IN THE SUPREME COURT OF FLORIDA

JOHN S. FREUND,)

Petitioner,)

vs.)

STATE OF FLORIDA,)

Respondent.)

_____)

JUL 1 1987

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CASE NO. 70,565
(4th DCA No. 4-86-0068)

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

AUTHORITIES CITED

AUTHORITIES CITED

AUTHORITIES CITED

OTHER AUTHORITIES

FLORIDA STATUTES

PRELIMINARY STATEMENT

The Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, and the Appellant in the Fourth District Court of Appeal for the State of Florida. The Respondent was the prosecution in the trial court, and the Appellee in the appellate court. In this Brief, the parties will be referred to by Petitioner and Respondent.

The following symbols will be used:

"R" Record-on-Appeal, Fourth DCA Case No. 4-86-0068

"SR" Supplemental Record-on-Appeal Fourth DCA Case No. 4-86-0068

"A" Appendix to Petitioner's Initial Brief on the Merits.

All emphasis in this Brief is supplied, unless stated otherwise.

STATEMENT OF THE CASE

The Petitioner was arrested on July 31, 1984, for the offense of first degree murder.

On August 14, 1984, the Petitioner filed his Motion to Determine Competency, pursuant to Fla.R.Crim.P., 3.210 (b). (R. 2494-2496).

On August 23, 1984, the Petitioner was indicted along with a co-defendant, John Trent, for the first degree premeditated murder of Ralph Walker. (R. 2502-2503, A.,p. 1).

The trial court conducted evidentiary hearings on the competency of the Petitioner to stand trial. On February 5, 1985, the Honorable Marvin U. Mounts, Jr., declared the Petitioner competent to stand trial. (R. 2504-2506).

On June 4, 1985, the Petitioner filed his Notice of Intent to Rely Upon the Defense of Insanity, pursuant to Fla. R.Crim.P., 3.216 (c). (R. 2601).

On October 21, 1985, the case came before Judge Mounts for a jury trial. At the conclusion of the trial, the Petitioner was found guilty of first degree premeditated murder. (R. 2473). The Petitioner was sentenced to life in prison, with the mandatory minimum twenty-five (25) years. (R. 2490, 2625-2627, A.,p. 2).

The Petitioner timely appealed to the Fourth District Court of Appeal which affirmed his conviction and sentence. (A.,p. 3). The Fourth District Court of Appeal certified the following question as one of great public importance:

> WHETHER THE FLORIDA SUPREME COURT'S HOLDING IN YOHN V. STATE, 476 SO.2d 123

(FLA. 1986), IS VIOLATED WHEN, PRIOR TO ISSUANCE OF THE YOHN OPINION, A TRIAL COURT INSTRUCTS THE JURY WITH THE OLD STANDARD INSTRUCTION ON INSANITY AND ADDS WITHIN THE CHARGE THE SENTENCE, "THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS SANE." (A.,p. 9).

On May 13, 1987, the Petitioner invoked the discretionary jurisdiction of this Honorable Court. (A., p. 10).

STATEMENT OF THE FACTS

Prior to a near fatal suicide attempt in June of 1983, the Petitioner was a practicing medical doctor specializing in the field of oncology he graduated number one from his medical school class at Columbia's Physicians and Surgeons. (R. 2097). After completing his studies at Columbia's Physicians and Surgeons, the Petitioner went on to Johns Hopkins Medical School for a two-year residency in internal medicine and then two additional years in a fellowship in oncology. (R. 2097, 2138).

In 1980 the Petitioner came to West Palm Beach, Florida and set up practice in oncology. Medical colleagues in the West Palm Beach area described the Petitioner during their testimony as not only having excellent technical medical skills, but that he was an exceptional, caring, compassionate physician/onocologist. (R. 1647, 1653, 1665). His patients loved him. (R. 1773). The Petitioner was known to practice medicine seven days a week, twenty-four hours a day. (R. 1649, 1650-1651, 1666). Fellow oncologists testified about the enormous pressures associated with caring day in and day out for dying cancer patients. (R. 1649, 1662). The doctors testified that they purposely spent time away from their practice, so as to cope with the stress and pressures of their profession. (R. 1643, 1663). The doctors testified that the Petitioner was not known to take time off and away from his practice.

The workaholic lifestyle of the Petitioner finally took its toll on him as he was discovered on June 11, 1983, "pur-

plish in color," unconscious and thought to be dead. (R. 1638, 1702-1703). Located near Petitioner's unconscious body was a syringe and several empty bottles of Morphine, Demerol and Dilaluid. (R. 1640). The Petitioner was transported to Good Samaritan Hospital, where he remained in a coma for four to five days. (R. 1710).

As a result of the Petitioner's suicide attempt, he sustained moderate to severe brain damage, particularly to the frontal lobe area of the brain. (R. 1827). Several witnesses testified that thereafter, they noticed significant changes in the Petitioner's personality and intellectual functions. Petitioner displayed problems with his memory, problems with judgment, and consequently, his hospital privileges were suspended. (R. 1654-1655, 1669-1670, 1746, 1751-1752).

The Petitioner's co-defendant, John Trent, a local West Palm Beach businessman, was aware of the mental problems of the Petitioner sustained as a result of his attempted suicide. (R. 1318). Trent had bragged to Eleanor Mills that because of the Petitioner's mental problems, he (Trent) was capable of controlling and manipulating the Petitioner. (R. 1318). Prior to the Petitioner's suicide attempt, the Petitioner had been Trent's mother's doctor.

The State first called Sgt. James Wilburn of the West Palm Beach Police Department. (R. 988).[1] Sgt. Wilburn

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1. A lengthy recitation of the facts is unavoidably necessary in order for a full and fair review of Petitioner's Point II, infra, concerning the sufficiency of the evidence.

testified that on July 28, 1984, he responded to the House of Draperies, a business owned and operated by John Trent. (R. 1019-1020). While there, Wilburn located within the House of Draperies a van containing a steamer trunk. (R. 997). Inside the steamer trunk was the victim, Ralph Walker wrapped up in plastic. (R. 1008).

Dr. Frederick Hobin, Associate Medical Examiner, testified that he performed an autopsy on the body of Ralph Walker. (R. 1130). During the course of his autopsy, Dr. Hobin discovered six stab wounds. (R. 1134). Dr. Hobin testified that bodily fluids were taken during the autopsy, which later revealed the presence of alcohol, a valium-like drug, and cocaine. (R. 1140). Dr. Hobin did not testify the drug Magnesium Sulfate was detected. Dr. Hobin testified that it was his opinion that Walker died as the result of multiple stab wounds. (R. 1142). He was unable to locate any needle marks on Walker's body. (R. 1146-1147). Dr. Hobin acknowledged that there was no evidence that all six stab wounds had been inflicted by one person. (R. 1148). Dr. Hobin testified that four ampoules of Magnesium Sulfate would not be lethal in and of itself. (R. 1154).

Eleanor Mills testified that while in the Palm Beach County Jail on a fifteen-year mandatory minimum charge of trafficking in cocaine, she was advised that the man who could help her out of her mandatory prison sentence was John Trent. (R. 1261-1265). Mills became friends with Trent, and she viewed him as her "salvation." (R. 1268). On Tuesday, July

24, 1984, Trent invited Mills and her 16-year-old daughter, Lisa Angelilli, to his Palm Beach apartment at the Palm Beach Hotel. (R. 1210). When Mills and her daughter arrived at Trent's apartment early in the afternoon, Trent answered the door while holding a 45-caliber gun. (R. 1211-1212). Mills, Lisa and Trent proceeded to do cocaine for seven (7) hours. (R. 1281). Inbetween snorts of cocaine, Trent was drinking Crown Royal Bourbon. (R. 1213). At some point in the evening, Lisa wanted marijuana. Trent called Ralph Walker and asked him to bring over some marijuana. (R. 1217). Subsequently, Walker arrived with marijuana, and he joined in the party by smoking marijuana, consuming cocaine and drinking alcohol. (R. 1219). Up until the time Walker arrived, Trent acted like a gentleman. (R. 1218-1219). For approximately one hour after Walker arrived, he and Trent talked about violence and were "getting worked up." (R. 1220, 1285-1286). It became obvious to Mills that Walker wanted to engage in sexual relations with Lisa. (R. 1220). About that time, Walker went into another room of Trent's apartment and returned with a baseball bat. He started banging things with the bat. (R. 1221). Walker thereafter picked up a 357-Magnum gun off a table and started toward Mills, Lisa and Trent. (R. 1222). Trent was able to knock the handgun out of Walker's hand, and Trent pulled out his own 45-caliber gun. Trent fired a shot at Walker. (R. 1222). Trent was very upset, saying "[he should blow away Walker right there.]" (R. 1223). Trent told Mills to get some handcuffs, which she did. While

Trent placed the handcuffs on Walker, Mills held the gun on Walker. (R. 1224). Trent continued his threats that "[he (Trent) should kill Walker right then and there.]" (R. 1226). Trent told Walker, "if you move, I will blow you away right here." (R. 1295). Mills testified that long before the Petitioner arrived, Trent had announced Walker was dead, that "he was going home to his momma in a box." (R. 1299). Mills had never seen Trent behave the way he was that evening. (R. 1304). She was of the opinion that Trent was "over the edge." (R. 1305).

Mills believed Trent wanted to have sex with Lisa, and Walker had interfered with those plans. (R. 1306-1307). Mills testified Trent had no respect for black people and that Trent was accordingly upset that Walker told him what to do in his own home. (R. 1289).

Mills testified that after Walker had been handcuffed and subdued, Trent asked her to call the Petitioner. (R. 1227). She was too nervous to do it, and Trent eventually made the call himself. Mills overheard Trent instruct the Petitioner to come right over with his little black bag. (R. 1227). Immediately after finishing the conversation with the Petitioner, Trent called Bill Daniel. Trent told Daniel to bring his piece, which Mills understood to mean a gun. (R. 1228, 1309). Trent made a third sequential telephone call to Bruce Fullerton. Trent told Fullerton to bring a trunk, a sledgehammer and a chain saw. Fullerton never showed up that evening. (R. 1229).

The Petitioner arrived approximately fifteen minutes after all three phone calls had been made. (R. 1229). He

was instructed by Trent to sedate Walker. (R. 1229-1312). Thereafter, Mills saw the Petitioner inject Walker with some medicine he had brought with him. (R. 1231). Mills identified State's Exhibit 12 as the Magnesium Sulfate ampoules the Petitioner had brought. (R. 1236, 1001-1002). At some point in time, the Petitioner ran out of the drugs he had brought, and he asked Trent if he had anything he could use. (R. 1232). Trent became furious with the Petitioner for not bringing a sufficient quantity of drugs. (R. 1314). Trent got some valiums and tranxenes out of a closet and gave them to the Petitioner and instructed him to crush up the pills and mix them with vodka. (R. 1232-1233, 1315). Trent told the Petitioner, "you have to bring the right stuff if you want to be part of the team." (R. 1233). The Petitioner injected Walker three or four times. (R. 1234).

At some point in time, Trent took Mills and Lisa down the hall to another apartment. (R. 1239). Later, the hotel doorman advised Mills and Lisa that they could return to Trent's apartment. Upon re-entering Trent's apartment, Mills asked Trent what was going on. Trent told Mills that "we had to take him out." (R. 1239).

During that evening, Trent told Mills that the Petitioner had attempted suicide and had mental problems as the result of said attempt. (R. 1318). Trent further advised Mills that because of the Petitioner's mental problems, he (Trent) knew he could control and manipulate him. (R. 1318).

While Mills and Lisa remained in the bedroom of Trent's

apartment, the Petitioner entered the bedroom with blood all over his shirt and pants. (R. 1242). He was smiling and beaming. (R. 1322). After some discussion, Mills acknowledged that it appeared the Petitioner was oblivious to the blood and intended to walk straight out of Trent's apartment. Trent, however, stopped the Petitioner and told him he could not leave without first changing his shirt. (R. 1242, 1245, 1326).

Mills heard the Petitioner say to Trent, "Nice doing business with you." (R. 1322). Also, the Petitioner stated to Lisa and Mills, "You never seen me here tonight." (R. 1246).

Trent initially refused to permit Mills and Lisa to leave the apartment. However, after the Petitioner left, Trent finally consented to their leaving.

Mills returned to Trent's apartment the next night to help Trent clean up the apartment. (R. 1249). During the early morning hours, the Petitioner appeared. (R. 1251). While sitting at the dining room table, with Walker's body nearby on the floor, the Petitioner never said one word about the body. (R. 1333). It appeared to Mills the Petitioner had forgotten completely about the body and what had occurred the night before. (R. 1334). Mills thought the Petitioner was crazy. (R. 1334). Mills heard Trent and the Petitioner talking, and Trent told him, "he would own the [Petitioner's] medical license." (R. 1334).

The Petitioner left and reappeared later on Thursday at Trent's apartment with two young boys and a girl. (R. 1255). Again, the Petitioner never said anything or acknowledged

Walker's body, which was still in Trent's apartment. (R. 1338). Mills interpreted the Petitioner's actions as if he had truly forgotten about the body and what had occurred on Tuesday. (R. 1339).

Mills assisted Trent in putting Walker's body in a steamer trunk. She acknowledged that she had not been charged with any offense in connection with Walker's murder by the State Attorney' Office. (R. 1343).

Lisa Angelilli testified that Trent was going to help her mother out of her possible fifteen-year mandatory minimum prison sentence. (R. 1408). Lisa first saw Trent on Monday, July 23, 1984, at his apartment. Trent was doing cocaine, and Lisa and her mother did not stay. (R. 1407). The next day, July 24, 1984, Trent called and invited Lisa and her mother over to his Palm Beach apartment. (R. 1375). Lisa wanted to go to Trent's apartment in hopes of getting a job from Trent and also she knew cocaine would be made available by Trent. (R. 1411). Lisa and her mother arrived at Trent's apartment around 4:00 P.M. (R. 1376, 1422). Trent answered the door with a gun in his hand. (R. 1376). Lisa described the layout of Trent's apartment: you enter the apartment through the bedroom, walk through or pass the kitchen, and then enter into the dining room area. (R. 1378). Lisa, Mills and Trent proceeded to do cocaine for five hours. (R. 1378). Lisa and her mother left Trent's apartment around 10:00 P.M. to check on Mills' boyfriend. (R. 1425). Trent had threatened that evening to hurt Mills' boyfriend. (R. 1426). The boyfriend was not located, so Lisa and her mother went back to Trent's apartment. (R. 1427). Lisa wanted to go back to Trent's

apartment for the cocaine, and she was also very interested in Trent. (R. 1428).

After arriving back at Trent's apartment, Trent called Walker and told him to bring over some marijuana. (R. 1378). Walker brought some marijuana, and he proceeded to join in smoking marijuana, consuming cocaine and alcohol. (R. 1434). Trent and Walker talked about killing people. (R. 1434). Lisa thought Trent was paranoid, (R. 1415), and that Trent did not like being told what to do by anyone. (R. 1437).

Lisa testified that Ralph Walker subsequently became very violent with the use of a baseball bat. Walker indicated that he wanted to have sex with Lisa. (R. 1380). When Walker and Trent started fighting, a shot was fired. (R. 1382). Lisa and her mother left Trent's apartment, but Trent made them come back. (R. 1382).

While Trent was handcuffing Walker, Lisa's mother held a gun on Walker, and told him if he moved, she (Mills) would blow his head off. (R. 1440). Trent was not satisfied with just subduing Walker by handcuffing him. (R. 1442). According to Lisa, Trent was going to take care of the situation. (R. 1442). Trent told Walker that he was dead, and he was going home to his momma in a box. (R. 1442-1444).

Lisa overheard Trent call the Petitioner, Bill Daniel and Bruce Fullerton. (R. 1384).

After the Petitioner arrived, Trent instructed him to sedate Walker. (R. 1448). Trent continued to instruct the Petitioner what to do all night. (Ar. 1451).

Lisa saw the Petitioner inject Walker with drugs he had brought with him in his black bag. (R. 1386). Lisa believed

that approximately four to six injections were done. (R. 1386). When the Petitioner ran out of drugs, Trent yelled at him for not bringing enough drugs with him. The Petitioner told Trent, "he was sorry." (R. 1387).

Trent got some drugs out of a closet and gave them to the Petitioner, who crushed them up with vodka. (R. 1388). The Petitioner injected Walker four to six times with the mixed up concoction. (R. 1382). Lisa left the dining room area and went into the bedroom. Thereafter, Trent took Lisa and her mother down the hall to another apartment. The two remained there for approximately 30 to 45 minutes until an old man came and got them. (R. 1390). Lisa acknowledged that she had no idea of what was going on in Trent's apartment while she and her mother remained down at the other apartment. (R. 1457).

When Lisa returned to Trent's apartment, Lisa heard moaning coming from the dining room area. (R. 1391). Trent turned up the volume of the T.V. (R. 1391).

Shortly thereafter, Lisa walked to the bathroom and observed the Petitioner with a knife in his hand making a stabbing action. The Petitioner was laughing. (R. 1393-1395, 1459-1460). Approximately 15 to 20 minutes later, the Petitioner walked into the bedroom. The Petitioner's shirt was bloody. (R. 1396).

After some discussion, Lisa acknowledged that the Petitioner appeared as if he was going to walk out of Trent's apartment with the bloody shirt on. (R. 1473). Lisa acknowledged that the Petitioner appeared unconcerned with walking

through the hotel lobby past the desk clerk with a bloody shirt on. (R. 1473).

Lisa overheard the Petitioner say to Trent that it was nice doing business with him and to call again. (R. 1399). The Petitioner stated to Lisa and her mother that "they never saw him there." (R. 1398-1399).

Lisa testified she believed that Trent had planned and orchestrated Walker's death. (R. 1477). Lisa felt that Trent was the man in control. (R. 1478).

On Thursday, Lisa returned to Trent's apartment. At that time, Trent advised her "he was going to burn Walker." (R. 1479). Trent told Lisa that "Walker had to die because he knew too much." (R. 1479). Trent had made it clear to Lisa that when people mess with him as Walker had done, that he (Trent) kills them. (R. 1481).

The last witness the State called in their case-in-chief was Bill Daniel. Daniel had known Trent for approximately thirteen to fourteen years. (R. 1494). Daniel had met Mills approximately two to three months before the murder at Trent's apartment. Daniel was under the impression Trent was working a deal for Mills to get out of her cocaine charge. (R. 1495).

Daniel stated that on the night of July 24, 1984, Trent called him and instructed him to come over. (R. 1496). Within 30 minutes of arriving at Trent's apartment, Trent advised him that he was going to kill Walker. (R. 1531).

Daniel saw the Petitioner inject Walker. At some point in time, Petitioner stated that his drugs would not hold any-

body out for very long, and Trent was asked what drugs he had. (R. 1505-1506). Daniel testified that the Petitioner crushed up some pills and mixed them with vodka and proceeded to inject Walker again. (R. 1506). The Petitioner remarked to Daniel, "I wonder what [Walker's] blood alcohol level is now." (R. 1509).

Daniel offered to take Walker out of Trent's apartment, whereupon the Petitioner replied, "We can't let him go," to which Trent replied, "No problem, we will kill him." (R. 1510).

After awhile, Daniel left the dining room area and went into the bedroom. While there, he later observed the Petitioner holding a knife, and he appeared happy, like a kid "with a new toy." (R. 1513). Approximately 15 minutes later, the Petitioner walked into the bedroom and told Trent, "It is over." (R. 1513).

Daniel testified that the Petitioner appeared like he wasn't there or could have cared less where he was. (R. 1554-1555). Inbetween injections of Walker by the Petitioner, the Petitioner heard Daniel coughing and offered to examine him with a stethoscope. After listening to his chest, the Petitioner advised Daniel that he should quit smoking. (R. 1515).

Daniel heard Trent tell the Petitioner to change his shirt before leaving the apartment as someone would notice the blood. (R. 1565). Trent told Daniel the night of the murder that he (Trent) had always had the fancy of killing "a nigger." (R. 1571). Daniel also talked Trent out of wanting to

kill Mills and Lisa. (R. 1553).

In support of his announced intention to rely upon the defense of insanity, the Petitioner presented the testimony of several witnesses.

Dr. Douglas Smith, a board certified radiologist, (R. 1587-1588), testified that on October 9, 1985, a CAT Scan of the Petitioner's brain was done at St. Mary's Hospital. (R. 1590-1591). A CAT Scan, simply stated, is a method of imaging the brain, and if there is any brain damage, it will be illustrated. (R. 1587-1589, 1604-1605). Dr. Smith acknowledged that the CAT Scan does not by itself tell how an individual functions with any brain damage so demonstrated by the CAT Scan. (R. 1605).

The State stipulated to the admission into evidence of the CAT Scans done at St. Mary's Hospital in 1985, as well as the CAT Scans done at Good Samaritan Hospital in June of 1983, the time of the Petitioner's suicide attempt. (R. 1586).

Dr. Barry Gordon of Johns Hopkins testified as an expert in the field of neurology. (R. 1795). Dr. Gordon testified he first evaluated the Petitioner in January of 1984 for memory problems following Petitioner's suicide attempt. (R. 1796-1797). The Petitioner was discovered having a profound memory problem. (R. 1799). In addition to the memory problem, other aspects of the Petitioner's behavior concerned Dr. Gordon, problems with his judgment and inappropriate behavior. The Petitioner displayed signs of right hemisphere damage. (R. 1799-1801). However, his primary concern at that time was the Petitioner's memory problems. (R. 1799).

In August of 1985, Dr. Gordon compared the 1983 CAT

Scans done of the Petitioner at the time of his suicide attempt and the scans done in 1985. (R. 1808-1809). In support of his testimony, Dr. Gordon displayed slides of both CAT Scans to the jury. The CAT Scans done at the time of the suicide attempt did not show any brain damage. (R. 1817). Dr. Gordon explained that it was not unusual that the Petitioner's brain damage did not appear in the first scan, as it normally takes some time, even years, for brain damage to appear following a suicide attempt like the Petitioner's. (R. 1824). In regards to the 1985 brain scan, Dr. Gordon testified that it revealed moderate to severe brain damage, particularly to the frontal lobe area of the brain. (R. 1827). The brain damage was caused by the Petitioner's suicide attempt. (R. 1827).

Dr. Gordon testified that individuals with frontal lobe damage have problems in planning, foresight and judgment, and often display inappropriate responses and can become easily tractable. (R. 1833-1837). Back in the 1940s and 1950s, frontal lobotomies were surgically performed to make tractable and controllable maniacs. (R. 1829). As a result of the Petitioner's pre-frontal lobe damage, Dr. Gordon opined he was very tractable, easily controlled and very suggestible. (R. 1841, 1845).

Many of the Petitioner's actions and conduct the night of the homicide were entirely consistent with someone suffering pre-frontal lobe brain damage according to Dr. Gordon. (R. 1847). Dr. Gordon testified that at the time of the stab-

bing, the Petitioner was reported to have been laughing. He was apparently prepared to leave Trent's apartment with a bloody shirt, totally oblivious to the blood, or the potential observations by others of the shirt. (R. 1847). Additionally, Dr. Gordon testified that the Petitioner had apparently returned two days after the homicide with friends and gave absolutely no indication of recalling what had occurred the night of the homicide. While everyone present the night of the homicide appeared to be in a highly anxious and excitable state, Dr. Gordon testified that the Petitioner was reported as being calm with an expression like he couldn't have cared less where he was. (R. 1846).

Dr. Gordon testified that the Petitioner's actions demonstrated the well-documented lack of awareness and appreciation that pre-frontal lobe patients exhibit. (R. 1847). Finally, Dr. Gordon stated:

> Within reasonable medical certainty, [Petitioner] had the kind of mental impairment that if someone of the right personality commanded him to do something, he wouldn't necessarily evaluate the consequences of his actions, and he wouldn't be thinking of their implications, and he might well show disinhibited behavior and inappropriate emotional responses, or frankly disinhibited emotions and responses to whatever he was doing. (R. 1865).

Dr. Gordon indicated that the Petitioner could likely appear to be "normal" to jail guards observing him in a jail setting. The reasons for such observation is that the Petitioner's handicap would be manifested when forced to use higher mental functions of thinking, reasoning, anticipating and reacting to events. (R. 1848-1850). Thus, Dr. Gordon

testified that sitting in a jail cell, following orders would not necessarily reveal the Petitioner's illness.

Dr. Ola Selnes testified as an expert in the field of psychology. (R. 1885-1887). Dr. Selnes administered neuro-psychological tests to the Petitioner. These tests demonstrated cognitive impairments attributable to brain damage sustained by the Petitioner during his suicide attempt. (R. 1892, 1902).

Three board certified psychiatrists testified for the Petitioner and opined that at the time of the crime, the Petitioner was legally insane. (R. 1964, 2056-2057, 2118). All three doctors essentially testified that as a result of the Petitioner's suicide attempt, he sustained brain damage. The brain damage constituted a mental defect, which, in turn, caused the Petitioner to lose his ability to understand and reason accurately. He thus did not know what he was doing or its consequences, or although he knew what he was doing and its consequences, he did not know it was wrong. (R. 1965, 2056-2057, 2115-2118).

In rebuttal, the State first called two correctional officers from the Palm Beach County Jail. They testified that since his incarceration following his arrest, the Petitioner did not display any indication of any mental illness, but instead was a model prisoner. The officers testified that the Petitioner read books, played cards and watched T.V. (R. 2144-2147, 2154-2156).

Dr. McKinley Cheshire testified as an expert in the field of psychiatry. (R. 2176). In his opinion, the Petitioner knew right from wrong at the time of the homicide.

(R. 2179-2180). However, the doctor opined that the Petitioner had not gone over to Trent's apartment to kill Walker but instead went to pratice medicine and sedate a man. (R. 2191). Dr. Cheshire believed the instant case could only be explained in terms of sexual perversion. (R. 2180). Sexual perversion was defined by the doctor as the erotic form of hatred, whereby an individual uses sex and sex symbols to express this hatred and to demean another human being. (R. 2180).

Dr. Cheshire testified that he was aware the Petitioner was a homosexual. (R. 2181). As a result of being a homosexual, the Petitioner had proceeded through his life feeling rejected and thus, opined Dr. Cheshire, the Petitioner had developed feelings of anger. (R. 2181). After the Petitioner's suicide attempt, the Petitioner lost his hospital privileges, and thereby the Petitioner sustained another loss. (R. 2183). According to Dr. Cheshire, when the Petitioner arrived at Trent's apartment, all the anger and rejection that had been built up during the Petitioner's lifetime resulted in a sexually perverted act being performed by the Petitioner:

> If you will remember that sexual perversion is the erotic form of hatred. For all of those slights in the past, the anger that has built up there, the sexual perversion is an attempt to remedy and get satisfaction at an unconscious level for those things that have been done in the past. So it was almost a homosexual delight and he began a sexual act, and the sexual act was the stabbing because his behavior is all symbolic. It is a fantasy that goes on in the mind of the pervert. So the stabbing was symbolic for the sexual intercourse, the penetration of a male body by the stabbing of the knife. These are all fantasies. They are symbolic of this. It is possible

that the temptation, the delight of a release of emotional tension, it is possible the [Petitioner] had an irresistible impulse and followed it. (R. 2192-2193).

SUMMARY OF THE ARGUMENT

POINT I

The Petitioner contends that the certified question must be answered in the affirmative for two primary reasons. First, the Petitioner's case was tried after the Opinion in Yohn v. State, 476 So.2d 123 (Fla. 1985) was issued, and hence the Petitioner was entitled to the full benefits of said Opinion. Secondly, in Yohn v. State, this Honorable Court determined that the "old standard jury instruction on insanity," was wholly incomplete, misleading and inaccurate. As a result of this Court's Opinion in Yohn, an entirely new and revised jury instruction on insanity was implemented. Such action amply demonstrates that the mere insertion of the sentence, "the State must prove beyond a reasonable doubt that the defendant was sane," does not in and of itself overcome the other misleading, inaccurate, and burden shifting language of the old instruction.

POINT II

The State failed to prove the essential element of premeditation. At best, and in the light most favorable to the State, the circumstantial evidence relied upon by the State was as consistent with the Petitioner's defense that he was incapable forming a premeditated design as it was inconsistent with such defense. Because the evidence did not lead to only one conclusion contradicting the Petitioner's hypothesis of innocence, the trial court erred in not reducing the charge to second degree murder.

POINTS INVOLVED

POINT I

WHETHER THE FLORIDA SUPREME COURT'S HOLDING IN YOHN V. STATE, 476 SO.2d 123 (FLA. 1986), IS VIOLATED WHEN, PRIOR TO ISSUANCE OF THE YOHN OPINION, A TRIAL COURT INSTRUCTS THE JURY WITH THE OLD STANDARD INSTRUCTION ON INSANITY AND ADDS WITHIN THE CHARGE THE SENTENCE, "THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS SANE."

POINT II

WHETHER THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO FIRST DEGREE MURDER AND REQUEST TO REDUCE THE CHARGE TO SECOND DEGREE MURDER.

POINT I

WHETHER THE FLORIDA SUPREME COURT'S HOLDING IN YOHN V. STATE, 476 SO. 2d 123 (FLA. 1986) IS VIOLATED WHEN PRIOR TO THE ISSUANCE OF THE YOHN OPINION, A TRIAL COURT INSTRUCTS THE JURY WITH THE OLD STANDARD INSTRUCTION ON INSANITY AND ADDS WITHIN THE CHARGE THE SENTENCE, "THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS SANE."

The Petitioner contends that the certified question must be answered in the affirmative for two primary reasons. First, the Petitioner's case was tried after the Opinion in Yohn v. State, 476 So.2d 123 (Fla. 1985) was issued, and hence the Petitioner was entitled to the full benefits of said Opinion.[1] Secondly, in Yohn v. State, this Honorable Court determined that the "old standard jury instruction on insanity,"[2] was wholly incomplete, misleading and inaccurate. As a result of this Court's Opinion in Yohn, an entirely new and revised jury instruction on insanity was implemented. Such action amply demonstrates that the mere insertion of the sentence, "the State must prove beyond a reasonable doubt that the defendant was sane," without remedying the deficiencies of the old instruction, does not in and of itself overcome the other misleading, inaccurate, and burden shifting language contained in the old instruction.

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1. Yohn v. State, was actually decided July 11, 1985, with the rehearing denied October 7, 1985. The Petitioner's case proceeded to a jury trial on October 21, 1985.

2. Throughout the course of this Brief the Petitioner will refer to the former standard jury instruction on insanity as the "old instruction" and the standard jury instruction on insanity adopted by this Court in February, 1986, as the "new instruction," which is also the verbatim instruction requested by the Petitioner.

In the instant case, the Petitioner's sole defense was that at the time of the crime he was legally insane. The Petitioner presented substantial, compelling evidence as to his insanity. Three board certified psychiatrists testified that the Petitioner was legally insane at the time of the crime. CAT-scans were introduced into evidence showing uncontradicted proof that as a result of the Petitioner's suicide attempt a year before the crime, the Petitioner had sustained moderate to severe brain damage to the frontal lobe area of his brain. Because the evidence presented clearly raised a reasonable doubt concerning the Petitioner's sanity, the misleading and confusing instruction concerning the Petitioner's sole defense constitutes reversible error.

At the jury charge conference, the Petitioner objected to the trial court's proposal to use the now former Florida Standard Jury Instruction on Insanity. (R. 2260). The trial court was advised of this Honorable Court's Opinion of Yohn v. State, supra. The Petitioner submitted a written instruction on the defense of insanity, which is the verbatim instruction approved and adopted by this Court as the new standard jury instruction on insanity. (R. 2607), (A.,p. 14). See, Standard Jury Instructions Re: Criminal Cases (Supplemental Report No. 85-2), 483 So.2d 428 (Fla. 1986).[3]

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3. By virtue of this Court formally approving and publishing the "new insanity" instruction on February 13, 1986, this instruction was the law at the time Petitioner's appeal was pending.

The Petitioner further advised the trial court his requested instruction was at that time being considered as the replacement to the then standard jury instruction on insanity because of this Court's decision in Yohn v. State, supra. (R. 2163-2164, 2266).

The trial court refused to give the Petitioner's requested instruction which is now the verbatim standard jury instruction on insanity. (R. 2266, A.,p. 14). Instead, the jury was instructed as follows:

> Now, insanity. An issue in this case is whether this defendant was legally insane when the crime was allegedly committed. All persons are presumed to be sane, however if the evidence causes you to have a reasonable doubt concerning the defendant's sanity, then the presumption of sanity vanishes and the State must prove beyond a reasonable doubt the defendant was sane.
>
> If the defendant was legally insane, he is not guilty. To find him legally insane there are three elements. These three elements must be shown to the point where you have a reasonable doubt about his sanity.
>
> That the defendant had a mental infirmity, defect or desease; that this condition caused the defendant to lose his ability to understand or reason accurately, and because of the loss of these abilities the defendant did not know what he was doing or did not know what would result from his actions or did not know what was wrong although he knew what he was doing and its consequences.
>
> Now, in determining the issue of insanity you must consider the testimony of expert and non-expert witnesses. The question you must answer was not whether the defendant is legally insane today or has always been legally insane but simply if the defendant was legally

> insane at the time the crime was allegedly committed.
>
> When a person tried for an offense shall be acquitted for the cause of insanity, the court shall then determine that the defendant presently meets the criteria set forth by law.
>
> The court shall commit the defendant to the Department of Health and Rehabilitative Services for involuntary hospitalization or placement or show order that he receive outpatient treatment at any other appropriate facility or treatment on an outpatient basis or shall discharge the defendant. (R. 2442-2444, A.,p. 11-13).

The Petitioner readily acknowledges that the trial court modified the old insanity instruction by inserting the following sentence:

> However, if the evidence causes you to have a reasonable doubt concerning the defendant's sanity, then the presumption of sanity vanishes and the State must prove beyond a reasonable doubt the defendant was sane. (R. 2442, A.,p. 11-12).

Presumably, the trial court added the above underlined sentence after being informed of this Court's decision in Yohn v. State, supra. (R. 2260-2266).

Nevertheless, even with the insertion of the sentence that the "State must prove beyond a reasonable doubt that the defendant was sane," the trial court's instruction still did not conform with the Yohn Opinion by properly instructing the jury on the allocation of the burden of proof.

In Yohn v. State, supra, this Court held that the old insanity instruction did not accurately state the law with

respect to the State's burden of proof in an insanity case. In rejecting the contention that the general standard instructions on reasonable doubt and burden of proof could cure the deficiencies in the insanity instruction, this Court stated:

> The general standard jury instructions on reasonable doubt and burden of proof in standard jury instruction 2.03 do not rectify the failure of standard jury instruction 3.04 (b) [insanity] to set forth the State's burden of proof as to the defendant's insanity. These instructions were general, whereas the instructions on insanity were specific. Id, at 128.

In condemning the old insanity instruction, this Court in Yohn v. State, supra at 127, adopted and quoted approvingly of Judge Anstead's dissenting Opinion in Reese v. State, 452 So.2d 1079, 1080 (Fla. 4th DCA 1984), reversed and remanded for a new trial, Reese v. State, 476 So.2d 129 (Fla. 1985), wherein Judge Anstead correctly pointed out that the framing of the old insanity instruction erroneously suggested that the accused must establish a reasonable doubt as to his sanity in order to prevail:

> The second part of the standard instruction states the issue as a defense issue: "if the defendant was legally insane, she is not guilty" again, this framing implicity suggests the burden is upon the defendant to establish the defense of insanity. That burden is made more explicit by the remainder of the instruction which says "to find her legally insane, these three (3) elements must be shown to the point if you had a reasonable doubt about her sanity." Shown by whom? Obviously by the defendant who has raised this issue. This is contrary to the federal scheme and the scheme contemplated by Parkin. This

> instruction confuses the burden of presenting some competent evidence as to insanity, commonly referred to as the burden of going forward with evidence, with the ultimate burden of proof. The instruction erroneously suggests the burden of proof is upon the defendant to establish a reasonable doubt as to his sanity. (citations omitted.) (emphasis supplied).

In Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979), the United States Supreme Court stated that in reviewing jury instructions, the analysis should begin with "careful attention to the words actually spoken" to the jury, and how a "reasonable juror could have interpreted the instruction." See also, Francis v. Franklin, ____U.S._____, 105 S.Ct. 1965, (1985). By applying the "reasonable juror" test as articulated in Sandstrom v. Montana, supra, it is evident that a reasonable juror could have reasonably understood and interpreted the trial court's instruction sub judice to require the Petitioner to prove his insanity. This reasonable interpretation exists because in reading the trial court's instruction in its totality, the jury is first advised that the defendant has raised "an issue of his insanity." The jury obviously realizes that it is not the State raising an issue as to the defendant's insanity. Next, the trial court's instruction tells the jury that everyone is presumed sane, but this presumption of sanity will vanish if the evidence causes the jury to have a reasonable doubt about the defendant's sanity. Surely, the jury concludes that it will be evidence from the defense that will be offered to attempt to overcome this presumption.

The second paragraph of the trial court's instruction given in the instant case advised the jury that, "to find him legally insane... three elements must be shown..." This

instruction is entirely silent as to who must establish the three elements to the degree that the jurors will have a reasonable doubt as to the defendant's sanity. However, it is obvious that it will be the [Petitioner's] burden. It was precisely this glaring deficiency in the former instruction on insanity that was analyzed and noted by Judge Anstead quoted above.

Finally, in addition to the confusing and misleading language of the trial court's instruction, the trial court concluded its instruction on insanity by informing the jurors that the Petitioner could be "discharged from custody" if they found him not guilty by reason of insanity:

> When a person tried for an offense shall be acquitted for the cause of insanity, the court shall determine that the defendant presently meets the criteria set forth by law. The court shall commit the defendant to the Department of Health and Rehabilitative Services for involuntary hospitalization or placement or show order that he receive out-patient treatment at any other appropriate facility or treatment on an out-patient basis or shall discharge the defendant. (R. 2444, A.,p. 12-13).

Thus, when the entire insanity instruction given by the trial court is viewed from the jury's perspective, one finds that the jury is told that the defendant must overcome a presumption of sanity and the ultimate issue, finding a matter to be established is insanity. This patently places the burden of proof on the defendant. The one brief reference to the State's burden of proof, which is immediately followed and contradicted by instruction as to an ultimate finding of insanity, does not dissipate the confusion in the jurors'

minds, in that based on a purely numerical perspective, the jury is implictedly told in four (4) separate ways that the defendant has the burden of proving or establishing insanity, while the State's burden is mentioned only once. Moreover, the trial court's instruction that if the defendant is found not guilty by reason of insanity he could be discharged, places considerable pressure on the jury, such that the jurors could well find it more palatable to resolve any conflicts within the insanity instruction so as to place the burden of proof on the defendant, thereby decreasing the likelihood of a verdict of not guilty by reason of insanity.

In sharp contrast, the Petitioner's requested instruction and this Court's revised standard jury instruction on insanity clearly delineates the proper burden of proof in applying the insanity defense. Gone from the new requested/ instruction is the confusing and misleading language that this Court determined in Yohn v. State, supra, would cause a reasonable juror to believe that the accused must establish a reasonable doubt about his sanity. First, the requested/new instruction merely defines insanity while the instruction given by the trial court spoke of a finding of insanity thereby placing an obvious burden of proof on the accused. In the requested/new instruction the phrase that "the State must prove beyond a reasonable doubt that the defendant was sane" follows the initial paragraph which defines insanity. (R. 2607). This placement is important in that it directs the jury to focus on the State's burden of proving sanity. In addition, in the fourth paragraph of the requested/new instruction the jury is told if they "have a reasonable doubt that he [i.e. the Petitioner] was sane at the time, then you

must find him not guilty by reason of insanity." This sentence reiterates and uneqivocally focuses the jury's attention on the State's burden of proving sanity. Additionally, and perhaps most importantly in light of the John Hinkley trial, the requested/new standard jury instruction on insanity does not tell jurors that a defendant found not guilty by reason of insanity will be discharged, but instead, jurors are told:

> If your verdict is that the defendant is not guilty because of insanity, that does not necessarily mean he will be released from custody. I can conduct additional proceedings to determine if he should be committed to a mental hospital or given other treatment. (A.,p. 14,17).

It is clear that this Court determined that a major deficiency of the old insanity instruction was the lack of a specific instruction within the insanity instruction itself specifically delineating the State's burden of proof. More importantly, however, this Court did not conclude that the mere insertion of a single sentence to the effect that "the State has the burden of proving beyond a reasonable doubt that the defendant was sane," within the old instruction would be a sufficient and a correct statement of Florida law.

Instead, this Court in Yohn expressed its total and complete dissatisfaction with the then existing insanity instruction. This Court held in Yohn that the old insanity instruction, paragraph by paragraph, erroneously suggested and could be interpreted by jurors that the burden of proof is upon the accused to establish a reasonable doubt as to his or

her sanity in order to prevail. This, of course, is contrary to Florida law. Parkin v. State, 238 So.2d 817 (Fla. 1970), cert. den., 401 U.S. 974, 91 S.Ct. 1189 (1971).

As further evidence of this Court's total and complete dissatisfaction with the old insanity instruction, this Court following Yohn v. State, supra, requested the Committee on Florida Jury Instructions in Criminal Cases to submit a revised insanity instruction. Standard Jury Instructions Re: Criminal Cases (Supplemental Report No. 85-2), supra. At the time of Petitioner's trial, the Committee's revised insanity instruction was published in the Florida Bar News of which the trial court was given a copy of. (R. 2266). Again, the Petitioner's requested insanity instruction is the verbatim instruction published by the Committee and adopted by this Court as the new standard jury instruction on insanity.

The importance of clearly instructing the jury on any defense theory cannot be understated. This was recently demonstrated by the decision of the First District Court of Appeal in Lentz v. State, 498 So.2d 986 (Fla. 1st DCA 1986), pet. for rev. granted ____So.2d ____(Fla. 1987), which held that the use of the old insanity instruction constitutes fundamental error reviewable on appeal even in the absence of a contemporaneous objection.[4]

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4. The Third and Fifth District Courts of Appeal have taken an opposite view. Snook v. State, 478 So.2d 403 (Fla. 3d DCA 1985); State v. Lancia, 499 So.2d 11, (Fla. 5th DCA 1986). Lentz is presently pending before this Court. State v. Lentz, Fla. Sup.Ct. Case No. 69,838, with Oral Argument scheduled for August, 1987.

The trial court's instruction on insanity, viewed in its entirety, did not properly and correctly charge the jury on Florida law on the insanity defense. The concept of sanity and insanity at the time an individual commits a criminal offense is an extremely difficult concept for a lay jury to apply to a given situation. The jurors are routinely called upon to resolve diametrically opposed opinions of experts. The citizens of our State who are called on to serve on juries must be provided clear, concise and thorough instructions on the burden of proof in regard to the issue of insanity in order to accomplish their difficult task.

The Petitioner's special requested instruction on insanity clearly delineated the proper burden of proof and was a correct statement of Florida law as evidenced by the adoption of the same instruction by this Honorable Court. Under the facts of this case, the trial court's failure to instruct the jury with the Petitioner's requested instruction resulted in substantial prejudice to the Petitioner and constitutes reversible error.

Prior to his suicide attempt, the Petitioner was a highly skilled physician, dedicated to prolonging the lives of his cancer plagued patients. His technical medical skills were only exceeded by the human warmth and compassion he exhibited towards all his patients. (R. 1773). It thus came as a shock to the community when the Petitioner was indicted, for murder was the anthesis of what the Petitioner had been dedicating his whole life to. Donnis Foster, a registered nurse of thirty-two (32) years, testified that the Dr. Freund she knew before his suicide attempt "would never have harmed

anything or anybody." (R. 1778).

The Petitioner's sole defense was that the bizarre, atypical behavior the night of the crime was the result of insanity, stemming from his brain damage sustained during the near fatal suicide attempt. Petitioner presented strong psychiatric evidence of three board certified psychiatrists that he was legally insane at the time of the crime. These opinions were bolstered by uncontradicted physical evidence, i.e., the CAT Scans of the Petitioner's brain showing that as a result of the suicide attempt Petitioner's brain had been moderately to severely damaged.

In light of this strong substantial evidence in support of the Petitioner's sole defense, the giving of the confusing, misleading, and burden shifting instruction on insanity by the trial court cannot be deemed harmless beyond all reasonable doubt. Butler v. State, 493 So.2d 451 (Fla. 1986). State v. Diguilio, 491 So.2d 1129 (Fla. 1986).

In conclusion, the certified question must be answered in the affirmative. Petitioner's case was tried after Yohn v. State, was decided by this Court. Petitioner's appeal to the Fourth District was pending during the time this Court formally adopted the verbatim instruction requested by the Petitioner on the defense of insanity as the new standard instruction to be used in criminal cases in this State when dealing with the issue of insanity. Accordingly, applying the well established case law that the law as it exists at the time of the appeal is to be applied, the Petitioner's conviction and sentence must be reversed and this cause remanded for a new trial. Smith v. State, 496 So.2d 983 (Fla. 3d DCA 1986); See State

v. Jones, 485 So.2d 1283 (Fla. 1983).

Secondly, the certified question must be answered in the affirmative because the mere insertion of the single sentence "the State must prove beyond a reasonable doubt that the defendant was sane," within the context of the old instruction is nevertheless misleading and confusing as to the proper burden of proof. As noted and argued above, this Court condemned the old insanity instruction in Yohn v. State, supra, and thereafter adopted a completely new and revised jury instruction on insanity. In determining the correctness of a jury instruction, the instruction must be considered as a whole. Had this Court felt it sufficient to add the one isolated sentence within the old insanity instruction, i.e., that the State must prove beyond a reasonable doubt that the defendant was sane," surely this Court would have done so and not gone to the extra effort to completely revise the instruction. Instead, this Court completely revised the insanity instruction so as to delete or alter phrases which implicitly placed the burden of proof on the defendant. The trial court's instruction failed to do this. Therefore, the certified question must be answered affirmatively.

POINT II

THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO FIRST DEGREE MURDER AND REQUEST TO REDUCE THE CHARGE TO SECOND DEGREE MURDER.[1]

The State failed to prove the essential element of premeditation. At best, and in the light most favorable to the State, the circumstantial evidence relied upon by the State was as consistent with the Petitioner's defense that he was incapable forming a premeditated design as it was inconsistent with such defense. Because the evidence did not lead to only one conclusion contradicting the Petitioner's hypothesis of innocence, the trial court erred in not reducing the charge to second degree murder.

Premeditation is a stringent legal concept. The prosecution must prove that the premeditated design existed for an appreciable length of time before the killing so that the perpetrator of the act may know and be conscious of the nature and character of the act which he is about to commit and the probable result therefrom insofar as the life of the assaulted person is involved. Forehand v. State, 171 So.2d 241 (Fla. 1936). The accused must have the distinct and definite

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1. Once this Court acquires jurisdiction, it has the authority to consider the entire case on the merits. Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982); Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977). See also Bell v. State, 394 So.2d 979, 980 (Fla. 1981); Zirin v. Charles Pfizer and Co., 128 So.2d 594 (Fla. 1961).

purpose to take the life of another human being and must have deliberated or meditated upon such purpose for sufficient length of time to be conscious of a well defined purpose to kill another human being. Gurganus v. State, 451 So.2d 817 (Fla. 1984); Purkhiser v. State, 210 So.2d 448 (Fla. 1968); Snipes v. State, 154 Fla. 262, 17 So.2d 93 (1944); Douglas v. State, 152 Fla. 63, 10 So.2d 731 (1942); Hines v. State, 272 So.2d 334 (Fla. 1st DCA 1969).

A premeditated design to effect death is more than an intention to kill; thus, more than a mere intention to kill must be proved. Miller v. State, 75 Fla. 136, 71 So. 699 (1918); Tien Wang v. State., 426 So.2d 1004 (Fla. 3d DCA), pet. for rev. den. 434 So.2d 889 (Fla. 1983); Littles v. State, 384 So.2d 744 (Fla. 1st DCA 1980). It is also clear that the premeditated design cannot be clouded by passion. Forehand v. State, supra; Tien Wang v. State, supra.

> As the element of premeditation is an essential ingredient of the crime of murder in the first degree, it is necessary that the fact of premeditation uninfluenced or uncontrolled by a dominating passion sufficient to obscure the reason based upon an adequate provocation must be established beyond a reasonable doubt before it can be said that the accused is guilty of murder in the first degree. Forehand, supra, at 243.

It has also been recognized that "sudden passion," while not a complete defense to a charge of premeditated

murder, can and does operate to reduce the crime from first degree to second degree murder. Smith v. State, 314 So.2d 226, 233 (Fla. 4th DCA 1975), cert. den., 345 So.2d 427 (Fla. 1976).

Murder in the second degree is defined as the killing of a human being by the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless of human life, without a premeditated design to effect the death of any particular individual. Marasa v. State, 394 So.2d 544 (Fla. 5th DCA), rev. den., 402 So.2d 613 (Fla. 1981); F.S., §782.04 (2)(1985). In Evans v. State, 452 So.2d 987, 988 (Fla. 3d DCA 1984), the Third District held that "depraved mind" within the definition of second degree murder is the unjustifiable killing out of a sense of anger and vengeance.

As noted above, there is a legal difference between the degrees of homicide. Accordingly, if the facts do not legally support a conviction, it is the duty of an appellate court to reduce the conviction to its proper degree. Marasa v. State, supra; F.S., §944.34 (1986).

Premeditation may be, and in fact usually is established by circumstantial evidence. Hall v. State, 403 So.2d 1319, 1321 (Fla. 1981). When circumstantial evidence is relied upon the proof must be not only consistent with the guilt of the accused, but also inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972 (Fla. 1977); Davis v. State, 436 So.2d 196 (Fla. 4th DCA 1983), rev. den.,

444 So.2d 418 (Fla. 1984).

In Fowler v. State, 492 So.2d 1344, 1347-1348 (Fla. 1st DCA 1986), rev. den., 503 So.2d 328 (Fla. 1987), the First District stated, with regard to the standard of review on circumstantial evidence cases:

> Initially, we must consider whether, in order to be legally sufficient, the circumstantial evidence relied on by the state, must lead only to an inference or conclusion that contradicts defendant's hypothesis of innocence, or whether it may be susceptible of two or more inferences, one being consistent with defendant's story and others being inconsistent with such story. We conclude that a circumstantial evidence case should not be submitted to the jury unless the record contains competent, substantial evidence which is susceptible of only one inference and this inference is clearly inconsistent with the defendant's hypothesis of innocence. Evidence that leaves room for two or more inferences of fact, at least one of which is consistent with the defendant's hypothesis of innocence, is not legally sufficient to make a case for the jury.

There are several recent Florida cases wherein the courts including this Honorable Court, found circumstantial evidence of premeditation to be insufficient and, therefore, reduced the charge to second degree murder. Hall v. State, 403 So.2d 1319 (Fla. 1981); Tien Wang v. State, supra; and Clay v. State, 424 So.2d 139 (Fla. 3d DCA 1982), pet. for rev. den., 434 So.2d 889 (Fla. 1983). Each of these cases involved evidence of premeditation analogous to that in the instant

case. Yet, in each of these cases, the court held the evidence to be insufficient and reduced the charge.

In Hall v. State, supra, the defendants were fleeing from a rape and murder when they approached a deputy who they shot in the side. This Honorable Court noted that the evidence concerning premeditation was subject to conflicting interpretations, one supporting premeditation and another negating premeditation; therefore, this Court reduced the judgment to second degree murder.

In Clay v. State, supra, the defendant and the deceased had a stormy romantic relationship. The deceased beat the defendant. She left, procured a firearm, and shortly thereafter shot him. In reducing the conviction from first degree murder to second degree murder, the Third District held that even though the defendant left, obtained a gun, and may have had time to think before shooting, premeditation was not proven because the defendant was "under a dominating passion" from the prior beatings and arguments. 424 So.2d at 141.

Similarily instructive is Tien Wang v. State, supra. There, Pau-Chin Chou, the defendant's wife, was disenchanted with the marriage, and chose to separate from the defendant. She induced the defendant to return to his native Taiwan. The defendant, upset and disturbed at the prospect of their marriage having failed, returned to Florida to effect a reconciliation. He forced his wife to go to Miami with him. At Pau-

Chin Chou's request, her stepfather came to Miami to take her from the defendant. The defendant pleaded with the stepfather to allow Pau-Chin Chou to remain with him. A violent quarrel ensued, and the defendant stabbed the stepfather to death. The defendant was convicted of first degree murder.

The Third District, nevertheless, reduced the judgment of conviction to second degree murder. In so doing, the Court highlighted the state of mind of the defendant. The Third District noted that the evidence in the case, "although not necessarily establishing that the defendant acted 'in the heat of passion,' is as consistent with that hypothesis as it is with the hypothesis that the defendant acted with a premeditated design." Id., at 1007. Thus, the Court held that the defendant was improperly convicted of first degree premeditated murder.

The common thread of Hall v. State, supra, Clay v. State, supra, and Tien Wang v. State, supra, along with other decisions in which the appellate courts have reduced judgments of conviction from first or second degree murder to manslaughter, (See e.g., Forehand, supra; Febre v. State, 126 Fla. 464, 171 So. 241 (1936); Douglas v. State, supra), is that where the psychological state of the defendant is such that differing inferences can be made as to the existence of premeditation, the courts must resolve this conflict in favor of the

reasonable hypothesis that premeditation did not exist.

Applying these authorities to the facts of the instant case, it is clear that the Petitioner did not have the requisite premeditated design to effect the death of Ralph Walker.

Dr. Barry Gordon, a board certified neurologist from Johns Hopkins, testified that in examining the cat-scans of the Petitioner's brain, there was unequivocal evidence that the Petitioner had moderate to severe brain damage as a result of his June, 1983 suicide attempt. (R. 1827). The brain damage was particularly noteworthy to the frontal lobe area of the Petitioner's brain. According to Dr. Gordon, individuals, like the Petitioner who suffer frontal lobe damage, have problems in planning, foresight, and judgment, and often display inappropriate responses, and perhaps most importantly, become very tractable, i.e., are able to be manipulated and used by others. (R. 1833-1837, 1841, 1845).

Dr. Gordon testified that many of the Petitioner's actions the night of the homicide were exactly the type actions one would expect with an individual having frontal lobe brain damage. (R. 1847). Dr. Gordon noted that at the time of the stabbing, the Petitioner was reported to have been laughing. Lisa Angelilli testified at trial that the Petitioner was in fact laughing at the time of the stabbing. (R. 1459). State witness Bill Daniel testified that the Petitioner on the night of the homicide, appeared "like he wasn't there," and could have "cared less where he was." (R. 1554-

1555). Dr. Gordon also noted that the Petitioner was apparently prepared to leave Trent's apartment with a bloody shirt, totally oblivious to the blood, or the potential observations by others of the shirt. (R. 1847).

Dr. Gordon further noted that the Petitioner had apparently returned with friends two days after the homicide with absolutely no expression or indication of recalling what had occurred the night of the homicide. (R. 1847). Ms. Mills testified that the Petitioner had returned on two occasions after the homicide, and on both occasions it appeared to Mills that the Petitioner had forgotten completely about the homicide. (R. 1334, 1339).

Dr. Gordon concluded that the Petitioner's actions demonstrated the well documented lack of awareness and appreciation of someone, like the Petitioner, with frontal lobe damage. (R. 1847).

In regard to the Appellant being tractable as a result of the pre-frontal lobe damage, Dr. Gordon testified:

> DR. GORDON: Within reasonable medical certainty [Petitioner] had the kind of mental impairment, that if someone of the right personality commanded him to do something, he wouldn't necessarily evalute the consequences of his actions and he wouldn't even be thinking that they might have consequences. He wouldn't be thinking about their implications and he might also well show disinhibited behavior and inappropriate emotional responses or frankly disinhibited emotions and responses to whatever he was doing. (R. 1856).

During the State's case-in-chief, Eleanor Mills tes-

tified that the night of the homicide, Trent told her that the Petitioner had attempted suicide, and as a result of that, the Petitioner had mental problems. (R. 1318). Furthermore, Trent told Mills that he knew he could control and manipulate the Petitioner. (R. 1318).

Lisa Angelilli testified that based upon her observations, and having been physically present the night of the murder, it was Trent who had planned and orchestrated Walker's death. (R. 1477). Lisa further testified that Trent had ordered the Petitioner around the night of the homicide. (R. 1498).

William Daniel acknowledged in his testimony that within one hour after arriving at Trent's apartment, Trent told him, "[I am going to kill Walker]." (R. 1531).

Although, the jury obviously rejected the Petitioner's three psychiatric opinions that the Appellant was legally insane at the time of the homicide, the doctors' respective testimony nevertheless clearly negates the element of premeditation. [R. 1963-1965 (Villalobos); 2056-2057 (Almeida); 2115-2116 (Blackman)]. Dr. Blackman testified that, as a result of the Petitioner's suicide attempt, the Petitioner had a "kind of pre-frontal lobotomy...whereby he could follow orders, but could not reason and initiate things himself." (R. 2115-2116).

The State's one rebuttal psychiatrist, Dr. McKinley Cheshire, testified that in his opinion the Petitioner was legally sane. (R. 2179-2180). However, and importantly, Dr.

Cheshire did not testify that the Petitioner premeditated the death of Ralph Walker. Instead, the doctor's testimony reveals that, at best, the Petitioner committed second degree murder.

Dr. Cheshire stated that in his professional opinion, the Petitioner did not go to Trent's apartment on the night in question to kill the victim. Instead, Petitioner responded to Trent's telephone call in order to practice medicine. (R. 2191). The testimony of other State witnesses revealed that the Petitioner did in fact arrive at Trent's apartment with the drug Magnesium Sulfate. Associate Medical Examiner Hobin testified that the ampoules of magnesium sulfate in and of themselves would not be lethal. (R. 1154). State witnesses also testified that Trent was furious with the Petitioner for not bringing enough/proper medicine. (R. 1314, 1387).

Dr. Cheshire further testified that on the night of the homicide the Petitioner did have a mental infirmity or defect, i.e., an "alternation of his brain", as a result of his suicide attempt, and that "he was a sexual deviate." (R. 2201). According to Dr. Cheshire, the homicide was a case of "sexual perversion," which the doctor explained as a neurotic form of hatred, whereby an individual uses sex and sex symbols to express the hatred and to demean another human being. (R. 2180).

Dr. Cheshire was aware the Petitioner was a homosexual. (R. 2181). As a result of being a homosexual, the Petitioner had proceeded through his life feeling rejected, and thus

developed feelings of anger. (R. 2181). After the Petitioner's suicide attempt, the Petitioner lost his hospital privileges, and accordingly sustained another rejection. (R. 2183).

Thus, according to Dr. Cheshire, when the Petitioner arrived at Trent's apartment all of the anger and rejection that had been built up during the Petitioner's life, resulted in a sexually perverted act being performed by the Petitioner:

> DR. CHESHIRE: If you will remember that sexual perversion is the erotic form of hatred. For all of those slights in the past, the anger that has built up there, the sexual perversion is an attempt to remedy and get satisfaction at an unconscious level for those things that have been done in the past. So it was almost a homosexual delight and he began a sexual act, and the sexual act was the stabbing because his behavior is all symbolic. It is a fantasy that goes on in the mind of the pervert. So the stabbing was symbolic for sexual intercourse, the penetration of a male body by the stabbing of the knife. These are all fantasies. They are symbolic of this. It is possible that the temptation, the delight of the release of emotional tension, it is possible the [Petitioner] had an irresistible impulse and followed it. (R. 2192-2193).

Clearly, Dr. Cheshire's testimony is that the Petitioner "at an unconscious level" acted out of a sense of anger and vengeance for all of the rejections and disappointments the Petitioner had sustained in his life. Petitioner's state of mind was thus directly analogous to those of the defendant's in Tien Wang v. State, supra, and Clay v. State, supra,

wherein the finding of premeditation was judically declared to be legally insufficient.

Moreover, in Spaziano v. State, 425 So.2d 1201 (Fla. 2d DCA 1983), the Second District recognized that a sudden impulsive act may be committed under circumstances showing the lack of premeditation. See also, Smith v. State, supra.

In the instant case, the State's own witness, Dr. Cheshire, testified to the reasonable hypothesis that the Petitioner acted with a depraved mind as opposed to a premeditated design.

It is well established that the prosecution is bound by its own evidence. Weinstein v. State, 269 So.2d 70 (Fla. 1st DCA 1972), cert. den., 273 So.2d 764 (Fla. 1973); See also, Hodge v. State, 315 So.2d 507 (Fla. 1st DCA 1975); Majors v. State, 247 So.2d 446 (Fla. 1st DCA 1971), cert. den., 250 So.2d 898 (Fla. 1971). If the prosecution witnesses create reasonable doubt as to any element of the offense charged, then reasonable doubt is created as a matter of law and a judgment of acquittal must be granted. See, Hodge v. State, supra, at 509; Weinstein v. State, supra, at 73-74; Majors v. State, supra, at 447.

In conclusion the very circumstances relied upon by the State to establish the fact of premeditation were equally susceptible of proving that the Petitioner did not premeditate the death. Under these circumstances where the evidence leaves room for two or more inferences of fact, at least one of which is consistent with the Petitioner's hypothesis of innocence, the charge of first degree premeditated murder

should not have gone to the jury. Fowler v. State, supra., See, also, Cockett v. State, ____ So.2d____, (Fla. 4th DCA 1987), 12 FLW 1402. The Petitioner's conviction and sentence for premeditated first degree murder must be reduced to second degree murder. Hall v. State, supra; Tien Wang v. State, supra; Clay v. State, supra.

CONCLUSION

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

Respectfully submitted,

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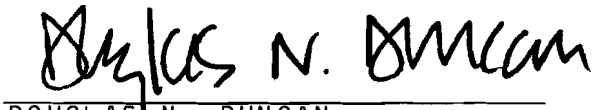

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief has been furnished by mail to Eddie Bell, Esquire, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, this 29th day of June, 1987.

DOUGLAS N. DUNCAN