively to all of the trial court's questions. In our view, the trial court here conducted an adequate inquiry into Goode's competence to waive trial counsel. 90/

Goode v. Wainwright, supra, at 598.

Since the trial court, through his questions and based on the information before him, had adequately determined that Goode's desire to conduct his own defense was a rational, logical judgment not substantially affected by any mental disorder, the Eleventh Circuit also rejected Goode's argument that the trial court, in determining that he was competent to waive counsel, had applied an improper standard. Goode v. Wainwright, supra, at 598.

Finally, in State v. Bauer, supra, at 858-859, the Supreme Court of Minnesota, after quoting the relevant passages from Westbrook and Massey, said:

> To summarize, when the mental competency of the defendant comes into question, it is incumbent on the trial court, independent of the issue of competency to stand trial, to conduct further hearings or inquiries into the competency of the defendant to make a knowing and intelligent waiver of his right to the assistance of counsel before permitting the defendant to proceed pro se. An examination of the record here discloses a failure to do so.

90/ Contrast the instant case, in which the trial court initially made no inquiry whatsoever regarding appellant's mental condition before allowing him to conduct his own defense in the penalty phase. Subsequently, the trial court heard the testimony of Dr. McClane, in support of defense counsel's motion to continue the proceedings for further inquiry into appellant's competency to stand trial, that (inter alia) appellant was irrational in his decision making, that his mental condition had deteriorated to the point where he was probably no longer even competent to stand trial, and that his lack of motivation to defend himself against a death sentence was largely the product of his mental illness. (R985-986,996).

Whether the Ninth Circuit interpretation of Westbrook (requiring a hearing on the issue of mental competency to waive counsel) or the Eleventh Circuit interpretation (that an inquiry into mental competency to waive counsel is sufficient, as long as said inquiry provides a basis for the trial court to determine that the defendant has the capacity to make a rational choice, as opposed to one substantially affected by mental illness), is the correct one[91], neither standard was satisfied in the instant case. The trial court erred in failing to conduct an adequate inquiry into appellant's competency to waive counsel. Westbrook; Evans; Goode; Bauer. Moreover, the record affirmatively demonstrates (through, inter alia, the testimony of Dr. McClane) that appellant was, at the time of the penalty phase, severely mentally disturbed; and, as a result of his mental illness, incapable of making a rational choice to dispense with the assistance of counsel. The death sentence, which was imposed in accordance with the jury's recommendation, and on the basis of less than all of the pertinent evidence (due to appellant's refusal to allow witnesses to be called who would have testified regarding mitigating circumstances), must be vacated, and the case remanded for further proceedings if and when appellant is competent to stand trial.[92]

91/ Actually, appellant submits that Evans and Goode are entirely reconcilable, and that both are correctly decided on their respective facts.

92/ For similar reasons to those stated in footnote 78 on page 127, a retrospective hearing on competency to waive counsel would be inadequate to protect appellant's rights to due process and to the effective assistance of counsel, particularly since the only expert who observed or interviewed appellant contemporaneous with the penalty phase has already made it clear that appellant was irrational at that time, and probably not even competent to stand trial. See Drope v. Missouri, supra; Scott v. State, supra; Hill v. State, supra; State v. W.S.L., supra; cf. Mason v. State, supra.

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 TO MAKE ANY ARGUMENT AGAINST A DEATH SENTENCE AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL AS A MATTER OF LAW.

The state may contend that what appellant did in the penalty phase was something other than self-representation, something other than a waiver of the right to counsel. Such an argument, if made, will be one of form over substance. At the insistence of appellant, counsel did literally nothing in the penalty phase (except to try to have it postponed due to appellant's incompetency). See State v. Bauer, supra. It cannot even be said that the trial court, in his discretion, had permitted hybrid representation, since that is when the defendant is heard both in person and by counsel. See Article I, Section 16, Florida Constitution; State v. Tait, 387 So.2d 338 (Fla. 1980). In the present case, counsel was not heard at all, and neither was any evidence or argument in mitigation.[93] Attorneys Alcott and

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93/ Not only did counsel present no evidence and make no argument, they also took no action when the prosecutor introduced before the jury four prior convictions, at least three of which (and probably all four of which, see Issue X, infra) were not for violent felonies. The prosecutor acknowledged that three of the convictions could not be used to support an aggravating circumstance, but stated that he was introducing them to rebut the mitigating circumstance of no significant criminal history (R953). Defense counsel at that point was well aware that nobody was going to be arguing that that (or any other) mitigating circumstance applied, since appellant was going to demand a death sentence and since counsel was going to make no argument at all. That being the case, counsel could have prevented the state from introducing at least three and maybe all four of the priors, simply by waiving a mitigating factor which no one was going to argue anyway. However he did not do so. Cf. Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986).

Fredericks were relegated, at best, to the role of "standby counsel", and the availability of standby counsel does not relieve the trial court from the obligation of conducting the inquiry required by Faretta and Westbrook. See State v. Bauer, supra; Goode v. Wainwright, supra.

However, assuming arguendo that this Court were to find that appellant never waived his right to counsel, then it must also find on the face of the record that ineffective assistance was rendered by counsel. See e.g. Blanco v. Wainwright, ___So.2d___ (Fla. 1987)(12 FLW 234,236); Stewart v. State, 420 So.2d 862, 864 (Fla. 1982). This is because, with the exception of certain fundamental decisions regarding the case (such as whether to plead guilty, whether to waive a jury trial, whether to testify in his own behalf, and whether to take an appeal), it is the attorney, not the client, who controls the case. See Jones v. Barnes, 463 U.S. 745,751 (1983); Cave v. State, 476 So.2d 180, 183 (Fla. 1985); see also Strickland v. Washington, 466 U.S. 668 (1984)(recognizing the authority and duty of counsel to exercise professional judgment in representing clients). Specifically, decisions regarding whether or not to call particular witnesses are entrusted to counsel (absent a waiver of the right to counsel). See e.g. Fuller v. Wainwright, 238 So.2d 65, 66 (Fla. 1970); State v. Eby, 342 So.2d 1087, 1089 (Fla.2d DCA 1977); Ferby v. State, 404 So.2d 407 (Fla. 5th DCA 1981). The question, then, is who was in control of the case in the penalty phase. If it was appellant, then see Issue IV, supra. If it was defense counsel, then clearly they had both a right and a duty to exercise their own professional

judgment to represent appellant's best interests.[94] It is abundantly clear on the record that if counsel had felt free to excercise their independent professional judgment, they would have called Dr. McClane and appellant's mother, stepfather, and brother to testify regarding appellant's mental condition, his emotional state around the time of the crime, and his background, and they would have made an argument to the jury asking them not to recommend death. (see R940,944,963,1003-1004,1013-1014). Their failure to do these things is not attributable to tactical or strategic decisions [see Strickland v. Washington, supra], but to their assumption that appellant had assumed control of his own defense, and that their role was now merely that of "standby counsel". If they were wrong in this assumption, then their acquiescence (against their own better judgment) to appellant's self-destruction amounted to ineffective assistance of counsel - more accurately, no assistance of counsel - on the face of the record.[95] See Blanco, Stewart. Either Faretta and Westbrook compel reversal, or the Sixth Amendment does.

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[94] This is especially true in light of the fact that, in their conferences with appellant, they perceived him to be irrational.

[95] Interestingly, in the sentencing proceeding before the trial judge, after the last competency-for-sentencing hearing, the same defense attorneys presented the testimony of appellant's sister, over appellant's protest (and despite his throwing the attorney's file)(R1515-1516,1519). This tends to confirm that the only reason the attorneys didn't present witnesses and make argument in the penalty phase notwithstanding appellant's protest (and whatever he might throw) is because they believed that the trial court had permitted him to exercise his right of self-representation.

ISSUE VI

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 Hamblen v. State, case no. 68,843, which is pending on appeal in this Court, the defendant waived counsel, pled guilty to first degree murder, introduced no evidence in the penalty phase, and asked the jury to sentence him to death. They obliged. Any resemblance between Hamblen and the instant case ends right there. Undersigned counsel found no basis in the record to challenge Hamblen's competency to stand trial, his competency to waive counsel, or the adequacy of any of the procedures employed by the trial court in determining same. Rather, the argument presented in Hamblen's appeal is a pure and simple one - that a defendant (even if competent) may not be allowed to take a dive in the penalty phase of a capital trial, by either refusing (if pro se) or preventing his attorney (if represented) from introducing any evidence in mitigation or making any argument against a death sentence. People v. Deere, 710 P.2d 925 (Cal.1985); State v. Hightower, 518 A.2d 482 (N.J. App. 1986). The California Supreme Court held in Deere (at 930) that:

> To permit a defendant convicted of a potential capital crime to bar his counsel from introducing mitigating evidence at the penalty phase because he wants to die, as did this defendant, would ... violate the fundamental public policy against misusing the judicial system to commit a state-aided suicide....

The Deere court went on to discuss the principles of Lockett v. Ohio, 438 U.S. 586 (1978), and observed that to allow the defendant to prevent the introduction of mitigating evidence defeats the reliability of the penalty determination just as surely as if the defendant had been precluded from introducing the evidence by a statute or by a judicial ruling. See also Caldwell v. Mississippi, ___U.S.___, 105 S.Ct. 2633 (1985). Both Deere and Hightower emphasize that there is a strong public interest, apart from the defendant's personal interest, in the reliability of any decision on whether to impose the death penalty in a particular case.[96/] A defendant may waive rights which are established solely for his benefit, but he cannot waive those which are intended to serve a public purpose. Deere. [The logic of this is particularly compelling where, as here, there is overwhelming evidence that the defendant suffers from a severe mental illness, and that he was irrational at the time of the penalty phase].

To conserve pages, appellant hereby adopts in its entirety the argument made by undersigned counsel in Hamblen's appeal [Initial brief, p.21-30].

96/ The New Jersey appellate court in Hightower, quoting former Chief Justice Burger in Mayberry v. Pennsylvania, 400 U.S. 455,468 (1971), observed that "[t]here are higher values at stake here than a defendant's right to self-determination.

ISSUE VII

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

A week before the last competency-for-sentencing hearing, defense counsel filed a written motion to set aside the penalty recommendation of the trial jury, on the ground that appellant had been incompetent and unable to assist counsel in the penalty phase of the trial, and on the ground that the jury's death recommendation no longer had any viability in light of the extensive expert testimony concerning appellant's mental condition and his hospitalization (R1387-1388, see R1513-1515). The trial court denied the motion (R1515). For the reasons stated in Points II through VI of this brief, appellant submits that the jury's recommendation was (a) obtained on the basis of a penalty trial which violated due process, and (b) unreliable, since the jury never heard any of the voluminous expert testimony regarding appellant's mental illness and his emotional state around the time of the crime. Since a capital defendant is entitled by law to an untainted jury advisory verdict[97], the trial court should have impaneled a new jury to hear the mitigating as well as the aggravating evidence, and make a valid recommendation based thereon as to the appropriate penalty.

97/ See e.g. Richardson v. State, 437 So.2d 1091,1095 (Fla. 1983); Teffeteller v. State, 439 So.2d 840,845, n.2 (Fla. 1983); Dougan v. State, 470 So.2d 697,701 (Fla. 1985). Trawick v. State, 473 So. 2d 1235,1240-1241 (Fla. 1985).

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.

In the penalty phase, at the very beginning of his summation to the jury, the prosecutor told them

> 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.

(R1005)

This is precisely the type of argument which was condemned in Caldwell v. Mississippi, 472 U.S. 320 (1985) as compromising the reliability of the jury's penalty recommendation, by lightening the jurors' sense of moral responsibility in determining whether the defendant shall live or die; by encouraging them to shift that sense of responsibility to an appellate court; by perhaps even making them feel free to "send a message" of extreme disapproval of the defendant's acts by recommending death, secure in the knowledge that any error will be corrected on appeal. Caldwell v. Mississippi, supra, 472 U.S. at 328-334; cf. Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986). As the Supreme Court pointed out in Caldwell, 472 U.S. at 333-334 and n.4, prosecutorial

comment of this kind has been uniformly condemned, and has often been held to be ground for reversal even in the absence of a contemporaneous objection; even when a curative instruction has been given; even when the defendant has failed to raise the issue on appeal; or even where the prosecutor has engaged in no other improprieties.[98]

Indeed, in addition to the decisions cited in Caldwell, this Court has so held in Pait v. State, 112 So.2d 380 (Fla 1959).[99] Appellant's death sentence must be vacated and the case remanded for a new penalty trial. Caldwell.

98/ See e.g. Hawes v. State, 240 SE.2d 833,839 (Ga. 1977); Fleming v. State, 240 SE.2d 37,40 (Ga. 1977); State v. Willie, 410 So.2d 1019, 1034-1035 (La. 1982); State v. Jones, 251 SE.2d 425,427 (N.C. 1979); State v. White, 211 SE.2d 445,450 (N.C. 1975); State v. Gilbert, 258 SE.2d 890,894 (S.C. 1979), each of which is cited in Caldwell. Other decisions holding such comment to be fundamental error requiring reversal even when no objection has been made include Prevatte v. State, 214 SE.2d 365,367-368 (Ga. 1975); State v. Hawley, 48 SE.2d 35, (N.C. 1948); and People v. Johnson, 284 N.Y. 182, 30 NE.2d 465 (1940).

99/ Also, as recognized in Caldwell, (472 U.S. at 336), the state's characterization of its comment on appellate review of a death sentence as "invited error" does not lessen the prejudicial and distortive effects of the remark. The fact that appellant, who was mentally ill, suicidal, and probably incompetent, saw fit to say to the jury, "... [Y]ou 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 and writing Governor Bob Graham demanding my execution" (R936), does not authorize the prosecutor to reassure the jury that an appeal will be taken and any errors corrected whether the defendant likes it or not. The import of Caldwell is that the jury should decide its penalty recommendation as if they were the last word on the subject.

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.

A. The Trial Court's Failure to Find the Existence of any Statutory or Non-Statutory Mental Mitigating Factors is Not Fairly Supported by the Record.

Appellant relies on the constitutional principle, recognized in Magwood v. Smith, 608 F.Supp. 218,225-228 (D.C. Ala. 1985) and Magwood v. Smith, 791 F.2d 1438,1447-1450 (11th Circ. 1986)(affirming the district court's decision), that, while the weight to be accorded a mitigating circumstance is discretionary with the trial court, he is not free to refuse to recognize the existence of a mitigating circumstance which is overwhelmingly established by the evidence before him. Phrased differently, the trial court's rejection of a mitigating factor must be "fairly supported by the record"; and if it is not, then the capital sentencing standards required by the Eighth and Fourteenth Amendments have been violated. Magwood v. Smith, supra, 791 F.2d at 1438. [The district court and the Eleventh Circuit went on to hold, in Magwood's case, that the evidence that he suffered from a serious mental disorder at the time of the offense was over-

whelming, and that the state trial judge had committed constitutional error in failing to find the existence of either of the two statutory "mental condition mitigating factors" (791 F.2d at 1449)].

In the present case, the reports and testimony of Dr. McClane (R1267-1268,1602,1620, see R1074-1075,1189), the reports and testimony of Dr. Dee (R1084,1087,1094-1095,1169,1176,1294,1298,1301-1303,1587-1588,1604), and the reports of the Florida State Hospital psychologists Ms. Roman and Mr. Tooley, and the testimony of Ms. Roman (R1208,1210-1211,1215,1217,1225,1234-1236,1310,1595-1596,1599, 1612-1613,1614,1616) all demonstrate that appellant is psychotic (specifically, that he suffers from paranoid schizophrenia[100/]), and that his mental illness is both severe and genuine. Dr. Ainsworth, while he classified appellant's mental disorder as "borderline personality disorder", described this as "someone who hovers just across the line from psychosis" (R1590). He emphasized that, while there is a tendency in the legal system to see this as a minor diagnosis, it is not one (R1106-1107,1590). To the contrary, Dr. Ainsworth stated, "In my opinion [appellant] suffers from a severe mental

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100/ Paranoid schizophrenia is the diagnosis which was made in the Magwood case as well.

illness which, although classified as a personality disorder, involves a distortion of reality of psychotic proportions". (R 1592).[101]

Appellant was given two separate batteries of psychological tests, one by Dr. Dee, and the other upon his admission to the Florida State Hospital. The tests yielded virtually identical results, strongly indicating that appellant (as Ms. Roman put it) "does have a psychotic disorder, namely schizophrenia, which is characterized by paranoid and grandiose delusions, poor reality testing, perturbability, and impulsiveness" (R1208, see R1210-1211,1595-1596 [Roman]; 1080-1089,1583-1588 [Dee]). Significantly, both Dee and Roman were convinced that appellant's mental illness was genuine,

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[101] Regarding the severity of appellant's mental illness, see also, e.g., Dr. McClane's report of 4/7/86 ("this man is still psychotic and probably suffering from a paranoid schizophrenic illness manifest by delusions and grandiosity. Indeed, his ability to tolerate such high doses of antipsychotic medicine tends to confirm this diagnosis.")(R1602); Dr. Dee's report of 6/19/85 (stating that appellant suffers from "one of the most severe forms of mental illness")(R1588, see R1087,1169,1303); Dr. Dee's testimony of 5/1/86 (describing the dosage of thorazine appellant was receiving as a "very high dosage level ... except for a very excited schizophrenic", and observing that appellant's favorable response to the medication [which, according to Dee, would render a non-psychotic person virtually immobilized] confirmed the diagnosis of schizophrenia)(R1298, 1301); Ms. Roman's report of 10/11/85 ("[Appellant] suffers from a major mental illness (Schizophrenia) in addition to severe characterological disorders...")(R1599, see R1225); Ms. Roman and Mr. Tooley's report of 3/5/86 ("[Appellant] continues to display some symptoms of psychosis despite receiving fairly substantial doses of an antipsychotic medication over a three month period")(R1616); Ms. Roman's testimony of 5/1/86 (describing the dosage of thorazine appellant was receiving as a moderate dose "[f]or a young healthy male who is actively psychotic")(R1324). See Magwood v. Smith, supra, 608 F.Supp. at 226-227.

and that he was not feigning or malingering[102/] (R1293-1294,1302, 1605 [Dee]; R1234 [Roman]).

Paranoid schizophrenia "is not a condition which develops suddenly or rapidly, typically having a long and insidious onset, usually beginning in adolescence, and sometimes even earlier" (R1604, see R1587). In Dr. Dee's opinion, appellant has suffered from paranoid schizophrenia at least since his early adolescence (R1085, 1094-1095,1303). In addition, appellant's "major depressive disorder" (R1579), his suicidal thinking and suicide attempts, and his delusional obsession with Lisa, were all recognized as early as Dr. McClane's pre-trial report (R1574-1579), and were confirmed by the overwhelming weight of the voluminous post-trial testimony. The series of events which culminated in appellant's rejection by Lisa and her mother occurred in March and April of 1984 (see R1575,1134). To a normal man, being rejected by a woman is painful but non-disabling, and it happens to everyone. To appellant, given his pre-existing mental illness, it was a traumatic event of catastrophic proportions. The totality of the psychiatric evidence (and even the testimony of his mother and sister (R1134-1135,1516-1418)) demonstrates unequivocally that he became severely depressed, emotionally disturbed, obsessed, delusional, and suicidal, and remained so during (and well beyond) the entire 6 to 7 month period preceding his arrest for the murder of

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102/ Ms. Roman (unlike Mr. Tooley and all three community examiners) felt that appellant's death wish was merely an attention getting device, and that he does not really want to be electrocuted. But with regard to her diagnosis of paranoid schizophrenia, she said "Well, I believe -- first of all, Mr. Pridgen has a genuine mental illness. There's no doubt about that, and I don't think he's malingering that at all, and, in fact, he would deny that he has that mental illness" (R1234).

Anne Marz. The trial court's refusal to find the existence of any mental mitigating circumstances, in the face of overwhelming evidence establishing both the statutory factor that the crime was committed while appellant was under the influence of extreme mental or emotional disturbance and the non-statutory factor[103] that appellant was (and is) suffering from a serious mental illness, is not fairly supported by the record, and amounts to both an abuse of discretion and a violation of the Eighth and Fourteenth Amendment standards of reliability and channelled discretion in capital sentencing. Magwood v. Smith, supra.[104] .

103/ See Lockett v. Ohio, 438 U.S. 586 (1978).

104/ See also Rogers v. State, ___So.2d___ (Fla. 1987)(case no. 66,356, opinion filed July 9, 1987)(12 FLW 368,371), in which this Court said:

> [W]e 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 then must 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. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

This statement in Rogers appears to recognize the principle set forth in Magwood; if the evidence clearly establishes mitigating facts of a kind capable of reducing moral culpability, then the trial court may not refuse to find the existence of such mitigating circumstance, although he is free to determine the weight it is to be accorded as against the aggravating circumstances. Since mental illness and extreme emotional disturbance have traditionally (and, in the latter instance, by statute) been recognized as the type of circumstance which lessens moral culpability, Rogers, like Magwood, requires reversal here.

B. The Testimony of Dr. Hahn, Which was Relied on by the Trial Court in Refusing to Find the Existence of any Mental Mitigating Circumstances, was not "Substantial Competent Evidence" For that Purpose.

This Court has said that a trial judge's rejection of a proffered mitigating circumstance should be upheld "if it is supported by competent substantial evidence." Stano v. State, 460 So.2d 890, 894 (Fla. 1984); Kight v. State, ___So.2d___ (Fla. 1987) (case no 65,749, opinion filed July 9, 1987)(12 FLW 357,362); cf. Magwood v. Smith , supra, 791 F.2d at 1449 (constitutional requirement that trial court's rejection of mitigating factor must be fairly supported by the record).

In the present case, the trial judge clearly did not reject the reports and testimony of Dr. McClane, Dr. Ainsworth, Dr. Dee, Ms. Roman, and Mr. Tooley as lacking credibility or as being "unworthy of belief" [Contrast Bates v. State, 506 So.2d 1033,1035 (Fla. 1987)]. To the contrary, after a series of hearings in which these were the only expert witnesses, he three times ordered that appellant be committed to the Florida State Hospital in Chattahoochee, and twice specifically found (based on the testimony of all of the experts) that appellant was in need of psychotropic medication, and ordered that such medication be administered involuntarily if necessary. While there was conflict as to appellant's competency to be sentenced, there was complete unanimity of opinion (confirmed by psychological tests and by appellant's tolerance of the drugs) that he suffers from a severe mental illness of psychotic proportions. At the conclusion of the third competency-for-sentencing hearing,

the trial judge specifically stated that he was favorably impressed with each of the expert witnesses, and had no criticism of the ability or work performed by any of them (R1352). [Contrast Bates v. State, supra].

Following the fourth and last competency-for-sentencing hearing, held nearly a year and a half after the trial, the trial court determined (based on the testimony of the Chattahoochee psychiatrists, Drs. Hahn and Phillips, as well as Mr. Tooley) that appellant was now competent, and proceeded to sentence him. While undersigned counsel is inclined to agree with defense trial counsel that the judge chose to believe the less credible witnesses on this question[105/] (R1508-1509), he concedes that it was within the court's discretion to resolve the conflicting evidence in that manner.

However, the trial court's use of Dr. Hahn's testimony in sentencing, to reject the existence of any statutory or non-statutory mental mitigating factor, is another matter entirely. Of all of the psychiatrists and psychologists in this case, Dr. Hahn had the least contact with appellant, and what contact he had was the farthest removed from the time of the crime and from the time of the trial. Dr. Hahn interviewed appellant three times, during the space of one week, on July 1st, 5th, and 6th, 1986 (R1446,1448-1449). Recognizing that a patient's mental condition can change from one week to the next, Dr. Hahn specifically limited his opinion that appellant was competent to be sentenced to the first week in July, 1986 (R1456, see R1448-1449).

105/ See, for example, R1457-1473, recounting the career of Dr. Phillips.

Dr. Hahn testified that, while he did find appellant to have a mental disorder, he did not see it as reaching the point of being psychotic (R1449-1450). Therefore, he asked Dr. Phillips why he was using Thorazine, and Phillips replied that appellant had been "diagnosed as having psychosis and improved and entered into remission" (R1454). In addition, the Thorazine was being used to try and calm him, to lessen his obsessions, and as a preventative measure (R1454). Hahn testified that at the time he saw appellant, he was on a low dosage of Thorazine, but he had previously been on a high dosage (R1454-1455).

Clearly, then, Dr. Hahn's testimony does not (and was never intended to) conflict with the opinion of every expert who examined appellant prior to his treatment with powerful antipsychotic drugs that he suffered from a serious mental illness. At most, Dr. Hahn's testimony establishes that during the week of July 1-6, 1986, appellant did not appear to be psychotic, perhaps because he was "in remission" as a result of his hospitalization and extended treatment with heavy dosages of Thorazine.[106/]

106/ Note that Dr. McClane, Dr. Ainsworth, Dr. Dee, and Ms. Roman all recommended that the trial court order that appellant be treated, involuntarily if necessary, with antipsychotic medication (R1193,1182, 1173,1248-1249), and all subsequently found that appellant's mental condition had improved to some degree as a result of such treatment (R1265-1267,1404,1411,1601-1602,1289,1292-1294,1298,1310,1613), though his delusional thinking remained relatively impervious to the drugs. Also note the testimony of McClane and Dee to the effect that appellant's ability to tolerate, and favorably respond to, dosages of Thorazine which would render a normal person virtually comatose, strongly tended to confirm the initial diagnosis of paranoid schizophrenia (R1267,1602,1298,1301).

Moreover, even Dr. Hahn's observations regarding appellant's mental condition as of the first week in July, 1986 recognize a great deal more significant mental and emotional disturbance than what is reflected in the trial court's sentencing order (see R1632-1634). In his report, Dr. Hahn emphasized appellant's lack of insight into his own mental and emotional problems:

> His insight in regard to the nature and quality of his illness is limited. He recognizes that he has emotional problems, namely his obsession with that girl and associated mental torment such as a great deal of anger, wish for revenge, insomnia, inability to find peace with himself and resolution to die. He does not accept his mental condition as a well defined mental illness. He does not see his problems as being caused by his girl rejection but by his own fault by allowing himself to fall in love when it was too late to change. He cannot see his condition as being the result of a longstanding emotional disequilibrium or mental disorder.

(R1634)

In Sumner v. Shuman, ___U.S.___, 97 L.Ed.2d 56, 67, (1987), the United States Supreme Court observed "Not only [does] the Eighth Amendment require that capital-sentencing schemes permit the defendant to present any relevant mitigating evidence, but 'Lockett requires the sentencer to listen to that evidence'" (citing Eddings v. Oklahoma, 455 U.S. 104,115, n.10). In the present case, the trial court refused to find the existence of mental mitigating circumstances which were plainly established by the evidence - evidence which the court found convincing enough when he heard it to warrant appellant's hospitalization and involuntary medication. The subsequent testimony of Dr. Hahn, which (1) was specifically limited to a one-week time frame after appellant had received extensive treatment with antipsy-

chotic drugs, and while he was apparently "in remission", and (2) acknowledged that appellant suffers from a "longstanding emotional disequilibrium or mental disorder", certainly is not "competent substantial evidence" or "fair record support" to justify the trial court in ignoring the overwhelming evidence that appellant was both seriously mentally ill and extremely emotionally disturbed at the time of the offense. The constitutional standards of reliability and guided discretion in capital sentencing were violated, and appellant's death sentence must be vacated. Magwood v. Smith, supra.

ISSUE X

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.

A. Introduction

In his sentencing order the trial court found seven aggravating factors, though he apparently recognized that factors (c) and (e)[107] could only be considered as a single circumstance. [See e.g. Provence v. State, 337 So.2d 783,786 (Fla. 1976)]. Appellant submits that three of the aggravating factors found by the trial court were either unsupported by the evidence (in the case of the "avoid lawful arrest" and "cold, calculated, and premeditated" factors) or invalid as a matter of law (in the case of the "under sentence of imprisonment"

107/ The court found that "c. The capital felony was committed while the defendant was engaged in the commission of a robbery and burglary" and "e. The capital felony was committed for pecuniary gain, i.e. the commission of a burglary and robbery (See Factor C)" (R1525).

factor). In finding a fourth aggravating factor ("prior conviction of a violent felony") the trial court weighed in aggravation appellant's entire criminal record, most of which was for non-violent offenses. In addition, the judgment of conviction for attempted robbery does not disclose on its face that it involved the use or threat of violence [see Mann v. State, 420 So.2d 578, 581 (Fla. 1982)], so the aggravating factor was not only tainted by consideration of appellant's entire record, but was also unsupported by any legally sufficient evidence. Mann. Since at least two-thirds of the aggravating circumstances found by the trial court were improperly considered, and since only two remain[108/], it cannot be said that the various errors were "harmless" or that they played no part in the sentencing decision. See Nibert v. State, 508 So.2d 1 (Fla. 1987); Albritton v. State, 476 So.2d 158 (Fla. 1985); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The compelling evidence of mental mitigating circumstances which the trial court should have (but did not) weighed against the properly-found aggravating circumstances [Magwood; Rogers] - is all the more reason why the improper findings in aggravation cannot be held harmless.

108/ Undersigned counsel concedes that one (but not two) aggravating factor was properly found, in that the capital felony was committed in the course of a burglary and robbery for pecuniary gain. As to the "especially heinous, atrocious, or cruel" factor, undersigned counsel does not necessarily concede its applicability, but has made a judgment call not to challenge it on appeal.

B. Under Sentence of Imprisonment

Florida Statute §921.141(5) provides that aggravating circumstances shall be limited to the nine enumerated in the statute. The first of these is "(a) The capital felony was committed by a person under sentence of imprisonment." This Court has held that this section applies to persons who, at the time of the commission of the capital felony, are (a) incarcerated, (b) escapees from incarceration, or (c) on parole [Peek v. State, 395 So.2d 492, 499 (Fla. 1981)], and that it does not apply to persons under an order of probation (unless they also fall into one of the above three categories). Peek v. State, supra; Ferguson v. State, 417 So.2d 631, 636 (Fla. 1982); Ferguson v. State, 417 So.2d 639, 646 (Fla. 1982). This Court has also squarely held that the trial judge cannot use the defendant's prior criminal record, or the fact that he was in prison at some time prior to the commission of the charged offense, to find this aggravating circumstance. Ferguson; Ferguson; Barclay v. State, 470 So.2d 691, 694 (Fla. 1985), cf. Dougan v. State, 470 So.2d 697, 701-702 (Fla. 1985).

In the present case, the trial court stated in his sentencing order, in pertinent part:

> The aggravating circumstances which justify a sentence of death in this case are:
>
> a. While the Defendant was not imprisoned on the occasion of the commission of the crimes in this case, it is a fact that the Defendant has previously been sentenced to prison for violent crimes, including Attempted Robbery and Grand Larceny (Case No. 75-424, Lake County, Florida). Furthermore, the Defendant was at the time of the commission of the crimes in this case on probation for felony offenses.

(R1524)

It is not entirely clear whether the judge intended this as a finding of the (5)(a) aggravating circumstance, or whether he intended it as a finding of a non-statutory aggravating circumstance. Either way, it is improper. Peek; Ferguson; Ferguson; Barclay; see (regarding the impropriety of considering non-statutory aggravating factors) Perry v. State, 395 So.2d 170, 174-175 (Fla. 1980); Odom v. State, 403 So.2d 936, 942 (Fla. 1981); Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985).

C. Previous Conviction of Violent Felony

In his finding of this aggravating circumstance, the trial judge stated that "[t]he Defendant was previously convicted of a felony involving the use or threat of violence to the person, to wit: the Defendant was convicted of Attempted Robbery and Grand Larceny in Case No. 75-424, Lake County, Florida" (R1524). "The Defendant has been previously convicted of the following crimes:

11/15/76 Attempted Robbery, Grand Larceny
09/10/81 Grand Theft
11/18/82 Dealing in Stolen Property
06/23/82 Trespass, Littering"

(R1524)

The latter three convictions were introduced by the prosecutor for the purpose of rebutting the mitigating circumstance of no significant criminal history[109/] (R953). However, the trial court enumerated these convictions in the context of an aggravating circumstance, and it cannot be presumed that he accorded them no weight.

109/ See P.143, n.93 of this brief.

See Trawick v. State, supra, at 1240, in which this Court said:

> In general, the trial court's findings are replete' with statements that are not specifically linked to any statutory aggravating circumstance. While some of the findings may properly relate to statutory aggravating circumstances, the lack of clarity makes it difficult for us to sort out the relevant and sufficient findings from the irrelevant or insufficient ones. We have noted several infirmities in the trial judge's findings. In effect the trial judge went beyond the proper use of statutory aggravating circumstances in his sentencing findings and the sentence of death cannot stand. See Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), cert.denied, ___ U.S. ___, ___ 104 S.Ct. 508, 509, 78 L.Ed.2d 697, 698 (1983); Brown v. State, 381 So.2d 690 (Fla. 1980), cert.denied, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981). 110/

With regard to the conviction for attempted robbery in Lake County, neither the information nor the judgment of conviction introduced into evidence by the state is legally sufficient to support a finding of the (5)(b) aggravating factor. This Court has held that, in order to establish this factor, the conviction must disclose on its face that the felony involved the use or threat of violence to

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110/ Contrast Brown v. State, 473 So.2d 1260, 1265 (Fla. 1985)(defense contended that judge's remark that defendant had "led a parasitic existence" was reversible error because it was an invalid aggravating circumstance; this Court rejected this contention "because the judge's oral comment was not part of the formal written findings of fact in support of the sentence of death prepared in accordance with section 921.141(3), Florida Statutes (1981)"

the person. Mann v. State, 420 So.2d 578, 581 (Fla. 1982)[111/]. In other words, the judgment of conviction will suffice if the offense is one which necessarily involves the use or threat of violence. Alternatively, the state can prove this circumstance by introducing the charging document, so that the trial court and this Court can determine whether it alleged, and whether the jury convicted the defendant of, a crime of violence. Mann v. State, supra, 420 So.2d at 581; see also Mann v. State, 453 So.2d 784 (Fla. 1984)(appeal on resentencing).

In the present case, the Lake County information alleged 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 (R952). Unquestionably, this 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. However, the Lake County jury did not convict appellant as charged in the information [contrast Mann], but rather convicted him of the lesser

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111/ See also Oats v. State, 446 So.2d 90, 94-95 (Fla. 1984)("Burglary is neither a capital felony nor is it per se a felony involving the use or threat of violence"); Barclay v. State, supra, at 695 (a conviction of breaking and entering does not, on its face, prove a prior conviction of a violent felony; information derived solely from a PSI does not prove this factor beyond a reasonable doubt, and it cannot be upheld).

included offense of attempted robbery (R953). Attempted robbery can be committed without the use or threat of violence; it requires only the intent to commit a robbery, coupled with some overt act (beyond mere preparation) in furtherance of that intent. Mercer v. State, 347 So.2d 733 (Fla. 4th DCA 1977). As illustrated by the facts of Mercer[112/], it is entirely possible to commit an attempted robbery without even coming into contact with the intended victim. See Lewis v. State, 398 So.2d 432, 438 (Fla. 1981) ((5)(b) aggravating factor "refers to life threatening crimes in which the perpetrator comes in direct contact with a human victim"). While the record in the present case does not disclose the evidence which convinced the Lake County jury to acquit appellant of the completed robbery as charged in the information, and to convict him only of attempt, it is incumbent on the state to prove the aggravating factor on the face of the prior conviction; it is not incumbent on the defendant to disprove it. Mann. This aggravating factor cannot stand.

Moreover, this error infected the jury's penalty deliberations, and therefore a new penalty trial before a newly impaneled jury is required. Perry; Trawick. First of all, the jury heard

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112/ In Mercer, the defendant formed the intent to rob the manager of a gas station at the point of a machine gun. Mercer tried unsuccessfully to recruit Henson, an employee of the gas station, to help him. Mercer told Henson he was going to commit the robbery at 8:30 the next morning. Next morning at 8:30, Mercer and a companion drove into the station, asked for the manager, and was told he wasn't there. Mercer said he would return in an hour. Meanwhile, however, Henson had blown the whistle on Mercer, and he was stopped by police before he had a chance to return to the gas station. A shotgun, a knife, and other incriminating items were found in his car. As the Fourth DCA put it "The robbery failed for want of a manager!" (347 So.2d at 735). The conviction for attempted robbery was affirmed.

evidence it should not have heard. Secondly, the prosecutor argued:

> In this case, Mr. Pridgen has previously been convicted of an attempted robbery, which was the situation in Lake County where he was alleged to have been involved in an incident with a shotgun. So that aggravating circumstance obviously applies.

(R1008)

Obviously, the problem is that appellant was not convicted in Lake County of what was alleged; he was convicted of something less than that, and the conviction does not disclose on its face whether it involved the use or threat of violence. Thirdly, the trial court specifically instructed the jury that attempted robbery is a felony involving the use or threat of violence to the person (R1014-1015), when in fact that is not necessarily the case. Mercer.

D. Avoid Lawful Arrest

Neither appellant's statement to Major Judd (R1563-1571), nor the circumstantial evidence presented by the state, indicate that the murder was committed for the purpose of avoiding arrest. In the jury penalty proceeding, the state did not argue this aggravating factor (see R1008-1010) and the court did not instruct on it (see R 1014-1015). In his sentencing order, it appears that the judge found that the murder was committed for the purpose of avoiding or preventing arrest only because he could think of no other purpose (R1525).

An aggravating circumstance cannot be considered in support of a death sentence unless it is proven beyond a reasonable

doubt. Clark v. State, 443 So.2d 973, 976 (Fla. 1983); Williams v. State, 386 So.2d 538, 542 (Fla. 1980); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). "Not even 'logical inferences' drawn by the trial court will suffice to support a finding of a particular aggravating circumstance where the state's burden has not been met." Clark v. State, supra, at 976. With regard to the (5)(e) circumstance, this Court has consistently held that, at least where the victim is not a law enforcement officer, proof of the requisite intent (i.e., that avoidance of arrest is the sole or dominant motive for the murder) must be very strong. See Riley v. State, 366 So.2d 19 (Fla. 1978); Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979); Rembert v. State, 445 So.2d 337, 340 (Fla. 1984); Rivers v. State, 458 So.2d 762, 765 (Fla. 1984); Doyle v. State, 460 So.2d 353, 358 (Fla. 1984); Caruthers v. State, 465 So.2d 496, 499 (Fla. 1985). Moreover, as this Court recognized in Rembert, Doyle, and Caruthers, the fact that the defendant and the victim were acquainted, even for a number of years, does not suffice to establish that the homicide was committed for the purpose of eliminating a witness. There must be direct evidence, or at least very strong circumstantial evidence, as to motive [Rivers v. State, supra, at 765]; in the absence of such evidence the aggravating factor is invalid.

E. Cold, Calculated, and Premeditated[113/]

In his confession to Major Judd, appellant said he only intended to burglarize the house and take a few things. The victim began hollering and screaming, so he put a pillow to her mouth, took her down to the floor, tied her hands with an electric cord, and put

113/ Appellant's arguments as to the "avoid lawful arrest" and "cold, calculated, and premeditated" factors are premised on the assumption, arguendo, that he, not Darryl Meadows, committed the murder. Needless to say, this should not be construed as an admission in fact.

some tape over her mouth (R1563-1571). The police officers who discovered the body and the medical examiner, Dr. Reavis, testified that the victim's hands were bound with the cord from an iron, some duct tape had been pressed over her mouth, and a belt was around her neck (R406-407,430-431,503-505,518). There was trauma and bruising to the head and face which, according to Dr. Reavis, was consistent with being struck by a blunt object, which could include a hand or fist (R430,442,519-524). There were two primary areas of bruising, one above the right ear and the other at the top of the head, which indicated that at least two blows were struck (R523). Dr. Reavis testified that the cause of death was asphyxia, probably due to strangulation (R524-525,531). The blows to the head occurred before the strangulation, and quite possibly could have rendered the victim totally or partially unconscious (R526,531).

While this evidence as to the cause of death may be sufficient circumstantial proof of simple premeditation [see e.g. Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1985); Larry v. State, 104 So.2d 352, 354 (Fla. 1958)], it does not establish the heightened level of calculation or planning necessary to establish the (5)(i) aggravating circumstance. See e.g. Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983); Peavy v. State, 442 So.2d 200, 202-203 (Fla. 1983); Preston v. State, 444 So.2d 939, 946 (Fla. 1984); Thompson v. State, 456 So.2d 444, 447 (Fla. 1984); Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984); Caruthers v. State, 465 So.2d 496, 498-499 (Fla. 1985). See also Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986)(killing, although premeditated, was most likely committed

upon reflection of short duration; aggravating factor improperly found).

ISSUE XI.

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

Basing a departure sentence on the "circumstances" of a defendant's prior record, without any attempt to explain how or why these circumstances justify a departure, violates (and attempts to circumvent) the principle set forth in Hendrix v. State, 475 So.2d 1218 (Fla. 1985). A statement by the trial court that he wishes the appellate court to affirm his departure sentence, even if it is based in substantial part on invalid reasons, does not relieve the state of its burden under Albritton v. State, 476 So.2d 158 (Fla. 1985) of proving beyond a reasonable doubt that the impermissible reasons did not affect the sentence. Griffis v. State, ___So.2d___ (Fla. 1987)(case no. 69,800, opinion filed July 16, 1987) (12 FLW 424); Van Tassell v. State, ___So.2d___(Fla. 1987)(case no. 69,871, opinion filed September 3, 1987)(12 FLW 455). Since the trial court's sentencing order places great emphasis on the impermissible factor (R1531-1532), appellant's sentences for robbery and burglary must be vacated, and the case remanded for resentencing on these charges.[114] Albritton; Hansbrough v. State, ___So.2d___ (Fla. 1987) (case no. 67,463, opinion filed June 18, 1987)(12 FLW 305,308).

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[114] The remaining reason, based on the concurrent conviction of first-degree murder, was held to be permissible in Hansbrough v. State, infra. Appellant respectfully requests this Court to reconsider that holding, on the ground that it would create an automatic reason to depart on the underlying felony counts in all first-degree felony murder cases.

ISSUE XII.

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

Somebody in this case - either appellant or Darryl Meadows - confessed to a murder he did not commit. Appellant gave the explanation at trial that he decided to confess because he was afraid that Meadows might harm his family, and also because he saw it as a way to end all of his problems by ending his life in the electric chair. Under ordinary circumstances, this might sound far-fetched, but it becomes much less so in light of (1) Darryl Meadows' testimony at trial that he, not appellant, committed the murder, and (2) the post-trial psychiatric testimony regarding appellant's mental illness, and, especially, concerning his pathological reaction to his rejection by Lisa (i.e. his suicidal depression, and his obsessive fantasies of revenge by making her feel guilty for what she had done to him). On the other hand, why would Darryl Meadows confess to this murder, unless he committed it? The prosecutor theorized that appellant had somehow induced Meadows to take the blame, but there was a great deal more speculation than evidence as to how this was accomplished, or why Meadows would have agreed to it.[115/]

115/ The state theorized that appellant and Meadows might have worked a deal whereby (in the prosecutor's words) "if you confess to my crime, I'll confess to yours; and we'll both walk free" (R889, see R888-890). However, the state introduced no evidence that appellant had ever tried to confess to anything Meadows was suspected of, nor was there any evidence of what crime or crimes Meadows was in jail for (or whether they were committed before or after appellant's arrest). The circumstantial evidence presented by the state showed only that prior to Meadows' March 1985 confession to the police, he and appellant had been in the same isolation area (though in different cells) in the Polk County Jail (R757-765,796-798,833-838,853-855,856-861), and that in December, 1984, appellant had written in a letter to Martha Jones:

> My aunt came down here to bond me out, but I haven't gotten one, and she said she will spend every penny she has to get me out of this trouble. But I told her that money can't get me out of this unless she pays someone to confess to it. (Smile).

(R584-585)

In view of these highly unusual circumstances, undersigned counsel submits that, if appellant's death sentence is carried out, there is an unacceptably high risk that the state will have executed an innocent man - one whose mental and emotional disturbance led him to voluntarily (if that's that word) take the rap for the real murderer, Darryl Meadows. The fact that Meadows, bothered by his conscience, came forward and confessed to the crime himself, and was not believed, makes this a scenario worthy of Alfred Hitchcock.

Possibly the jury was right in disbelieving Meadows' confession. But if there is even a five or a ten percent chance that they were wrong, the risk of a miscarriage of justice is too great. This Court is authorized by Fla.R.App.P. 9.140(f) to grant, in the interest of justice, any relief to which a party is entitled. Because of the serious doubt as to whether appellant was competent to stand trial in the guilt phase of the trial (a doubt shared, in retrospect, by all three community examiners), this Court should order a new trial. In the alternative, and at the least, this Court should recognize that the evidence of guilt is not conclusive enough to warrant the death penalty, and reduce appellant's sentence to life imprisonment. See ALI, Model Penal Code §210.6(1), p.107 (Off. Draft, 1980); Melendez v. State, 498 So.2d 1258, 1262-1263 (Fla. 1986)(Barkett, J., concurring specially).

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court grant the following relief:

> Reverse his conviction and death sentence and remand for a new trial, if and when he is competent to stand trial [Issues I, III, and XII].
>
> Reverse his death sentence and remand for imposition of a sentence of life imprisonment without possibility of parole for twenty-five years [Issue XII (alternative relief)].
>
> Reverse his death sentence and remand for a new penalty trial before a newly impaneled jury, if and when he is competent to stand trial [Issues II, IV, V, VI, VII, VIII, and X (part C)].
>
> Reverse his death sentence and remand for resentencing [Issues IX and X].
>
> Reverse his sentences for robbery and burglary and remand for resentencing [Issue XI].

Respectfully submitted,

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602, and to Charles Lamond Pridgen, Inmate No. 051665, Florida State Prison, P.O. Box 747, Starke, Florida 32091, by mail on this 13th day of October, 1987.

Steven L Bolotin

STEVEN L. BOLOTIN