IN THE SUPREME COURT OF FLORIDA

FREDERICK NOWITZKE,

Appellant,

v. Case No. **71,729**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF APPELLEE

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

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

WILLIAM I. MUNSEY, JR.
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. **0152141**
1313 TAMPA STREET, SUITE **804**
PARK TRAMMELL BUILDING
TAMPA, FLORIDA **33602**
(813) 272-2670

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Appellee does accept the statement of the case and facts as presented by the Public Defender.

Appellee notes that Appellant does not argue sufficiency of the evidence in his brief. This record does not support a sufficiency argument; and, the statement of the facts presented by the Public Defender demonstrates that a prima facie case was established by the State of Florida. This Court does automatically review the evidence to determine if the interest of justice requires a new trial. See, Fla.R.App.Pr. 9.140(f).

On January 18, 1990, Appellee was furnished with a Motion to File an Enlarged Brief filed by Appellant. On page 6 of that Motion, Appellee designates as error the following claims:

> (a) Improper lay testimony on the question of sanity, and on the behavior of other inmates who had raised insanity defenses.
> (b) Introduction of the testimony of NFETC counselor Douglas Bonar, objected to on the ground that it involved communications which were privileged under Fla.Stat. 890.503.
> (c) The trial court's failure to grant a mistrial when Judy Carroll (Clay's ex-wife and Bret's mother) approached two of the jurors and told them her son was murdered; and the trial court's ruling permitting her to remain in the courtroom during the remaining of the trial.
> (d) Absence of the defendant during the playing of his videotaped statement to the jury, where the record does not establish a knowing and intelligent waiver by the defendant personally.(e) Improper consolidation of the Indictment and the Information.

Appellee acknowledges the candor of Appellant in designating these supplemental assignments of error. That these claims are before the Court protects the judgment and sentence from collateral attack on either a habeas corpus before this Court or a 28 U.S.C. §2254 before a United States District Court on an ineffective assistance of appellate counsel claim. Appellate counsel is to be commended for making strategic decisions that go for the jugular as noted in Ruffin v. Wainwright, 461 So.2d 109, 111-112 (Fla. 1984) citing Davis, The Argument of an Appeal, 26 A.B.A.J. 895, 897 (1940) and Godbold, Twenty Pages and Twenty Minutes--Effective Advocacy on Appeal, 30 S.W.L.J. 801 (1976).

This is a reasoned, professional judgment of the Public Defender to decline pursuit of these issues. Under the teachings of McCoy v. Court of Appeals, 486 U.S. __, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988), the Public Defender has pointed this Court to issues in the record proper that might arguably support the appeal. Should this Court determine that these claims require further consideration, then counsel for Appellee would appreciate the opportunity to respond through a supplemental brief; otherwise, under Harris v. Reed, 489 U.S. __, 109 S.Ct. 1083, 109 L.Ed.2d 308 (1989), Appellee requests that this Court make a "plain statement" approving the professional judgment exercised by Appellee's appellate counsel. This Court, on January 24, 2990, returned the enlarged brief to counsel for Appellant. Thereafter, a subsequent brief was filed. Counsel for Appellant now has edited and/or deleted three issues from the brief before

this Court: (a) The trial court erred in allowing the state to introduce evidence concerning Frances Carroll's estate and her life insurance policies; (b) Other guilt phase errors; (c) The trial court erred in admitted irrelevant testimony of Clay Carroll in the penalty phase. Appellate counsel was correct in his deletion. Why? Because the omitted claims either established motive or reflected heinous, atrocious, cruel pain caused by someone else.

On March 12, 1990, Appellee sought relinquishment so that the case might be returned to the trial court so that a nunc **pro** tunc written death sentence might be rendered; and, thereafter an extension of time was sought until final disposition of the motion to relinquish. On March 30, 1990, this Court denied Appellee's Motion to Relinquish and established April 30, 1990, as the due date for Appellee's answer brief.

SUMMARY OF THE ARGUMENT

1.) Frederick Nowitzke's competency was intact at the time he asked for a supplemental evaluation. There was no entitlement to a subsequent evaluation based on the averments. Frederick Nowitzke was competent prior to trial; was competent during trial; and, competent at sentencing. No allegation was made that Frederick Nowitzke did not comprehend court proceedings; that Frederick Nowitzke did not have the ability to communicate with defense counsel; that Frederick Nowitzke did not have the ability in planning or deciding strategy; or testify.

2.) Two prospective black female jurors were stricken by the People. Frederick Nowitzke is a white male defendant. The defense had challenged Twanda F. McDuffie for cause; thus, that attack is moot. Lovie Johnson had a family member charged with a crime and the execution of John Spinkellink had bothered her. The trial court determined that there was no racism. That determination must be honored by this Court.

3.) Expert witnesses [whether engineers; architects; physicians; and/or real estate appraisers] are "hired guns" who are engaged to render a professional opinion for a fee. This has judicial recognition; and, there was no basis for a mistrial when the People established this fact.

4.) Dr. Tanay, a witness for Frederick Nowitzke, had established that he had "accomplished" much for his patient; and, that accomplishment was that his pre-trial opinion had secured a six-month sanctuary from prosecution. Thus, the door was opened as to post-trial habilitory time period estimates.

5.) Florida licenses physicians; but, Florida does not license medical specialities. A neurologist has relevant testimony for the trier of fact. In anticipatory rebuttal to a psychiatric defense, it goes to the truth of the probosition that Frederick Nowitzke did not suffer from an organic brain dysfunction over which his free-will and self-determination might well be impaired.

6.) That individuals indulge in drugs goes to motive; and, motive helps to establish intent. There is a War on Drugs in this country; and, part of that War is an attack on the financial disasters drug use harvests. One must have money to use drugs. There are no free lunches--only inducements. Frederick Nowitzke needed money to support his illicit drug use. The trier of fact was presented with relevant evidence to establish how individuals use their family economic resources to obtain drugs.

7.) Appellant's competency is intertwined into several stages of the criminal proceedings: competency at the time of the offense; competency to stand trial; competency to be sentenced. Here, Frederick Nowitzke's competency enjoyed most rapid habilitation enabling him to trial. It was relevant for the jury to be informed of the treatment; diagnosis; and, prognosis from his pre-trial hospitalization. Also, it was relevant for the jury to know of the shifts in psychiatric impressions coming from Dr. Vaughn. Because opinion is a matter for the trier of fact to either accept or reject, it is most relevant for a jury to be informed of the basis of professional opinions.

8.) The prosecution's argument on lack of remorse was in anticipatory rebuttal of the mitigation the defense would argue. Here, lack of remorse was not used as an aggravating factor; but, as further support of little mitigation. There is no error.

9.) No where in the trial is there any suggestion that the People punished Frederick Nowitzke for rejecting the offer of plea bargain. The prosecutor was correct in objecting to defense counsel's argument that Frederick Nowitzke would be incarcerated for 50-years prior to parole consideration. The jury is entitled to hear correct statements of the law in both argument and instructions. There is no error.

10.) There was record proper support for the instruction on "pecuniary gain". Frances Carroll's attorney testified that Frederick Nowitzke knew he would be beneficiary to a testamentary trust on the demise of his mother; and, that he would receive his share free and clear of all trusts created within the last will and testament of his mother if and only if his stepfather, Clay Carroll was dead. There was record proper support for the instruction on "avoid lawful arrest". The trial testimony of Clay Carroll established that his son, Bret Carroll was killed by Frederick Nowitzke so that there would be no witnesses. There was no objection to this testimony. There was record support for the instruction on "cold, calculated, and premeditated" as this was established by Clay Carroll's testimony and Sidney Merin's testimony [where Frederick Nowitzke detailed the holocaust].

11.) This Court declined to temporarily relinquish jurisdiction so that a nunc pro tunc sentencing order might be rendered. Under Clemons the People ask that this Court determine the propriety of sentencing from the oral pronouncement.

12.) Frederick Nowitzke was previously convicted of the murder of Frances Carroll and the attempted murder of Clay Carroll. This Court has not receded from Ruffin to the extent that prior homicides cannot be considered in sentencing. Further, there was a factual basis for the trial court to determine that this homicide was especially heinous, atrocious, or cruel. There was no failure of proof as to the aggravating circumstances.

13.) When Frederick Nowitzke's mass slaughter of his family is compared with those of similar offenders, this Court will approve the sentence of death.

ISSUE I

WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN DECLINING TO HOLD A COMPETENCY HEARING IMMEDIATELY PRIOR TO JURY SELECTION?
(As Restated by Appellee)

What Appellant overlooks and fails to consider is that legal competency to stand trial was the issue below. The trial court was not concerned with guardianship and/or conservatorship; testamentary capacity; and/or contractual capacity. What was at stake? Nothing more and nothing less than Appellant's Sixth Amendment right to confront witnesses and have the assistance of counsel. Obviously, this right is of little benefit to Frederick Nowitzke if his mental condition would not have permitted him recognition of witnesses or communication with his trial counsel. These rights were not ignored. Prior to trial, appellant's mental competency had been evaluated by Drs. Gonzalez and Merin. (R 17) It was at the October **26**, 1988, proceeding where trial counsel announced that Appellant's competency evaluation would be accomplished "...on Saturday before beginning the trial on Monday." (R 17) Appellant was benefited by mutliple psychiatric/psychological evaluations; and, Appellant was even obtaining evaluations of the evaluation. (R 9)

On the day of trial, appellant affirmed on the record that he understood the charges against him. (R **36)** Appellant affirmed on the record that he understood he faced the death penalty if convicted. (R **37)** Defense counsel established that the evidence had been reviewed with Appellant and that the

defense team had answered Appellant's questions. (R 37) Appellant affirmed on the record that the "plea bargain'' had been explained to him and that he understood same. (R 37-38) Appellant then affirmed that he had projected July 4, 1989, as the date of his liberation and that if he accepted the plea bargain there would be an impossibility for release on that designated date. (R 38) The prosecution objected to defense counsel testifying about client communication. (R 39) The trial court noted that defense counsel was perfecting the record. (R 39) Also, defense counsel stated that he had represented to Appellant the "...possiblity of the death penalty, and I believe he understands that." (R 40)

The claim presented to the trial court was whether Appellant was competent to accept and/or reject a "...plea offer that was presented to him on October 23rd." (R 40)

What Appellant overlooks and fails to consider is that Appellant's contractual capacity is not an issue in a criminal prosecution; wherein, it is of academic interest whether Appellant rejected as fact or grandiosity the conditions of the plea bargain. Why? Because no allegation was made that Appellant's cognitive processes were impaired; rather, the only claim was that Appellant lacked the judgment and insight to accept the terms of the plea bargain. This is a simple grandiose delusion wherein Appellant perceived he had some great insight; however, this is no basis to further defer a criminal trial.

This record proper establishes that the teachings of Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) were followed. Appellant had been evaluated to determine his competency to stand trial. There was no deprivation of psychiatric assistance in either the guilt and/or sentencing phase which would constitute a deprivation of due process. The test articulated by the United States Supreme Court in Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) is whether Frederick Nowitzke "...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." In Martin v. Estelle, 546 F.2d 177, 180 (5th Cir. 1977), the panel focused on whether the Petitioner had a rational and factual understanding of the proceedings. This record does not indicate that Frederick Nowitzke did not understand the criminal charges, the procedures that were used to resolve those charges, the roles of judge/jury/prosecutor/defense counsel/witnesses, and the consequences of his conviction. What trial counsel failed to appreciate is that even individuals who have been diagnosed as psychotic have nonetheless been found competent to stand trial. *See,* Fequer v. United States, 302 F.2d 214 (8th Cir. 1962). The Dusky test is recognized in Agan v. Dugger, 835 F.2d 1337 (11th Cir. 1987); Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986); Price v. Wainwright, 759 F.2d 1549 (11th Cir. 1985); Pridgen v. State, 531 So.2d 951 (Fla. 1988); and, Gilliam v.

State, 514 So.2d 1098 (Fla. 1987). Even amnesia does not render an individual incompetent to stand trial. See, U.S. v. Rinchack, 820 F.2d 1557 (11th Cir. 1987).

Appellant's claim is of academic interest. The trial court had complete information before it to form its determination. No where in the proffer made by defense counsel is there support for delaying the trial. No allegation was made that Frederick Nowitzke did not comprehend court proceedings; did not have the ability to advise counsel; and, that he had the potential for decompensation during the trial. Defense counsel did not assert that Frederick Nowitzke did not have the ability recall relevant events; assist in planning or deciding strategy; and, testify. Defense counsel did not assert that Frederick Nowitzke did not have the ability to understand the charges; the role of the actors in the trial [judge/prosecutor/defendant/witnesses/jury]; possible penalties; his Constitutional rights; and, applicable procedures. Defense counsel did not assert that Frederick Nowitzke would either decompensate or become violent during the trial. Nothing in the Motion for New Trial establishes that Appellant was incompetent during the trial proceedings. (R 3767-3775). In fact, when Appellant was being restored to competency to stand trial, Dr. Vaughn opined that Appellant never experienced mourning; contrition; or, remorse. (R 2375) In fact, Dr. Vaughn wrote: "The impression I get is that he toys with the idea of going back to jail and 'acting crazy'..." (R 2375).

Assuming that Frederick Nowitzke had delusions about the terms of incarceration contained in the plea agreement, then the People's only option was to withdraw the offer. However, this does not mean that Frederick Nowitzke was not to stand trial and answer the indictment. Appellant had been returned to stand trial; and, there was no need for additional hearings on competency. Immediately prior to trial; during trial; and, at sentencing, Appellant remained competent. As defense counsel stated: "We're not here trying the competency of the Defendant to stand trial. He's here. He's been adjudged competent." (R 2365) The trial court agreed; and, defense counsel asserted that this contention was no longer an issue. (R 2366)

The "State" now invites this Court to review Frederick Nowitizke's knowing and informed disclosures to Sidney Merin, Ph.D. as to his considered reasons for declining the plea offer made by the government. See, Issue IX infra where exhaustive and extensive reliance is placed on Frederick Nowitzke's interview. (R 2946-2954). Within Dr. Merin's testimony, a factual basis is established by Frederick Nowitzke as to why he declined the plea bargain: "And we talked about plea bargaining, and he said that he reasoned--he said he was not going to plea bargain. He reasoned that if he plea bargained, then he couldn't come back and appeal. Very good thought." (R 2946) Also see, Frederick Nowitzke's additional plea strategies as reported by Dr. Merin. (R 2948; 2949; 2952) Frederick Nowitzke's rejection of the plea offer was orchestrated; and, this record proper establishes there is no error.

ISSUE II

WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN DECLINING TO STRIKE JURORS McDUFFIE AND JOHNSON?
(As Restated by Appellee)

At bar, there were seventy-nine prospective jurors called for service in this trial; and, there was individual voire dire for them all. Appellant assails error as the trial court declined to strike Twanda F. McDuffie (R **115-123; 197--208; 210)** and Lovie D. Johnson (R **338-353; 379-383; 386).** As to Twanda McDuffie, there was a challenge for cause by the defense which was denied. (R **210)** As to Lovie D. Johnson, there was no challenge from either the prosecution or defense. (R **386).** Appellee now addresses each juror claim seriatim.

As to Twanda F. McDuffie, the defense challenged her for cause. (R **210)** The prosecution subsequently noted that it had no challenges for cause (R **1445);** but, on a peremptory basis the following transpired:

> MR. ECONOMOU: Judge, the State would back strike Juror 1, Miss McDuffie.
>
> MR. SLATER: Make a record that she's black.
>
> MR. ECONOMOU: If we could do that outside the presence of the jury.
>
> That's all, your Honor.
>
> (R **1446,** Lines **14-19)**

The bench conference was concluded; and, then in open-court, Miss McDuffie was excused. (R **1447)** Here, there was no objection to Miss McDuffie being black; and, there was no pattern

established where the prosecution would have a duty to establish that a peremptory challenge was and/or was not racially motivated. The trial court gave the government an opportunity to explain why Miss McDuffie was back stricken. (R 1697)

The prosecution gave a full explanation as to why Twanda McDuffie was stricken. (R 1698-99). Miss McDuffie was excluded for grounds independent of her race; and, defense counsel did not establish otherwise. (R 1700-01) In any event, the defense itself had sought to exclude Twanda McDuffie (R 210); thus, this aspect of the issue is rather academic.

The prosecution also explained why it back struck Lovie Johnson. (R 1699-70). Miss Johnson had a family member charged with a crime and the Spinkellink execution bothered her. These reasons are not racially motivated; and, the defense did not establish otherwise.

The United States Supreme Court has recently held that the prosecution's racially motivated use of peremptory challenges to exclude persons from a petit jury does not violate the defendant's Sixth Amendment right to a trial by an impartial jury. See, Holland v. Illinois, 493 U.S.__, 110 S.Ct. 830, 107 L.Ed.2d *905* (1990). There, no federal constitutional deprivation was found where a white defendant complained that black jurors were struck. Although, the question remains open as to whether there exists an equal protection argument. 107 L.Ed.2d at 921 (J. Kennedy, concurring) At bar, there is no indication that the jury ultimately selected was anything other than impartial. See,

Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988).

This Court has held that a white defendant has standing to challenge the exclusion of black jurors under State v. Neil, 457 So.2d 481 (Fla. 1984). See, Barwick v. State, 547 So.2d 612 (Fla. 1989). There, because the trial court was of a mind that Neil did not apply, this Court under Kibler v. State, 546 So.2d 710 (Fla. 1989) vacated the death sentence, reversed his conviction, and remanded for a new trial. This record proper does not merit such relief. The prosecution was required to establish why it was back striking the Twanda McDuffie and Lovie Johnson; and, the defense did not controvert non-racial reasons set forth by the State. Thus, the claim never was put in issue for the trial court to make a "conscientious" evaluation of Appellant's Neil claim. Although the trial court did not have the benefit of Kibler and was unsure of standing, there is no indication that careful consideration was not given the claim. Why? Because the trial court made an ultimate finding of fact: "I've seen no question of racism so far." (R 1700) There was no racism in the jury selection before this Court; and, no reversible error has been established to justify a retrial. The trial court's conclusion is correct and relief must be denied on the authority of Reed v. State, __So.2d__, 1990 W.L. 19872, 15 FLW S115 (Fla. No. 70,069)(Opinion filed March 1, 1990). The court below followed the procedures outlined in Reed. To the extent that Frederick Nowitzke made a prima facie showing that

there was a strong likelihood that jurors were challenged because of their race, the prosecution carried its burden to establish valid nonracial reasons why Twanda McDuffie and Lovie Johnson were struck. The trial court is vested with broad discretion to determine whether peremptory challenges are racially intended. Why? Because as this Court recognized in Reed, only the trier of fact who is present at trial can discern the nuances of the spoken word and the demeanor of those involved. As to Twanda McDuffie, the defense failed to establish prima facie prejudice because even Frederick Nowitzke wanted her struck. (R 210) As this Court noted in Reed:

> ...In trying to achieve the delicate balance between eliminating racial prejudice and the right to exercise peremptory challenges, we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a "feel" for what is going on in the jury selection process.
>
> (Text of 15 FLW at S116)

To the extent there is conflict between the "sound" and the "sense" of voir dire, the trial court is in the best position to resolve the discord; and, with no showing of an abuse of discretion, the trial court is presumed to be correct.

ISSUE III

WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING APPLELLANT'S MOTION FOR MISTRIAL DURING THE TESTIMONY OF DR. TANAY? (As Restated by Appellant)

A. The "Hired Gun" Attack:

Appellant's first attack under this claim finds support in the cross-examination of Dr. Tanay. The trial court did exercise reasonable control over the mode of the interrogation of Dr. Tanay. Dr. Tanay is an expert witness engaged to render psychological/psychiatric opinions. As such, he comes prepared to defend his professional life; his professional comments; and, his professional appearances. The trial court did not allow Dr. Tanay to be subjected to either harassment or undue embarrassment. See, §90.612(1)(C), Florida Statutes (1989). That Dr. Tanay has "established a reputation" was subject to disclosure to the trier of facts. Below, much was said of the ethical controversy over applications of the law to psychiatric patients. This issue has been explored by Thomas Szasz, a professor of psychiatry at the State University of New York. In his book The Myth of Mental Illness, Szasz argued that the various psychiatric diagnoses are totally devoid of significance and contended that psychiatrists have no place in the courts of law and that forced confinement of people because of their mental illness is unjust. On direct examination, Dr. Tanay noted that Appellant [in earlier times] would have been committed on the basis of his psychological/psychiatric/social history. (R 2227)

Dr. Tanay views Dr. Szasz with strong misgivings; and, Dr. Szasz views Dr. Tanay with strong misgivings. Such is the nature of forensic psychiatry. In fact, there is a strong movement in the legal community that insanity should no longer be an issue in determining criminal responsibility; but, rather insanity is a matter of consequence in the sentence determination. Dr. Tanay is of the view that 80% of all individuals who commit homicides could avail themselves of an insanity defense and secure commitment rather than incarceration. (R 2304)

Dr. Tanay made public his views in his published speeches to the American Academy of Forensic Sciences; and, while being qualified as an expert, Dr. Tanay shared that he was a member of this organization. (R 2165; 2168) Dr. Tanay's testimony leaves no doubt that he is a political activist in the psychiatric community. (R 2169-2170) Dr. Tanay was specifically asked if he had published any articles; and, he answered that he had both published and presented papers to a variety of professional organizations. (R 2171) On voir dire of Dr. Tanay, the prosecution explored the details of his expertise, background, and qualifications. The prosecution mission was to establish that Dr. Tanay was not an impartial witness. (R 2194) The trial court ruled that this would be relevant on cross-ex mination; but, not on voir dire. In fact, the court ruled that such matters would be allowed during cross-examination. (R 2194)

Dr. Tanay continued on direct examination informing the jury of various type of psychiatric diagnostic categories; and, he

further informed the jury that he had just published an extensive paper on schizophrenic homicide. (R **2210)**

The prosecution made no secret that it found Dr. Tanay to be an impartial witness; and, Dr. Tanay was confronted with generic testimony from prior criminal trials. Specifically, Dr. Tanay maintained that he was an impartial witness. (R **2309)** Thus, Dr. Tanay's "impartiality" was an issue; and, Dr. Tanay affirmed that he had on a prior occasion conceded that he did not know if he was an impartial witness. **(R 2312).** Further, Dr. Tanay established that he no longer had a active private practice [treating patients] and that he now specialized completely in forensic psychiatry. (R **2312-13)** Thus, Dr. Tanay established himself as an individual who "rides the circuit" rendering his forensic psychniatric opinion for a fee. There is absolutely nothing wrong in being a professional expert witness; but, when an individual limits his speciality to courtroom presentations, that individual becomes hardened to attack--much as professional real estate appraisers brace themselves from an onslaught from the Resolution Trust Corporation. In other words, a psychiatrist must be able to defend his professional reputation from peer criticism and adversarial cross-examination; and, a real estate appraiser must opine "fair market value" for a Savings & Loan Association to have portfolio integrity and defend that opinion in either an RTC or Office of Thrift Supervision audit and/or federal fraud prosecution. Today, professional opinions from aviation to finance to medicine are rendered under a micro-scope

and in consideration for rendition of that opinion and the basis of that opinion, the expert is paid a fee in a search for the truth.

The writings of Thomas Szasz are known to both the public and the psychiatric community. Dr. Szasz was recognized by Dr. Tanay in his speech; and, his speech focused on Dr. Szasz. When one enters the public light, then one's words [both spoken and written] are relevant. The cross-examination of Dr. Tanay established that he has been rather prolific in the dissemination of his opinions. The trial court was most careful to protect Dr. Tanay from both harassment and undue embarrassment. See, §90.612(1)(c), Florida Statutes (1989). Questions such as these are left to the trial court's discretion. It was established that Dr. Tanay had debated Dr. Szasz on November 8, 1982, in Detroit; and, Dr. Tanay recalled the debate. (R 2322-23) Upon reviewing a transcript of the debate, Dr. Tanay's memory was refreshed and he did recall the comment. In fact, Dr. Tanay clarified and explained the prosecution's characterization that "Dr. Szasz has called psycniatrists generally like me hired guns." (R 2326) Dr. Tanay recognizes Dr. Szasz an an expert in psychiatry; otherwise, why would he have dignified Dr. Szasz in a professional debate publicized as Hero or Hoax exploring the validity of forensic psychiatry? (R 2322) Obviously, Dr. Tanay has recognized Dr. Szasz and his works [in particular the transcript of Hero or Hoax] as authoritative even though Dr. Tanay continues to lend nonrecognition to Dr. Szasz's opinion.

The trial court, under g90.706, Florida Statutes (1989) has not abused its discretion in allowing the cross-examination as to the factual basis of Dr. Tanay's impression of Dr. Szasz and his works. What Appellant does not overlook, and Appellee agrees, is that the prosecution and defense of these capital cases is a "battle of the experts.'' See, Langston v. King, 410 So.2d 179, 180 (Fla. 4th DCA 1982). This is modern day litigation. (R 2587). The trial court has not abused its discretion; and, if there was error, and there was none, then at most it was harmless error. See, §§59.041 and 924.33, Florida Statutes (1989) and State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

B. Dr. Tanay's **Bill**

That Dr. Tanay tendered paid a monetary consideration for his time in both deposition and trial was a matter which the trier of fact was entitled to know. Dr. Tanay's fee is $150.00/hour. For a three-hour deposition, Dr. Tanay charged $1,800.00; however, Dr. Tanay defended his fee by pointing out that he "billed" for preparation time. (R 2393-97)

As pointed out in Tenzer v. Lewitinn, 599 F.Supp. 973, 974 (S.D. New York 1985): "The expert witness, or **'hired** gun'-is hardly ever found to give his or her opinion testimony without a fee." Under the authority of Pandula v. Fonseca, 199 So. 358, 359-60 (Fla. 1940) and Langston v. King, 410 So.2d 179 (Fla. 4th DCA 1982) the trial court did not abuse its discretion in allowing the prosecution to explore the amount and basis of compensation.

C. The Totality of the Cross-Examination

The Constitution does not guarantee perfection in obtaining psychiatric evaluations. See, Ake v. Oklahoma, **470** U.S. **68, 105** S.Ct. **1087, 84** L.Ed.2d **53 (1985).** If this were a perfect society, then Frances Carroll and Bret Carroll would be alive; however, Dr. Tanay's opinion was not to go unchallenged in this trial. The prosecution did attack.

The jury was allowed to learn that many relevant observations had been made by individuals other than Dr. Tanay. Further, the jury was allowed to learn that defense counsel had made all these observations and impressions known to Dr. Tanay. And, finally, the jury was allowed to learn that Dr. Tanay had reviewed the materials but not relied on them in forming his opinion. A sense of pride is communicated in Dr. Tanay's testimony when he stated that his "opinion" achieved a commitment on behalf of Appellant for six months prior to trial. (R **2249)** Dr. Tanay became argumentative and hostile when asked of the "Rosenhan Study" and was refreshed by his prior deposition. (R **2252-2257)**

Dr. Tanay's admission that he was familiar with the work of Dr. Jay Ziskin's work--Coping with Psychiatric Testimony (R **2252-2253)** served as a predicate to the mental status evaluation performed by Dr. Tanay. Dr. Tanay admitted that his opinion was based on two one-hour long interviews with Appellant. (R **2332)** Dr. Tanay did not consult with either a psychologist or neurologist in making his determinations. (R **2333)** In other

words, Appellant was not benefited by CAT Scan/EEG/Luria-Nebraska Test/Halstead-Reitan. (R 2334) But then, did Frederick Nowitzke present himself in such a manner for Dr. Tanay to suspect organic brain damage? The flaws in Dr. Tanay's social history were exposed as he had failed to develop whether Appellant was a battered child. (R 2335) In fact, the records that Dr. Tanay did review reflected that Appellant's life history was rather unremarkable. (R 2336). The People point out the positive aspects of the cross-examination because Frederick Nowitzke did in fact enjoy an advantaged childhood; was not physically abused; matriculated through the school system; and, shows no sign of brain impairment. Through the cross-examination of Dr. Tanay, the People were able to establish the normalcy of Appellant for the benefit of the jury. Further, the cross-examination established the pre-meditation of the murder. How? Appellant used a small gun delivering one shot to each victim's head. (R 2338) Once Dr. Tanay finally produced his notes for the prosecution, it was revealed that Appellant had informed Dr. Tanay that he used "hollow point bullets" because "they shoot straighter". (R 2407) Dr. Tanay denied that Appellant confessed that these "hollow point bullets" were used because they shatter making them harder to identify. (R 2407-08)

Additionally, the People established the "bias" of Dr. Tanay through his publications. In other words, Dr. Tanay should never fear that he will perish as he has published. This was a family homicide and Dr. Tanay's published view is: "They rarely kill

strangers and most frequently kill those they love most. Murders seem to be the occupational hazard of love." (R 2410) See, Irizarry v. State, 496 So.2d 822, 825 (Fla. 1986) where this Court noted: "...from evidence presented, the jury could have reasonably believed that appellant's crimes resulted from passionate obsession." So it follows in this case; and, so it was rejected.

These cases do, by necessity, involve a battle of the experts. The defense attempts to discredit the People's experts; and, the People attempt to discredit the defense experts. There is a search for the truth; and, such is the process of our criminal justice system. Judge Kravitch has best resolved the problem raised by Appellant: "Partisan psychologists and psychiatrists will often disagree in courts of law. Before we are convinced of a reasonable probability that a jury verdict would have been swayed by the testimony of a mental-health professional, we must look beyond the professional's opinion, rendered in the impressive language of the discipline, to the facts upon which the opinion is based." See, Bertolotti v. Dugger, 883 F.2d 1503, 1518 (11th Cir. 1989 . At bar, there has been no abuse of discretion in the scope of cross-examination allowed.

ISSUE IV

WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN ALLOWING THE PROSECUTION TO ESTABLISH ON CROSS-EXAMINATION THAT IT IS NOT UNCOMMON FOR PERSONS FOUND NOT GUILTY OF HOMICIDE BY REASON OF INSANITY TO SPEND ONLY SIX TO EIGHT MONTHS IN THE STATE MENTAL HOSPITAL?
(As Restated by Appellee)

This issue was made relevant by Dr. Tanay. In his testimony, Dr. Tanay made a point of establishing that he had "accomplished much" on behalf of Appellant; and, that "accomplishment" was that his opinion had secured Appellant sanctuary from prosecution for six months. (R 2249) In other words, this defense witness opened the door to pre-trial confinement. (R 2249) The jury was informed that early into his six-month confinement Appellant was taken off all psychotropic medication. (R 2250) And, that his treatment was the structure and/or milieu of the state institution. Further, Dr. Tanay relied on a psychiatric report from the North Florida Evaluation Center (R 2354) which read:

> Q. "Currently, Mr. Nowitzke has an adequate capacity to understand his attorney's explanation of the legal issues. He presents sufficient ability to consult with his attorney with a reasonable degree of rational understanding. He is able to give an account of his actions at the time of the alleged offense. He does have sufficient impulse control to reasonably present appropriate behaviors in court. He displays sufficient ability to participate in his own best interest in the legal proceedings. His ability to cope with his legal situation is adequate and unlikely to change with continued hospitalization at this facility. He **may, however, nullify any one or all of the above statements by acting out**

inappropriately and/or displaying learned psychotic behaviors; that is, talking to himself, claim hallucinations." --that's in brackets -- "to either render himself again as incompetent for trial purposes or as an attempt to get adjudication and returned to this -facility. He is fully aware of the seriousness *of* the charges and the range and nature *of* the possible penalty."

Do you recall that?

A. Yes, I recall reading that.

Q. All right. "Significant Medical Issues", and there it says, "There are no significant Medical Issues.

Then the next paragraph is -- about the second or third sentence -- "His judgments and insight are fair. His attitude and behaviors tend to pose questions of malingering as he nears a competency hearing in court. As he is pressed with regard to possible outcome of the legal process, he may become flippant and overly jovial. He will say that he was not himself during the shootings and, therefore, not responsible. At other times, he will say he may get the electric chair. Currently, Mr. Nowitzke presents as free of overt psychotic --" that's what it says -- "Currently, Mr. Nowitzke presents as free of overt psychotic symptoms. His actions and flow of speech indicate rational, goal-directed thought. He shows no evidence of hallucinations, delusions or perceptual distortions."

(R 2358-59) (emphasis supplied)

Dr. Tanay's testimony also established:

Q. Doctor, do you believe that 80 percent of those who commit homicide could avail themselves of the insanity defense and possible prevail and, therefore, be committed instead of being sent to jail?

A. It is -- or, it has been my view that there is a basis for making such statement, yes, sir. (R 2304)

Defense counsel did not object to any of this cross-examination. Thus, the testimony now challenged was made relevant and material by the testimony of Dr. Tanay.

Then, Dr. Vaughn testifies; and, his testimony is merely cumulative to that previously adduced by Dr. Tanay. Sanity is an issue at several stages of the criminal justice system: (1) time of the offense; (2) time of trial; (3) time that accused is rehabilitated to stand trial; (4) time of sentencing; and, (5) time of execution of death warrant. If an individual is found not guilty by reason of insanity, then is it not relevant in a capital prosecution for the trier of fact to know the time-spans of mental health habilitation? The judiciary places strong stock in a jury recommendation in a capital case.

After Dr. Vaughn left his professorship at the University of Florida, he established on direct examination that he was engaged to serve the programs in the state hospitals for the mentally handicapped--including the criminally insane unit at Chattahoochee and he was supervisor at Arcadia (R 2557). Defense counsel also established that at North Florida Evaluation/Treatment Center, part of the psychiatric penal patient population is composed of individuals who have been "...adjudged not guilty by reason of insanity." (R 2559). Defense counsel with this witness elicited an opinion that only 20% of individuals charged with crimes were insane (R 2565); whereas, Dr. Tanay had opined that 80% of individuals charged with homicide could avail themselves of an insanity defense. (R

2299-2304). The door is opened; and, there was no objection to the testimony focusing on an accused being not guilty by reason of insanity. There was a conflict as to whether 20% or 80% of individuals charged with crimes were candidates for an insanity defense.

Dr. Vaughn affirmed and adopted his deposition testimony that it was not uncommon for murderers to remain in state hospitals for a term of six to eight months. (R 2597) And, Dr. Vaughn agreed with his own deposition testimony [after refreshing his memory] that a person found insane after the commission of a homicide spends approximately six to eight months in a state mental hospital. (R 2597-99). In fact, the Termination of Treatment Summary has a prognosis that Appellant might well attempt through malingering and faking attempt to secure an adjudication of [insanity at the time of the offense] so that he might be returned to the facility. (R 2639-40). On redirect examination, by defense counsel, the following was clarified:

> Q. And you talked with Mr. Schaub about the stay of individuals in State hospitals and I think something came out about six months. Were you referring to those who were found incompetent to stand trial?
>
> A. That's the only ones, yes.
>
> Q. And who makes the determination, Doctor, as to how long somebody stays in a State Institution after they have been found not guilty by reason of insanity?
>
> A. Well, it's the same in both cases. If a person's found competent to stand -- incompetent to stand trial before the State Hospital -- I mean, trial can come about. The State, the Court must once again say the person isn't competent, so

competency must be restored.

Even after five years, it's possible for the court to find that competency has not been restored, even in those issues.

If you get back to the issue of not guilty by reason of insanity, that's an entirely separate thing. The person must be reviewed six months after they are admitted to a hospital and then again a year. The Court receives that report. That can go on in definitely.

But release is always dependent upon the action of the circuit court. The hospitals do not release.

Q. So it is the court that will make the ultimate determination as to the release of anybody that's found not guilty by reason of insanity; is that correct?

A. Correct.
(R *2655-2656)*

Even if there were error, then was it not certainly cured by the re-direct examination of defense counsel? The issue raised is certainly a non-issue. After the cross-examination of Dr. Vaughn, defense did conduct a redirect examination which both rebuts and/or explains the matters raised on cross-examination. There was a recross examination, and without objection, the following was brought out which is helpful to and supportive of the redirect.

Q. Doctor, the hospital makes that recommendation, do they not, to the Court and asked the Court " When are you going to want to take this man off our hands"?

A. I don't think that's entirely accurate.

Q. What is accurate of it or inaccurate?

A. I had mentioned to you that reports are rendered every year. And of course, in the report, the recommendation is made for release or detention.

> And the Court will act accordingly; appoint its own expert and make its own decision.
>
> But the Court, certainly -- the hospital makes makes the recommendation, negative or positive.
>
> Q. They make the recommendation to the Court?
>
> A. Yes.
>
> Vol XV, (R2657)

It cannot be said that the redirect examination did not facilitate the discovery of truth. (R 2655-56) On this evidentiary question, if error exists [and it does not] after redirect examination, then at most it is harmless error. See, §§59.041 and 924.33, Florida Statutes (1989). Here, where the testimony is read in the totality of Dr. Vaughn's testimony, there is no error.

Appellant relies on Williams v. State, 68 So.2d 583 (Fla. 1953) for reversal. There, in closing argument, the prosecution informed the jury that should Patrick Henry Williams be found not guilty by reason of insanity he would be sent to the insane asylum and soon after being confined there would be released to commit another homicide. There was a confession of error; and, presumedly there was no evidentiary support for the argument. At bar, on cross examination; redirect examination; and, recross examination, the jury was afforded a full and fair disclosure of the consequences of a "not guilty by reason of insanity" verdict. It cannot be argued that this contributed to the conviction of Appellant. Why? Because Appellant has always admitted that he is a murderer and the only issue was his competency. Florida

does not have a plea of "guilty but mentally ill". This plea has the advantage of identifying guilt and placing only psychiatric habilitation at issue. At bar, the jury was fully informed that if Appellant were found guilty by reason of insanity he is entitled to treatment and the trial court would continue to maintain an active role. This is not inflaming the passion of the jury or indulging in dissemination of dysinformation. When read in its totality, the testimony of Dr. Vaughn does not establish an appeal to the jury's sympathy; bias; rage; compassion; passion; or, prejudice. It is at this juncture that the case at bar is distinguished from Garron v. State, **528** So.2d **353, 357** (Fla. **1988).** Why? Because this jury was never "hopelessly" confused. Should there be error, and there is none, then this claim is be reviewed under the authority of State v. Murray, **443** So.2d **955** (Fla. **1984).** The record proper before this Court does not establish reversible error.

ISSUE V

WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN ALLOWING A LICENSED FLORIDA PHYSICIAN TESTIFY ON BEHALF OF THE GOVERNMENT?
(As Restated by Appellant)

Under the state evidence code, wide discretion is given trial courts for the introduction of opinion testimony. See, 8890.701 through 90.705, Florida Statutes (1989). What appellant overlooks and fails to consider is that the prosecution was faced with a defense of insanity. As such, on rebuttal, Stephen C. Padar, M.D. was called to testify. (R 2903) Florida does license physicians to practice medicine. Florida does not engage in specialty and/or sub-speciality medical licensure. In capital prosecutions, neurological dysfunction is a matter for both the "guilt" and "sentencing" phase of trial. How many times has this Court been faced with an incompetency of trial counsel claim where the deficiency alleged is that evidence of organic brain damage was not brought to the jury's attention?

Granted, the defense witnesses in the guilt phase testified that there was no brain damage which would be the etiology of this outbreak of rage, does that mean that the People were prohibited from distinguishing this aspect of mental competency before the jury?

This issue arises most often in the context of victim homicide photographs. Many times defense counsel will make an offer to stipulate to whatever facts a purposed gory photograph of a dead body might depict. In Williams v. State, 228 So.2d 377, 378 (Fla. 1969), this Court held:

> Appellant's offer at trial to stipulate whatever facts such picture might depict was properly refused by the State. An offer of stipulation does not cut off the right of opposing counsel to proceed if such continuation is relevant to proof of remaining issues of the case.
>
> (Text of **228** So.2d at **378)**

Also see, Mills v. State, 462 So.2d **1075, 1079** (Fla. **1985),** certiorari denied, **473** U.S. **911, 105** S.Ct. **3538, 87** L.Ed.2d **661 (1985).** There, in a homicide prosecution, the defense offered to stipulate to the ownership of the decedent's property. The "State" refused the stipulation and brought the decedent's father forward to testify. This Court noted that the fact that Mills stipulated to the ownership and value of the property does not render the testimony of the victim's father irrelevant. Why? Because the father could identify specific items of property; and, his testimony corroborated the testimony of the co-defendant relating to that property.

This is where this case fits. It was significant for the jury to know that the prosecution was not insensitive to Appellant's defense. As the testimony etablishes, the boundary between neurology and psychiatry is not clearly defined. How was the jury to know that Appellant's murders were not the result of a brain disease or brain trauma or tumor? If there were some physical [rather than emotional] reason for the crime, then the government has carried its burden of establishing guilt beyond and to the exclusion of reasonable doubt. For example, if Frederick Nowitzke did in fact have a small temporal lobe tumor,

this might well have triggered seizure activity whereby he kills. A computerized axial tomography (CAT) scan of Appellant's brain would reveal this abnormality. The diagnostic system requires the elimination of physical causes as etiological factors to make a psychiatric diagnosis; and, a good physical examination coupled with a neurological evaluation is the precedent to a psychiatric diagnosis and the formulation of a treatment plan.

At bar, Dr. Padar testified in anticipatory rebuttal that he does conduct examinations to determine mental conditions and that he treats patients with mental disorders. (R 2905) Further, he testified that he uses "objective" criteria in making his determinations of mental illness. (R 2905) Dr. Padar testified that he examined Appellant pursuant to an Order of the trial court. (R 2906) He testified that he could find no evidence of a neurological dysfunction. (R 2907) Dr. Padar testified that when Appellant presented himself, his neurological functions did not fall from without normal limits. (R 2907-2909) Specifically, Dr. Padar's examination did not reflect any abnormalities relating back to November 16, 1985, when the murders were committed. (R 2909)

Dr. Padar testified that Appellant appeared neurologically intact and sane on the date of the examination; and, further he opined that Appellant appeared to have been neurologically [intact] as far as any organic brain lesion is concerned at the time of the murders. (R 2911) Further, Dr. Padar testified that he saw no indication that appellant had been insane at the time

of the crime. (R **2912** Here there was an objection that the question had been asked and answered. (R **2912).** Prior to Dr. Padar testifying, there was an objection by defense counsel. (R **2895)**

Dr. Padar's deposition testimony reflected that he had felt he would be going out on a limb to render an opinion as to Appellant's mental condition at the time of the murders. (R **2899)** The trial court held that if Dr. Padar was able to formulate an opinion, he would be allowed to express it. (R **289)**

It is interesting that when, in fact, Dr. Padar did testify there was one objection as to the basis of his opinion. (R **2906-2907)** Defense counsel asked if Dr. Padar's answer was to address "legal" sanity and/or "medical" sanity. (R 2906) The prosecutor asked Dr. Padar if he understood the distinctions between "legal sanity" and "legal insanity". (R **2906)** Dr. Padar did answer: "...I know what sanity and insanity is." (R **2906-2907).** No objection was made by defense counsel. (R **2907)** Further, defense counsel's objection as to Dr. Padar's answer to the ultimate issue in question was not on the grounds now argued. (R **2912).** See, Castor v. State, **365** So.2d **701** (Fla. **1978).** Here, the trial court was never asked to rule on the putative error. As there was no **contemporaneous objection** the "State" argues in the alternative that the issue was procedurally defaulted.

ISSUE VI

WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN PERMITTING TESTIMONY REFLECTING THE CRIMINAL BEHAVIOR OF DRUG ADDICTS?
(As Restated by Appellee)

Sergeant Larry M. Costanzo, of the Florida Highway Patrol, testified on behalf of the People. (R 2678) He described Appellant's physical condition shortly after the homicides. (R 2679). The prosecution established Trooper Costanzo an individual with the competency to render an opinion as to the physical condition of cocaine users. (R 2680-2682). The relevancy of this line of questioning was to establish that the actions of Appellant were normal for a drug user. (R 2680)

Trooper Costanzo testified that in his law enforcement experience he had made various determinations about the habits and mannerisms of drug users. (R 2681). The trial court correctly perceived that this testimony was relevant to establishing Trooper Costanzo as an expert in the field of recognizing individuals under the influence of cocaine. (R 2681-2682). Trooper Costanzo testified that regular use of cocaine is an expensive habit. (R 2682)

Specifically, Trooper Costanzo [without objection] established:

> Q. All right. Now, based upon your experience in the enforcement of our narcotic laws, have you been acquainted with what narcotic or cocaine users do to satisfy their habits?
>
> A. They'll steal, they'll -- what do you call it? Take things from the home, sell things; sell their own property.

Q. How about their parents?

A. They take things from their parents, stuff like that.

Q. Do they commit crimes against their parents?

A. Stuff like that. They'll even commit murder.

(Vol. XVI, (R2688)

Defense counsel objected to Trooper Costanzo testifying that "drug users'' commit murders. **(R 2689)** The prosecution never asked if "drug users commit murders'' and the trial court correctly ruled on the objection. **(R 2689).** The trial court sustained Appellant's objections when the prosecution attempted to establish that there was no behavior on the part of Appellant to indicate to Trooper Costanzo that Appellant was insane. **(R 2691)** and, the trial court sustained Appellant's objection to Trooper Costanzo testifying that Appellant appeared normal (R **2693).** Defense counsel, on cross-examination, did establish that it would be difficult for Trooper Costanzo to opine whether in fact Appellant had imbibed drugs on the evening in question. (R **2695-2696.**

Lieutenant Roy Hackle of the Manatee Sheriff's Office then was called on behalf of the People. (R **2696)** This witness testified that he observed Appellant upon arrest and that he was both scared and nervous **(R 2698);** also, Lieutenant Hackle testified that Appellant's condition was consistent with that of a narcotics user. **(R 2698)** Lieutenant Hackle established that

the price of an ounce cost around $1,800.00; and, that small quantities [such as "toots"] sold for $20.00 to $30.00. (R 2700) Lieutenant Hackle testified that children have stolen from their parents to support a drug habit; and, further that drug users have been involved in homicides. (R 2702-2705)

The prosecution argued that this testimony established "motive". (R 2683) The trial court correctly noted that the "State" did not carry the burden of establishing "motive" (R 2683); however, the trial court later noted that this line of inquiry did show the "overall picture." (R 2702) There is a distinction between "motive" and "intent". The former is the cause, reason, inducement, or why an act is committed while the latter is the mental purpose and/or design to commit a specific act. Intent is an essential element of the crimes charged in the indictment; and, motive is not an element of any crime. The People did not have to show why Frederick Nowitzke killed. Motive, however, is relevant evidence which, because it was available, was used to show why Frederick Nowitzke committed the crime. In this sense, does not motive serve the purpose of proving intent? Motive provides the trier of fact with more information; and, this may help remove doubt, thus answering the question "why". The traditional reasons for murder are hatred; anger; greed; and/or revenge. Here, Frederick Nowitzke did not kill out of either love or compassion. This was not a mercy killing: but, rather it was one of "gain" so that a self-placed entitlement to a cocaine indulgence might be continued. See generally, Words & Phrase, "Motive".

ISSUE VII

WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN ALLOWING THE PEOPLE TO INQUIRE AS TO THE DISTINCTIONS BETWEEN COMPETENCY AT THE TIME OF THE OFFENSE AND COMPETENCY AT THE TIME OF TRIAL?
(As Restated by Appellee)

Frederick Nowitzke is presumed to have been sane; and, further he is presumed to have intended the consequences of his homicides. This is couched in the basic premise of free-will and self-determination. However, Florida does not assess punishment where it cannot assess blame. The question throughout this trial was Frederick Nowitzke's sanity. The burden of proof was on Frederick Nowitzke to establish his incompetency; and, his plea of not guilty because of insanity was how he raised the issue.

The People had reason to believe that Frederick Nowitzke was both sane and normal. Thus, there was much rebuttal in this trial.

There are several interrelated stages in the criminal proceedings when the question of Frederick Nowitzke's sanity might be raised: (1) sanity at the time of the homicides; (2) sanity at the time of trial; (3) sanity while incarcerated; and, (4) sanity just prior to execution of the death warrant. The first two stages became intertwined dichotomies; and, contrary to Appellant's position, it was not reversible error to dichotomize these first two stages. Sanity issues are not always presented in an alternative syllogistic fashion where the inclusion of one stage means the exclusion of the other. Was it not relevant and

probative evidence for the jury to know how Appellant presented himself at the North Florida Evaluation and Treatment Center? It was most important for the jury to know the psychiatric impressions at both stages and the rapid progress Appellant had made in habilitating himself [without the use of psychotropic medication] to stand trial. The case boiled down to one of "insanity" versus "malingering". This is common. The burden of proof was on Frederick Nowitzke as it was he who challenged the presumption of sanity and mental capacity; thus, the testimony now assailed was related and relevant rebuttal testimony.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO ARGUE "LACK OF REMORSE" TO THE JURY IN THE PENALTY PHASE
(As Restated by Appellee)

At bar, the prosecution argued:

> When he didn't like the way things were going, he'd go back to the lake and do drugs and drink. After the killings, he didn't accept responsibility for them, either. He said his mother was a bitch, "I had an awful life. Clay Carroll wasn't very sympathetic."
>
> Now, this is the same Clay Carroll who got him the job where he worked. He used to drive him to the job even after he moved out of the house.
> Clay Carroll would go by, pick him up and drive him to and from work.
>
> But "Clay Carroll wasn't very sympathetic. They didn't understand me." They wanted to get him in a drug program so he could have a better life.
>
> "My mother was a bitch," this lady who worked all her life hard to support three children and took care of a dying husband. But she's a bitch. She's a bitch and Clay's unsympathetic.
>
> At the hospital, he's up there and he shows no remorse for those killings. And that plays a big part in this case because he showed remorse -- he showed remorse over Brett Carroll and he showed remorse over Brett Carroll because it's the one he can't justify in his own mind.
>
> MR. SLATER: Excuse me Your Honor. Excuse me. For the record, I need to object to this particular statement. I apologize for interrupting the Prosecutor, but I'll object to him referring to remorse.
>
> Remorse has no bearing at this phase, and it's an impermissible comment. Any regard

> to remorse shown by the Defendant has no bearing on the aggravating circumstances and is an improper argument for the State. We object to it and move for a mistrial.
>
> MR. SEYMOUR: I'll concede to it per se.
>
> THE COURT: I'll deny the mistrial. Go ahead.
>
> MR. SEYMOUR: I'm tying that up right now. The lack of remorse for anybody else except Brett Carroll shows that he knew guilt. He knew responsibility for his actions. He knew the difference between right and wrong. He knew that shooting that boy was wrong.
>
> The others, he justified in his mind, she was a bitch and he wasn't sympathetic to his place in life. He told Doctor Gonzalez -- excuse me, Doctor Merin, he wasn't going to accept any kind of a deal that the State might offer him because "I'm insane. I'm insane. I ought to get out."
> (R3457-3458)

The prosecutor in his closing argument was citing the defendant's "lack of remorse" not as an aggravating factor; but, as probative evidence of the non-applicability of mitigating evidence relating to his state of mind. The prosecutor conceded that "lack of remorse" is not an aggravating factor. (R 3458)

The trial court's recitation in its sentencing pronouncement (R 3788) that Appellant did not seem remorseful occurs during the discussion of the applicability vel non of any mitigating circumstances. Certainly, the trial court could take into account "remorse" as a non-statutory mitigating factor if there was evidence supporting it. And, if the trial court failed to do so, Appellant would be urging trial court error in this tribunal.

The instant case is totally distinguishable from cases such as Trawick v. State, 473 So.2d 1235 (Fla. 1985) and Hill v. State, 549 So.2d 179 (Fla. 1989) wherein the trial court impermissibly used "lack of remorse" as an aggravating factor; here the trial court was explaining in his reasoning as to mitigating factors why he could not accept "remorse" to counter-balance the aggravating factors.

ISSUE IX

WHETHER "HE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SUSTAINING THE PEOPLE'S OBJECTION DURING DEFENSE COUNSEL'S PHASE II CLOSING ARGUMENT?

(As Restated by Appellee)

Appellant raises two sub-claims under this issue; and, for purposes of brevity and clarity, Appellee argues both under one section.

In Phase 11, the prosecution called Sidney J. Merin, Ph.D to testify. Dr. Merin, a psychologist, gave testimony that was devastating. Dr. Merin established the mental status of Appellant and how he recalled with great clarity the entire day of the homicides and the homicides. (R 2925-2942).

Specifically, Dr. Merin testified:

> Q. Pardon me, Doctor. Is that how he summed this up, "a little bit of killing"?
>
> A. He said -- oh, he thought a little bit of killing himself. Just to some extent, he thought about killing himself, but he didn't figure that was the right way because he didn't think that the .22 would kill him.
>
> So he buried his knives and the gun, and he drove around and returned to his house. He parked at the end of the dirt road. He said that eventually the authorities came, the police came. And he said, quote, I hid out there for a little while and then finally they picked me up.
>
> And that was about the extent of that first session. The next, the lengthy session I had with him in June of '87, he was able to go back over these things. But the interesting thing about the June of '87 session, I had already had him tested the day before, was the tremendous clarity of his thinking.
>
> He knew exactly what he was doing and what he was going to do with what he was doing. He was that convinced that he was going to plead not guilty by reason of sanity.

May I go over some of the notes with regard to that?

(R 2942-2943)

Dr. Merin then explained the time-sequence of Appellant's ideation:

Q. All right.

A. But the important characteristic I found in the two hours and ten minutes or so of my final interview with him on June 20th, 1987, he said, in effect, that these unusual thoughts that he had -- he would make mention of such thoughts as "The devil possessed, "me which I'll get into here, plus a number of other oddities of speech which fit a particular type of diagnostic formulation, not psychosis -- but these thoughts had occurred to him after the shooting and not before the shooting.

And in my opinion, the stress of this whole matter created some fixed ideas. That is, again, after the shooting. Sometimes people who think about these things develop some fixed ideas. They also develop some magical ways of thinking in much the same way as some children do to kind of undue it.

If I were to put my shoes right in a row, then I don't have to worry about something else. And if I check the lock four or five times, then I feel better about some other things.

That's not psychosis. It's somewhat of what we used to call a neurosis, but it's an obsessive/compulsive type of thing.

(R 2944-2945)

Defense counsel thereafter objected to Dr. Merin's clinical impressions asserting, in part: "....He's here just as to the diagnostic issue of whether or not he was sane or insane at the time of the commission of the offense.'' (R 2945-2946)

The prosecution again inquired:

Q. (By Mr. Schaub) If you will, tell us what else he told you Doctor?

A. Yes. He said that he had told Clay that he would kill Clay if Clay ever hurt his mother.

And we talked about plea bargaining, and he said that he reasoned -- he said he was not going to plea bargain. He reasoned that if he plea bargained, then he couldn't come back and appeal. Very good thought.

He proposed to plead insanity and, thus, he was going to get out of prison. He said he would reject several life terms; consecutive life terms, even. He would reject that in favor of risking a death penalty because he wasn't going to get the death penalty anyhow. He wasn't going the be found guilty anyhow because he was going to plead not guilty by reason of insanity.

Now, in order to achieve that, he had to behave in a way that he believed was consistent with insanity. Now, he claims in his situation, in his particular situation, he would have to just laugh at the offer that the State might make of that type of negotiated arrangement.

And he said, quote, if you take a deal, you're more or less saying you're guilty, end of quote. Now, that's reasoned thinking. That's very complex thinking. "If you take a plea bargain, then it means you're saying you're really guilty."

He claims he was not in his right mind when he committed the offenses. And then I asked him why. And he said, quote, he was possessed by the devil.

Now, in his mind, he used that as part of his reasoning behind his defense of not guilty by reason of insanity. Obviously, if we considered that type of thinking, to be possessed by the devil, if we considered that to be a function of insanity, we'd have an

awful lot of clergy people in mental hospitals along with some of the congregation. It's a figure of speech. It's a comment, a way of thinking that's used very commonly. You say that to little kids, "What the devil got into you" or "The devil's in you" or something of that nature. It has nothing to do at all with being crazy. It has nothing to do at all with being insane which, by the way, are two different things.

He referred to the spirit. He refers to the jail minister the week before talking about two forces: God and the devil. Now, that is part of where he gets the idea, "The devil rules the earth.''

Well, by golly, we hear this in church all the time. It's a way of explaining certain things. I asked him about his attending church. He said he attended church quite frequently I think up until his early adolescence, and we went back until about 18 years of age.

And then we talked about this insanity, when did he become insane. He said he was never a normal person.

I asked him how long. And he said from birth. But it wasn't until after the murders that he decided that he was not a normal person to start with. And he said he knew that it would, as he said, take a miracle to get him out of this.

That's not crazy thinking. That's very nice clear thinking. So that he must now look out for his own best interest and he wouldn't want to push his luck by any means, thus to accept a plea bargain would be unacceptable because it would deprive him of the opportunity for appeal because he's not guilty. He's going to plead, as he says, "N.G.I.". And I asked him what "N.G.I." meant, and he indicated that means not guilty by reason of insanity.

It was clear he understood the jargon, he understood the words and he rehearsed these concepts in his own mind. He claims he

wasn't in his right mind; and when I asked him if he were insane, he hesitated a little while, just a few seconds, but consistent when I think of the way he answered other questions -- it was a noticeable hesitation when I asked him if he were insane. And he claimed, well, he's not a normal person as he's not at the present time. It means that something's wrong with him.

In my thinking, he was capable of reasoning through what a plea bargain was and what it would mean from the State's point of view. And he said, from the State's point of view, they would think -- the State would think that he's not very smart, it's not a very wise decision to make. But he was able to differentiate the complex differences between what the State might -- how the State might view him and how he has to view himself.

And then he contradicts his own position. He says in effect, "The State will think I'm insane because I'm not going to take this plea bargain." But then he contradicts his own position as is often the case, I felt, in people who manipulate. He said he how claims from the State's view point, it's his belief that his rejection of a plea bargain would suggest at least poor judgment; that is, not being in his right mind.

From his point of view, he would be in his right mind and would be serving his own best interests if he were not to accept a plea bargain, again because he could now legitimately appeal. Again, a very complex sort of thing.

Then at that point, he realized that he kind of stepped into a little trap. I didn't set the trap; it just turned out that way. He knew -- it was his opinion that the State would view him as being foolish or not using good judgment, but that he is using good judgment because he is looking out for his own best interest. Therefore, he's not insane in his use of good judgment when he's not going to plea bargain.

So if he's not insane, how can he then go into court and say he is insane? So then, he realized that. He realized he'll be found guilty; and when he realized the contradiction, he returned to a reasoned statement that he of course is really not in his right mind.

When I suggested he may not be in his right mind now by turning down a plea bargain, and I asked him then would he know what he -- that this is not a good deal for him. He then states that he would consider himself not to be in his right mind now as well as at the time of the offense, stating, quote, because I didn't do it, end of quote.

And then when I asked who did it, he then quickly stated he didn't do it and added further quickly, "My finger did it. I'll put it that way."

Now, if the man were delusional, seeing little green men from Mars and "my finger did it. This thing outside my own body here someplace, it did it" -- you'd have to be fairly crazy across the board to think through that type of abstraction.

But he says, "My finger did it, I'll put it that way.'' That added phrase reflects his awareness of how he's going to make a statement in order to give a particular impression, "I'll put it that way."

Now, here he is working at a logical explanation, using an insanity defense mechanism by distancing himself with great skill from any responsibility. When he states, "I'll put it that way", that is not a psychotic delusion but a symbolic or abstract impression as a figure of speech.

If he could convince the Jury -- he was saying, in effect, if he could convince the Jury that it was that figurative culprit -- that is, his finger -- then he'd be successful in removing himself from a conscious, well organized sequence of behavior that he had engaged in to do the killing.

Then he said that his doctors in Gainesville had told him that he's trying to place the blame on somebody else. But he's very fully aware of what he was doing. I felt that he was strong enough and determined enough in his resolve to plead not guilty by reason of insanity, he uses a lot of medical words.

We have to differentiate between metaphors and crazy thinking and psychotic thinking. All of us use metaphors. "A pillar of the community" is a metaphor. "He's a shining light" is a metaphor. "The pearly gates of heaven" is a metaphor.

To think that people who use those metaphors are crazy is, in itself, crazy. You just don't do it. For him to speak of a trap door being at the bottom of the lake sounds crazy, but people often think of, "I have to get out on the stage. I just wish I could break my leg or the state could open up, I could fall down in it." It's a way of expressing one's self; not a psychosis.

But he's a strong enough individual to stick to this not guilty by reason of insanity plea. Now, I asked him then, to kind of check on his resolve, should his lawyer advise him to accept a plea bargain, "What would you do? If your lawyer says, hey, take this plea bargain that the State has and don't plead not guilty by reason of insanity."

He said, "I'd fire my lawyer."

Not psychotic thinking., So he's certainly clearly not so impaired in his thinking to turn his entire decision over to his lawyer. Should his lawyer be fired, I asked him, "What happens then if you fire your lawyer?" He understands pretty clearly that the State then would provide him with a private lawyer.

He's got it all worked out in his mind. So he got the idea, by the way, of not guilty by reason of insanity from his previous

lawyer who had told him -- that he was told by that lawyer that they are going to, quote, beat this thing, end of quote.

He also learned from other inmates many of the events which would occur to him, the process of him behaving in a way consistent with an insanity defense. He knows that if he refuses to eat, they're going to put a tube down his mouth, down his throat. And he's willing to go through all those things. In fact, I'm not certain but I think he did go through those things.

He knows what it's going to take to go through that entire process. And then he said after behaving in the necessary manner -- in effect, he's saying quote, which would be a breeze, end of quote, then he'd be out. All planned, all thought through, representing a complex organized, goal-directed series of events necessary to, as he says, beat this thing.

He recognizes that other prisoners have told him he's crazy, but he's not certain that he would consider these other "crazy" good diagnosticians.

Now, should an adverse witness state that he and not his finger did it, he and his lawyer can do very little about that if someone simply says something about that. He's not disturbed by that because his own wishful thinking, his own immature notions and his denial of irresponsibility he believes is going to carry him through.
(R 2946-2954)

Clearly, Appellant was too candid with Dr. Merin in his publication of his internal thought processes. There is little question in the mind of Appellee but that when Dr. Merin's testimony is read.....there is no doubt as to why the opinions of Appellant's psychiatric experts was rejected by the trier of fact. **(2978-2979)** Appellant's disclosure that he had "planned"

to kill his family certainly did not credit his insanity defense. (R 2989)

Appellant's "sentence completion test" in part reads:

(1) I like--nothing right now.

(2) The happiest time--is getting free.

(3) I want to know--when I get out.

(4) Back home--is going to be beautiful.

(8) The best--time is getting out.

(13) My greatest fear--getting out.

(24) I suffer--from nothing.

(25) I need--to be free.

(33) The only trouble--is here.

(34) I wish--to be free.

(37) I--want to be free.

(39) My greatest worry--is staying in prison. (R 3009-3011)

Against this liberated testimony, the prosecution in his closing argument, focused on Nowitzke's relationship with his family (R 3456-3457). Then he focused in Nowitzke's remorse for the death of Brett Carroll and lack of remorse for shooting Clay Carroll:

> He looked like there was so much confusion, so much going on. He was just -- I don't know how to explain it.
>
> Q. On November 15th, that Friday night before the shootings, did you call your mother?
>
> A. Yes, I did.
>
> Q. Why?

A. I hadn't seen Rick for a couple of weeks and I was wondering where he was.

Q. Was that unusual, for you not to see him for a couple of weeks?

A. Yes.
(R 3358-3359)

The prosecution did object to defense counsel's closing. Why? Because no where in this record is there a factual basis to support the defense inferences and conclusions that the government was punishing Appellant by seeking the death penalty because he declined a negotiated plea. Appellant attempts to create an alternative syllogistic structure where the "offer of a plea" is either an aggravating or mitigating circumstance. The "plea offer'' was neither. It was and remains merely a Machiavellian aspect of Frederick Nowitzke's machinated defense of insanity. The prosecution's case-in-chief focused on the rebuttal of Nowitizke's insanity defense; and, so did Mr. Seymour's closing argument. The trial court's instruction to the jury is correct:

THE COURT: In connection with the Jury, you will disregard any reference to any negotiations that took place prior to this trial. Such negotiations were not accepted and, therefore, are not to be considered in this matter. You will disregard any statement concerning that.
(R3471-3472)

Appellant's second argument focuses on the trial court's sustaining the People's objection to defense counsel's argument that if Frederick Nowitzke were sentenced to life--he would be

incarcerated for fifty years before he would have parole consideration. (R 3472-3474) The trial court was correct in its admonishment. The defense closing and ruling reads:

> MR. SLATER: Thank you Your Honor. Your duty here is not to execute. Your duty is to consider the circumstances and decide the fate of another human being.
>
> You know, Rick will never see the outside of the dark walls of prison. He will serve a minimum of 50 years in prison before he's even eligible for parole.
>
> MR. SEYMOUR: Objection, Your Honor. Excuse me.
>
> MR. SLATER: Two mandatory --
>
> MR. SEYMOUR: Objection. It's improper and it's untrue.
>
> MR. SCHAUB: The Court has not passed a sentence at this time as to whether he's to serve 50 years, 25 years or what. There's been no sentence at this time, Your Honor, and the Court has a great deal of latitude in sentencing.
>
> MR. SLATER: That is absolutely false. The latitude is, it's either a life sentence with a mandatory 25 years in prison, as the State well knows, on each one of those counts, or the death penalty. Those are the only two options before the Court and before the Jury.
>
> THE COURT: And the Jury's been informed of that.
>
> MR. SCHAUB: Concurrent or consecutive, Your Honor.
>
> THE COURT: And the jurors will be informed of it. And please do not refer to it anymore, please, sir. They're to decide which he should get, not the amount or the time or the severity of it.

> MR. SCHAUB: Well, the Court also instructs the Jury that you have the latitude as to whether consecutive or concurrent sentences may be imposed.
>
> THE COURT: That's certainly the latitude within the Court and I will instruct you about my being able to sentence.
>
> Bearing in mind through all of this, if we can get some of the clouds cleared away, yours is merely an advisory opinion to this judge. I make the final decision.
>
> You may proceed.
>
> (R3472-3474)

There were no defense objections before or after the standard jury instructions were given. What Appellant overlooks and fails to consider is scope of review for this claim. The issue is whether either counsel or the trial court misled the jury in its Phase II role. In other words, were improper suggestions, insinuations, or calculations made which would have misled the jury? In Harvey v. State, 529 So.2d 1083, 1086 (Fla. 1988), cert. denied, __U.S.__, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989), this Court found that the prosecutor's argument to the jury [at the time of trial] was a correct statement of the law--that Harold Lee Harvey, if sentenced to life imprisonment rather than death, would be eligible for parole in 25-years. Also see, Stewart v. State, 549 So.2d 171, 175 (Fla. 1989).

At bar, the record establishes that the prosecution objected to an improper calculation. Defense counsel argued that Frederick Nowitzke would "...serve a minimum of 50 years in prison before he's even eligible for parole." (R 3473) That was

not a correct statement of the law. That argument certainly did not inform the jury that Frederick Nowitzke might serve a minimum of 25 years concurrent time before he's even eligible for parole. The only question is whether a correct statement of law is made to the jury. At bar, there was an incorrect statement of law argued by the defense. There is no error in the trial court's action.

ISSUE X

WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN INSTRUCTION THE JURY ON THREE AGGRAVATING CIRCUMSTANCES?
(As Restated by Appellee)

Appellee will address each of the subclaims seriatim.

(A) Aggravating Instruction: "Cold, calculated, and premeditated" (R 3477)

(B) Aggravating Instruction: "Avoid Lawful Arrest" (R 3477)

(C) Aggravating Instruction: "Pecuniary Gain" (R 3477)

Prior to the instructions, the trial court pointed out that the prosecution was to present evidence of aggravating circumstances and the defense was to present evidence of mitigating circumstances. (R 3384) The trial court, in a charge conference, noted the aggravating circumstances. (R 3389-3393) The prosecution argued that the "pecuniary gain" circumstance applied to Frederick Nowitzke's mother, Frances Carroll. (R 3415) At trial, the prosecution called William Garland, Esq. to testify. Attorney Garland established that the late Mrs. Carroll's probate was calculated to be $112,882.21 (R 2043) Frederick Nowitzke, under his late mother's last will and testament, was entitled to 25% of the estate; however, had he not failed in his attempt to murder his stepfather, Clay Carroll, he would have been entitled to 33 1/3% of the estate. (R 2043) Frederick Nowitzke's late mother had established a testamentary trust to look after her children; and, Appellant was a beneficiary of this trust; and, had Clay Carroll expired, there

would have been an outright distribution of trust assets to the three Nowitzke children. (R 2046) Frederick Nowitzke knew his late mother's estate plan. (R 2046) Frederick Nowitzke knew he was an heir. (R 2047) Mr. Garland could not establish whether Frederick Nowitzke knew he had been removed as a beneficiary of his late mother's life insurance policy. (R 2048) The interview with Dr. Merin established that Appellant fled and hid to avoid detection, capture and arrest; otherwise, why did Appellant not call for medical assistance? What Appellant did do was to mount his motorcycle and flee. (R 2941-2942) Appellant disclosed that he threw away a holster and buried a .22 pistol and knives. (R 2941-2942) Appellant admitted that he "hid out" at the end of a dirt road until apprehended by police. (R 2942) The prosecution argued that the "cold, calculated, and premeditated" circumstance was established through a heightened premeditation and/or "...something more than an instantaneous forming of an intent to kill." (R 3423) The prosecution argued the following:

> MR. SEYMOUR: Yes. In this case, we have four shots. We have Clay shot, then we have Mrs. Carroll shot and that's the second shot. We have a third shot into the boy. And I will submit to the Court, the third shot's got to be when he's standing up. And the shot that hit him in the head, immediately he's going to fall.
>
> The last -- we can argue over whether he's laying on the ground when that last shot is fired, but we certainly can't argue over which shot came first. The one that goes through his flank is the one that goes in that wall.
> (R 3430)

The trial court inquired as to whether those facts had been proven. (R 3430) Frederick Nowitzke's confession to Dr. Merin established those facts. (R 2938-2943)

ISSUE XI

WHETHER THE TRIAL COURT ERRED IN FAILING TO PROVIDE WRITTEN FINDINGS IN SUPPORT OF HIS PRONOUNCEMENT OF THE DEATH PENALTY?
(As Restated by Appellee)

On March 12, 1990, the "State" filed a Motion to Temporarily Relinquish Jurisdiction to the trial court so that a **nunc** pro **tunc** order might be rendered for this Court to review. The basis of the Motion reflects that sentencing was pronounced prior to this Court's decision in Grossman v. State, 525 So.2d 833 (Fla. 1988). The Grossman opinion was filed on December 18, 1987. Also see, Stewart v. State, 549 So.2d 171 (Fla. 1989); and, Bouie v. State, __So.2d__, 15 F.L.W. S188 (Fla. No. 72,278)(Opinion filed April 5, 1990).

Subsequently, the United States Supreme Court rendered an opinion in Clemons v. Mississippi, 1990 W.L. 32663, 46 Cr.L. 2210 (No. 88-6873)(Opinion filed March 28, 1990); and, thereafter, this Court on March 30, 1990, rendered an Order denying Appellee's Motion to Temporarily Relinquish Jurisdiction *so* that a **nunc pro tunc** sentencing order might be rendered by the trial court. In light of Clemons, this Court is invited to conduct a harmless-error analysis of the death sentence pronounced. See, 8859.041 and 924.33, Florida Statutes (1989). It has now been made abundantly clear by the Supreme Court of the United States that the federal Constitution is not violated by the state appellate court making a determination of harmless error when reviewing the appropriateness of an imposed death sentence. For

example, this Court affirmed a trial court's improper consideration of a nonstatutory aggravating circumstance--Arthur Frederick Goode's future dangerousness as a pedophillic killer who had killed little "Jason" just for the fun of it. This misplaced sense of accomplishment was not overlooked. See, Goode v. State, 365 So.2d **381** (Fla. **1978).** The Eleventh Circuit granted collateral relief. Goode v. Wainwright, **704** F.2d **593** (11th Cir. **1983).** The United States Supreme Court reversed holding that the death sentence was constitutionally imposed even if the state trial court relied on a factor unavailable to him under state law. See, Wainwright v. Goode, **464** U.S. **78, 104** S.Ct. **378, 78** L.Ed.2d **187 (1983).**

This Court has implictedly rejected Appellant's argument by determining that it is unnecessary to relinquish jurisdiction for rendition of written findings; whereby, it would appear that the trial court's articulation in the transcript is sufficient. (R **3786-3791)** Under both Clemons and Goode, there is authority for his Court to determine the propriety of the sentencing rendered below.

ISSUE XII

WHETHER THE TRIAL COURT ERRED IN ITS FINDINGS OF AGGRAVATING FACTORS?
(As Restated **by** Appellee)

Appellant argues alternatively. He argues that the trial court erred in finding both unproven aggravating factors and unproven non-aggravating factors. By this Court's Order of March **30, 1990,** this case is not to be temporarily remanded for imposition of a written order imposing death. The jury, by a **7-5** vote recommended death for the killing of Brett Carroll. (R **3843)** The jury recommended life imprisonment, without the possibility of parole, for the killing of Frances Carroll. (R **3483-3484)** The trial court confused the two verdicts; and, this jury mandated the trial court to correct his error. (R **3484)** The correction was made. (R 3484-3485)

Thereafter, on December 18, **1987,** the trial court entertained and denied a Motion for New Trial. (R **3763)** Following that denial, the trial court proceeded with its imposition of the death penalty. **(3786-3791)** The trial court found no basis to deviate from the jury recommendation of death. **(R 3786)** In aggravation, the trial court considered and determined that:

(1) Frederick Nowitzke was previously convicted of a felony involving the use of violence against Clay Carroll;

(2) The capital felony was especially heinous, atrocious, or cruel.

The embellishing comments by the trial court in support of these aggravating circumstances stand as dicta. This sentence was pronounced on December 18, 1987. Subsequently, this Court in Lamb v. State, 532 So.2d 1051, 1052-53 (Fla. 1988), rehearing denied November 23, 1988, held that a contemporaneous conviction cannot be used as a prior felony where it was part of a single criminal episode or where there was but one victim. Also see, Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988) where this Court receded from Ruffin v. State, 397 So.2d 277, 283 (Fla. 1981), cert. denied, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981). Ruffin holds that a "history" of prior criminal conduct could be established by contemporaneous crimes; wherein, there had been rendition of a judgment for the killing of the police officer prior to Mack Ruffin's sentencing for the killing of Mrs. Hurst. **However, in Scull there was but one victim and the prior crimes were not homicides.** Thus, this Court's recession from Ruffin is not expanded to cases where there is more than one homicide victim. The "State" submits that Scull is limited to its facts of a single homicide; otherwise, why would this Court recognized prior capital felony convictions in one episode as an aggravating factor in making a determination as to imposition of the death penalty. See, Correll v. State, 523 So.2d 562 (Fla. 1988), cert. denied, 109 S.Ct. 183 (1988). There, Jerry William Correll appealed four death sentences imposed for the first-degree murders of his ex-wife, Susan Correll, her sister, Marybeth Jones, their mother, Mary Lou Hines, and the Corrells' daughter,

Tuesday. This homicide was in the nature of a domestic dispute; and, this Court reasoned: "As to each crime, Correll had already been convicted of three capital felonies even though all four murders were committed in one episode." See, Correll at 568.

At bar, there is record support for the aggravating circumstances. The following are cases holding the "heinous, atrocious, or cruel" factor to be sufficiently established. In Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988), the killers discussed murdering elderly victims in their presence. This circumstance has been upheld where the victim is part of a mass slaughter. See, Cooper v. State, 492 So.2d 1059, 1062 (Fla. 1986); Garcia v. State, 492 So.2d 360, 366 (Fla. 1986). Little Brett Carroll sufferred the ordeal and/or mental torture of seeing his stepmother and father shot. For a child to be part of this **wholesale holocaust** of his loved ones is especially heinous, atrocious, or cruel. This is a **mental anguish** horror which merits designation in the cases so holding. This case falls in line with those cases where this Court limits the finding of heinous, atrocious, or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. E.g., Smalley v. State, 546 So.2d 720 (Fla. 1989); Garron v. State, 528 So.2d 353 (Fla. 1988); Jackson v. State, 502 So.2d 409 (Fla. 1986), cert. denied, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987); Jackson v. State, 498 So.2d 906 (Fla. 1986); Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). These facts fulfill the

narrow construction this Court places on its review of the trial court determination that a killing was heinous, atrocious, or cruel

ISSUE XIII

WHETHER IMPOSITION OF THE DEATH PENALTY FALLS WITHIN THIS COURT'S SCOPE OF PROPORTIONALITY ON DIRECT REVIEW?
(As Restated by Appellee)

This Court reviews each and every death sentence to insure that Frederick Nowitzke's individual death sentence is in line with sentences imposed upon similar offenders who have committed such homicides in similar fashions. The "proportionality review" compares the sentence of death with other cases in which the sentence of death was approved or disapproved. See, Palmes v. Wainwright, 460 So.2d 362, 364 (Fla. 1984). This Court points out that the "proportionality review" of a death sentence is a matter of state law. See, Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) and State v. Henry, 456 So.2d 466 (Fla. 1984). The proportionality comparison is limited to cases in which this Court has approved or disapproved a death sentence. In other words, the "proportionality review" is not extended to cases in which the death penalty was not imposed at the trial level. See, Proffitt v. Florida, 428 U.S. 242, 259 fn. 16, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Garcia v. State, 492 So.2d 360, 368 (Fla. 1986); and, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). The "State" urges that when this Court concludes its review process a determination will be made that there was sufficient competent evidence in this record from which the trial court and the jury could properly find the presence of

appropriate aggravating and mitigating circumstances. Here, the trial court considered the aggravating and mitigating circumstances and accorded the appropriate weight. The trial court has culled through the aggravating and mitigating circumstances; and, the imposition of death below is comparatively appropriate for affirmation.

Once one aggravating circumstances is found, death is presumed to be the proper sentence unless, it is overridden by one or more mitigating circumstances. See, State v. Dixon, 283 So.2d 1, 9 Fla. 1973) and Foster v. State, 369 So.2d 928, 931 (Fla. 1979). The tri 1 court **determined** the existence of the mitigating factor that Frederick Nowitzke committed Bret Carroll's murder while under the influence of extreme mental or emotional disturbance; and, the trial court afforded the weight which this circumstance merits. In Lemon v. State, 456 So.2d 885 (Fla. 1984), this factor was outweighed by other aggravating ones. The trial court found most significant that the murder was especially heinous, atrocious, or cruel; to wit, the trial court noted:

> ...This Defendant went to the house. He sought weapons. He knew where they were. He asked for a weapon that was missing. He obtained it and he deliberately killed his mother, thought he had killed his stepfather, and very cruelly shot and -- the second time, shot and killed with the second shot his brother who suffered for and lingered for some time after this.
>
> All these factors lead me to the conclusion that the shocking nature of this murder, of these murders, and of the

> circumstances make me believe that the aggravating circumstances necessary to impose the sentence have been proved.
>
> **(R 3789)**

One case which falls in line with the one at bar is Correll v. State. **523** So.2d **562** (Fla. **1988)** where an adult family member subjected members of the family constellation to mass slaughter. This was not a heated domestic confrontation. At bar, the entire picture of mitigation and aggravation is that of a case which warrants the death penalty. On the proportionality issue, there are two aggravating circumstances; and, the trial court found in mitigation that Appellant was acting under the influence of extreme mental and emotional disturbance (R **3878)** and gave it the weight it merits. The "State" does not argue that Fitzpatrick v. State, **527** So.2d **809** (Fla. **1988)** controls Frederick Nowitzke's proportionality review. There, this Court noted: "Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer.'' Id. at **812.** The mental health experts opined his emotional age to be between nine and twelve years, and one characterized him as "crazy as a loon." Id. Frederick Nowtizke's mitigating evidence is no where as compelling as that presented by Earnest Fitzpatrick, Jr. or Billy Ferry. See, Ferry v. State, **507** So.2d **1373** (Fla. **1987).** Frederick Nowitzke's case warrants the imposition of Florida's highest penalty. The People ask that Frederick Notwitzke's sentence of death be affirmed as it passes this Court's proportionality review.

CONCLUSION

WHEREFORE, based on the foregoing reasons, argument, and authority, Appellee prays that this Court will make and render an opinion affirming the judgment of guilt and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

WILLIAM I. MUNSEY, JR.
Assistant Attorney General
Florida Bar No. **152141**
1313 Tampa Street, Suite **804**
Park Trammell Building
Tampa, Florida **33602**
AC **813** 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **the** foregoing has been furnished by U.S. mail to **Steven L. Bolotin, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33830** on this 27th day of April, **1990.**

OF COUNSEL FOR APPELLEE