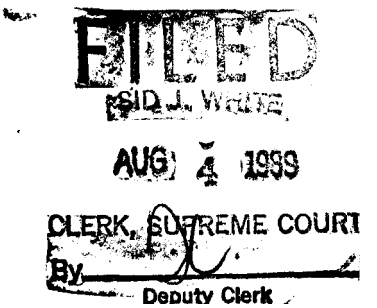
IN THE SUPREME COURT OF APPEAL OF FLORIDA

CASE NO. 72,463



MANUEL PARDO,JR.,

Appellant/Cross-Appellee,

vs.

THE STATE OF FLORIDA,

Appellee/Cross-Appellant.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

INITIAL BRIEF OF APPELLANT/CROSS-APPELLEE

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INTRODUCTION

The appellant/cross-appellee, Manuel Pardo, Jr., was the defendant in the trial court. The appellee/cross-appellant, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appear before this court. The symbol "R" will be used to refer to the record on appeal and transcript of proceedings. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The appellant/cross-appellee, Manuel Pardo, Jr., was charged along with co-defendant, Rolando Garia, with various offenses enumerated in a nineteen **(XIX)** count indictment filed for record on January 11, 1986, in the Circuit Court, in and for the Eleventh Judicial Circuit of Florida in Case No. 86-12910. (R. 1 - 15a). An amended indictment raising the charges to twenty-four **(XXIV)** counts was filed on March 11, 1987. (R. 16-34a). The amended indictment charged Appellant and his initial co-defendant with: first-degree murder of Mario Amador (Count **I);** first-degree murder of Roberto Alfonso (Count **II;** robbery of cocaine from Mario Amador (Count **III;** unlawful possession of a firearm while engaged in the felony of first-degree murder and/or armed robbery (Count **IV);** first-degree murder of Luis Robledo (Count **V);** first-degree murder **of** Ulpiano Ledo (County **VI);** armed robbery of a wallet and its contents and/or cocaine from one Luis Robledo (Count **VII);** unlawful possession **of** a firearm while committing a felony, namely, murder and/or armed robbery (Count **VIII);** first-degree murder of Sara Musa (Count **IX);** first-degree murder of Fara Quintero (Count **X);** armed robbery of Sara Musa (Count **XI);** armed robbery **of** Fara Quintero (Count **XII);** unlawful display of a firearm while committing a felony (or felonies) (Count **XIII);** first-degree murder of Ramon Alvero (Count **XIV);** first-degree murder of Daisy Ricard

(Count **XV**); unlawful possession of a firearm while engaged in a felony (Count **XVI**); Counts **XVII** through **XXIV** only named initial co-defendant Rolando Garcia. (R. 25).

An indictment was filed in Case No. 86-14719 on June 11, 1986. Said indictment charged Appellant and his initial co-defendant, Rolando Garcia, with the first-degree murder of Michael Millot (Count **I**); and with unlawful possession of a firearm while engaged in a criminal offense. Various pre-trial motions were filed including a Motion to Sever Defendants filed on October 30, 1986. (R. 191-193).

On February 26, 1988, Appellant by and through undersigned counsel filed a Motion to Appoint Merry Haber, Ph.D. as an expert to examine Appellant in order to assist trial counsel in preparation of his defense. (R. 211-212). The trial court granted said motion on March 4, 1988. (R. 229). On March 22, 1988, the trial court ordered the appointment of three disinterested qualified experts, Doctors Leonard Haber, Lloyd Miller and Sanford Jacobson.

A jury trial as to both Appellant and his co-defendant, Rolando Garcia commenced on March 30, 1988. A motion for mistrial was made on that date, as to both defendants. (R. 41-44; R. 1569). Upon hearing argument of counsel on March 31, 1988, the Court granted a mistrial and discharged the jury. (R. 45). On that same date, counsel for Appellant orally withdrew

his prior joinder in the co-defendant's Motion to Sever Counts 9 through 13 and moved to consolidate the indictments (R. 1841). Counsel for co-defendant Garcia orally renewed his Motion for Severance of defendants and the trial court granted this motion. (R. 45).

Jury trial solely as to Appellant Pardo was commenced before the Honorable Phillip Knight, Circuit Judge on April 4, 1988. (R.2076-2085). During the prosecutor's opening statement, counsel for Appellant objected and moved for a mistrial based on the prosecutor's use of charts during opening statements and by doing so referred to the forgery counts that were enumerated in the indictment were stricken or not applicable to Appellant. (R. 2099, 2100).

The first witness called to testify on behalf of the State was Carlo Manuel Ribera. (R. 2156). He stated that in the latter part of 1985, he worked at a video store called "Rainbow Video." (R. 2156). He said that he met initial co-defendant, Rolando Garcia, and knew him as "Rollie." (R. 2158). When he left his job in 1986, he spent time with Rollie and asked him for a job off-loading drugs from ships, even though if knew it was illegal. (R.2159-60). Ribera went on to say that he met Manuel Pardo at the christening of his brother-in-law's son and that he was told that Appellant was Garcia's uncle. (R. 2161). At a later point and time, Garcia allegedly showed Ribera clippings of

abouty people that Garcia had said that he and Appellant had "ripped-off or killed." (R. 2162). He related that co-defendant Garcia and Appellant had told him about a Federal Agent, "Frenchy," that they had killed. (R.2163-2170). Ribera said that he had been shown newspaper clippings, but did not see any names on them.(R.2167). Ribera also said that Appellant had told him that he and Garcia had "wasted" someone named "Mario", somewhere on Fontainebleau Boulevard. (R. 2171). He said that on another occasion Appellant had showed him a black briefcase with a telephone book diary containing information about killings, specifically he alleged that Appellant said," this is the time we killed Luis Rebledo." (R. 2177).

Ribera gave further testimony concerning clothing and guns.(R. 2189-2191). Ribera said that met an individual named Fara Quintero at a Kaufman and Roberts store in Hialeah, were co-defendant, Garcia, allegedly purchased a VCR with Luis Rebledo credit card. (R. 2193). He said he was allegedly present when Garcia gave Fara Quintero credit cards allegedly belonging to Luis Rebledo. (R. 2195-2196). Ribera said that he sold a wedding ring for Fara Quintero for $50.00 and that Garcia purchased cocaine with the money. (R. 2196). The witness went on to relate that he allegedly drove Appellant and Garcia to a meeting place in the Westchester area named "El Negro." (R. 2198-2199). Appellant and Garcia allegedly left in a vehicle,

returning some later time. (R. 2200). The witness testified as to further contacts with Appellant and Garcia and stated that Garcia had told them that they had killed "El Negro" and showed him a polariod picture. (R. 2200-2225). On cross-examination, Mr. Ribera admitted that he had been involved in the drug business and had carried guns. (R. 2253-2254). He further stated that he did not go to the police on two circumstances concerning the alleged death of some of the people and that he did not go to the police because he wanted to be in the drug business. (R. 2254 - 2255). Notwithstanding the fact that he was allegedly afraid of Appellant on the basis of threats to him or his family, he went to meet Appellant alone at a place called Babcock Park, in lieu of going directly to the police. (R. 2255-2256). Ribera stated that Appellant appeared to be proud of allegedly killing people and that he had shot-up an empty house. (R. 2258-2259). He further stated that he had observed an arsenal of weapons. (R. 2258-2260). The witness said that Appellant had told him that he had to blow-up at least one person a week. (R. 2265).

The State proceeded to present numerous witnesses as to each offense charged. Over the objection of his counsel, Appellant testified that he had killed all the people with whose murder he was charged, except that the State was incorrect as to his motive. (R. 3561-3586). Appellant denied being a drug dealer and also denied involvement in drug transactions to benefit himself. He admitted to killing all nine victims and stated

that he killed them because they were drug dealers. (R. 3564). He felt that the victims were not "people" or "human beings." He characterized them as "parasites" and "leeches" that had no right to be alive. He denied that it was wrong to kill these people.(R.3565). After he shot the victims, he allegedly took polaroid photographs to capture the victims' "spirits" on film. He would then take the film home to his house and burn the picture in a special, alabaster ashtray. (R. 3567). He set forth experiences he had involving drugs during the time that he was a policeman. In particular, as a policeman, he had responded to a scene where an eleven year-old girl overdosed on quaaludes. Another time, he encountered a young lady sitting on a commode following a miscarraige. Appellant observed a little purple fetus floating in the commode while the woman had hypodermics sticking out of her hand. (R. 3578). He stated that Daisy Ricard, Sara Musa and Fara Quintero were all drug dealers. (R. 3574-77). He stated that Sara Musa sold cocaine in a hospital where she worked and that Fara Quintero could not pay for cocaine because an individual named "Julito" was selling it to high school students at Hialeah High. (R. 3577). Mr. Pardo testified that the notations in his diary book of dollar figures were from the sale of guns with silencers to people who were going to kill drtug dealers, not records of drug sales for profit, as the State was alleging at trial. (R. 3582).

The following statements were made by the prosecutor at the outset of the closing argument:

MS. WEINTRAUB:...In opening statements, defense counsel told you that the defendant was admitting that he did these things but that he should escape criminal responsibility.

MR. GURALNIK: Objection to the word escape.

THE COURT: Sustain the objection.

MR. GURALNIK: And I ask for a curative instruction.

THE COURT: Ladies and gentlemen, what the attorneys say is not evidence and what the attorneys say is not law. So don't attach any significance to what the attorney said or didn't say concerning that.

You may continue, ma'am.

MS. WEINTRAUB: Defense counsel told you that the defendant did nine murders for which he is charged but that because of his state of mind, in Florida, called insanity, that you shouldn't hold him responsible, he will escape criminal responsibility.

MR. GURALNIK: Objection.

That is absolutely--1 am going to move for a mistrial right now.

Your Honor, that is absolutely not the law. He will not escape.

Your Honor has the final say in this case even if he is found not guilty.

MS. WEINTRAUB: Your Honor, I said criminal responsibility.

MR. GURALNIK: And again, she used the word escape.

THE COURT: Your using the word escape is improper, ma'am.

The jury should disregard any escape on the part of the defendant.

MR. GURALNIK: Your Honor, she has already left the imprtession--

THE COURT: Your motion for a mistrial is denied, sir.

Have a seat, sir.

(R. 3951-53)

On April 15, 1988, the jury returned the following verdicts: As to Count **I** in Case No. 86-14719A, guilty of first-degree murder as charged, victim Michael Millot (R. 939); as to Count **II** in Case **No.** 86-14719A, guilty of unlawful possession of a firearm while engaged in a criminal offense (R. 941); as to Count **I** in Case No. 86-12910A, guilty of first-degree murder, victim Mario Amador (R.940) ; as to Count **II** in Case No. 86-12910A, guilty of first-degree murder, victim Roberto Alfonso (R. 942); as to Count **III** in Case **No.** 12910A, guilty of robbery with a firearm, victim Mario Amador (R. 943); as to Count **IV** in Case **No.** 86-12010A, guilty of unlawful possession of a firearm while engaged in a criminal offense (R. 944); as to Count **V** in Case **No.** 86-12910A, guilty of first-degree murder, victim Luis Rebledo (R. 945); as to Count **VI** in Case No. 86-12910A, guilty of first-degree murder, victim Ulpiano Ledo (R. 946); as to Count **VII** in Case No. 86-12910A, guilty of robbery with a firearm, victim Luis Robledo (R. 947); as to Count **VIII** in Case **No.** 86-12910A, guilty of unlawful possession of a firearm while engaged in a criminal offense (R. 948) ; as to Count IX in Case Number 86-12910A, guilty of first-degree murder, victim Sara Musa

(R. 949); as to Count X in Case No. 86-12910A, guilty of first-degree murder, victim Fara Quintero (R.950); as to Count XI in Case No. 89-12910A, guilty of robbery with a firearm, victim Sara Musa (R. 951); as to Count XII in Case No. 86-12910A, guilty of robbery with a firearm, victim Fara Quintero (R. 952); as to Count XIII in Case No. 86-12910A, guilty of unlawful possession of a firearm while engaged in a criminal offense (R. 953); as to Count XIV in Case No. 86-12910A, guilty of first-degree murder, victim Ramon Alvero (R. 954); as to Count XV in Case No. 86-12910A, guilty of first-degree murder, victim Daisy Ricard (R. 955); as to Count XVI in Case No. 86-12910A, guilty of unlawful possession of a firearm while engaged in a criminal offense. (R. 956).

Various individuals testified on Appellant's behalf during the penalty phase of proceedings. His father, Manuel Pardo, Sr., and his mother, Patricia Pardo appeared on his behalf. (R. 4160-63). Chief Charles Toledo of the Sweetwater Police Department, Appellant's former chief commanding officer also testified for him, relating to the Court that Appellant had received a certificate of appreciation and letters of commendation for saving the life of a critically ill two-month old child in June of 1982. Appellant began cardiac massage and saved the child who had apparently suffered some type of respiratory failure and convulsions. (R. 4171-72).

Appellant also testified during the penalty phase (R. 4179-4185). He testified that he was a combat veteran and had served in the United States Navy and United States Marine Corps. He received commmendations in the service and was honorably discharged from both branches. (R.4181). Over the objection of counsel, including counsel's expression of doubts as to his competency, Appellant was allowed to make a statement to the jury. (R. 4182-4186). He stated that at no time what he did was for financial gain and that he was a soldier. He wenton to state, "I am ready for the death penalty and that is what I am asking." (R. 4185).

The jury voted eight to four to impose the death penalty for the death of Mario Amador. (R. 4251). The jury voted nine to three to impose the death penalty for the death of Roberto Alfonso. (R. 4251). The jury voted nine to three to impose the death penalty for the death of Luis Rebledo. (R. 4251). The jury voted nine to three to impose the death penalty for the death of Ulpiano Ledo. (R. 4252). The jury voted eight to four to impose the death penalty for the death of Sara Musa. (R. 4252). The jury voted ten to two to impose the death penalty for the death of Fara Quintero. (R. 4252). The jury voted ten to two to impose the death penalty for the death of Ramon Alvero. (R. 4252). The jury voted ten to two to recommend imposition of the death penalty for the death of Daisy Ricard. (R. 4252). The jury voted eight to four to recommend imposition of the death penalty for the death of Michael Millot. (R. 4253). The Court adjudi-

cated the appellant guilty on each of the charges in accordance with the jury's verdict. (R. 4254); (See also: R.957-958; 1146-1147).

On April 20, 1988, the Honorable Phillip Knight, Circuit Court Judge, filed a written Order imposing sentence upon Appellant. (R. 1009-1017). On April 21, 1988, the trial court read the formal sentencing order into the record. (R. 4275-4290). The Court made the following rulings:

> One, with reference to the finding concerning aggravating factors, the court has, of course, applied to the test as to whether the State has applied such factors beyond and to the exclusion of very reasonable doubt. And in so doing, I have carefully construed each aggravating factor submitted by the state.
>
> One, the court declines to accept as an aggravating factor that the defendant was previously convicted of another capital offense. It's the view of this Court that the legislature intended this aggravating factor to refer to offenses other than the ones for which he is being accused and tried. Thus, notwithstanding the fact that defendant was convicted of several offenses in this trial, same is not an aggravating factor.
>
> Two, with reference to the aggravating factor as to the commission of the crime for financial gain, the court denies the application of this factor as to all of the victims in the case, with the exception of the victim, Amador. The court finds that a crime was committed by the defendant in this case as to the victim, Amador, in whole or in part for the purpose of obtaining financial gain and thus, is an aggravating factor as to Count I only, Case No. 86-12910A.

Three, with reference to the aggravating factor as to the acts taken by the defendant as being such that would disrupt or hinder the exercise of any governmental function the court declines to accept as to the victim, Millot, it being the finding of court that the primary, if not sole, purpose of the murder of Mr. Millot by the defendant in this case, was to prevent him from being informed upon by the victim to lawful government agencies and thus, is an aggravating factor as to Count I only, Case No. 14719A.

Four, with reference to the aggravating factor to the acts being especially wicked, evil, atrocious, and cruel, the court finds that each of those crimes were wicked, evil, athrocious, and cruel as to each of the victims. However, the court believes that the promulgator of this statute did not intend it to apply to factual circumstances such as the case at hand but rather should be limited to such cases wherein victims were tortured, beaten, threatened, raped, violated or otherwise. This court agrees that each of these murders constituted an evil, atrocious and wicked crime.

The court, however, can not find as an aggravating factor that is was "especially" wicked, evil, etc. as to warrant the imposition of a death penalty statute and thus, the Court declines to find this to be an aggravating factor.

Five, with reference to the aggravating factor as to the commission of the crimes being conducted in a cold, calculated and premeditated manner without any pretense of moral or legal justification, the court finds that each of the crimes were committed in a cold, calculated and premeditated manner without any pretense of legal or moral justification, accept perhaps in the subjective opinion of the defendant, which does not preclude the application of this aggravating factor as to each murder.

Thus, the court has found that certain aggravating factors have been proven by the State beyond and to the exclusion of every reasonable doubt as would warrant the con-

sideration of the death penalty.

The court is then compelled to weigh and evaluate the mitigating factors as alleged by the defendant, Manuel Pardo, in this case.

A. The Court accepts the mitigating factors that the defendant had no prior criminal activity of any nature, prior to the commission of these crimes.

B. The Court is of the further belief that the defendant has demostrated that it committed these crimes while he was under the influence of extreme mental or emotional disturbance. This Court concurs with the jury's determination that the defendant did not suffer a mental or emotional disease or defect that would warrant a defense of insanity in accordance with the law of the State of Florida and our fellow states, but the Court does find that the defendant did suffer from extreme emotional and mental disturbances, but not to a degree that would warrant the position of a valid defense of insanity, thus, the court concludes that the defendant did suffer some extreme emotional or mental disease at the time of the commission of these murders and thus is a mitigating factor.

C. With reference to the alleged mitigating factor as to the capacity of the defendant to appreciate the criminality of his conduct, the court rejects same. The court finds, on the contrary, that the defendant appreciate his conduct, and by the application of the use of a silencer, by attempting to hide the commission of a crime, and also by going to New York for medical care and giving false information, etc., and did appreciate the criminality of his conduct. The court declines to find this factor to be a mitigating factor.

D. The court denies the age of the defendant to be a mitigating factor. The defendant is mature and intelligent and thus, his age does not warrant any mitigating circumstances.

E. With reference to the other circumstances, the court has considered, the court has favorably considered, as a mitigating factor such other matters including the acts of the defendant in saving the life of a child. The court has considered, the court has favorably considered, the love and affection of the defendant's family, as well as his

> service record while in the military.
>
> F. Last, but not least, the Court has given great weight to the jury's advisory recommendation as to the imposition of the death penalty for each of the crimes for which the defendant is charged. Based upon these findings of fact as recited herein, this Court concludes as a matter of law that the defendant, Manuel Pardo, having been tried and convicted by his peers, having the peers' recommendation of the death penalty and the court after weighing the aggravating and mitigating factors found above, it is hereby:
>
> ORDERED AND ADJUDGED that the defendant suffer death by electrocution on each of the counts for each he has been convicted, said sentence to be consecutive in nature.
>
> With reference to each of the Counts pertaining to robbery and possession of firearms, the defendant, Manuel Pardo, be and he is hereby sentenced to 15 years concurrent sentences on each such Count.

(R.4275- 4281).

A Notice of Appeal was timely filed on May 13, 1988. (R.1047). The State of Florida filed a Notice of Cross-appeal of the Trial Court's sentencing order on May 24, 1988. (R. 1048-1049). This appeal follows. Appellant respectfully reserves the right to argue additional pertinent facts in the argument portion of this brief.

POINTS ON APPEAL

I

WHETHER THE TRIAL COURT ERRED IN NOT CONDUCTING FORMAL HEARINGS TO ASCERTAIN APPELLANT'S COMPETENCE TO STAND TRIAL?

II

WHETHER APPELLANT IS ENTITLED TO ACQUITTAL, AS THE STATE DID NOT OVERCOME THE REASONABLE DOUBT RAISED BY HIM AS TO HIS SANITY AT THE TIME OF ALL OF THE OFFENSES FOR WHICH HE WAS CHARGED?

III

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT/CROSS-APPELLEE'S MOTION FOR MISTRIAL WHERE PREJUDICIAL COMMENTS DEROGATORY OF HIS INSANITY DEFENSE WERE MADE BY THE PROSECUTOR DURING CLOSING ARGUMENT IN THE GUILT PHASE?

IV

WHETHER THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH?

SUMMARY OF THE ARGUMENT

I

Appellant contends that the trial court committed reversible error by not conducting formal competency hearings throughout the course of proceedings. Due process guarantees of the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution were not protected during Appellant's trial and sentencing proceedings. Since Appellant's due process rights cannot be protected retroactively, his convictions and sentences should be vacated and Appellant should not be retried unless and until a formal determination is made as to his competence to stand trial.

II

Appellant is entitled to acquittal as the State did not overcome the reasonable doubt raised by him as to his sanity at the time of all of the offenses for which he was charged. Where the defendant introduces evidence sufficient to present a reasonable doubt of sanity, the presumption of sanity vanishes and the accused's sanity must be proven beyond a reasonable doubt by the State. Appellant submits that the State did not sufficiently rebut the reasonable doubt raised by Appellant and that as such, the jury verdicts cannot stand and Appellant is entitled to

acquittal as to his convictions, as jeopardy had attached and the State did not prove the "intent" elements of the offenses in question.

III

Appellant/Cross-appellee Manuel Pardo, Jr., respectfully submits that the trial court committed reversible error in denying his motion for mistrial where the prosecutor made prejudicial comments derogatory of his insanity defense during closing argument in the guilt phase of the proceedings. The comments, although "clothed" in a form resembling a response to defense counsel's argument, were in reality a personal attack on the accused and his insanity defense so as to appeal to the jury's sympathies and prejudices. Improper prosecutorial comment will warrant a new trial where a prosecutor indulges in personal attacks upon an accused, his defense or his counsel.

IV

Assuming arguendo, that Appellant does not obtain relief as to any of his other grounds, he submits that the case should be remanded to the trial court for resentencing. Appellant submits that the record does not support, beyond a reasonable doubt, the finding of the aggravating circumstance of commission of the

murder of Mario Amador for pecuniary gain, nor the finding that the murder of Michael Millot was to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. The aggravating circumstance that the nine murders was committed in a cold, calculated manner without any pretense of legal or moral justification should not have been applied in light of the evidence introduced by the defense as to Appellant's state of mind and mental problems. Likewise, the Court should not have rejected the mitigating circumstance that Appellant did not appreciate the criminality of his conduct.

ARGUMENT

I

THE TRIAL COURT ERRED IN NOT CONDUCTING FORMAL HEARINGS TO ASCERTAIN APPELLANT'S COMPETENCE TO STAND TRIAL.

Appellant contends that the trial court committed reversible error by not conducting formal hearings throughout the course of proceedings. Due process guarantees of the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution were not protected during Appellant's trial and sentencing proceedings. Since Appellant's due process rights cannot be protected retroactively, his convictions and sentences should be vacated and Appellant should not be retried unless and until a formal determination is made as to his competence to stand trial. Hill v. State, 473 So.2d 1253 (1985); Weber v. State, 438 So.2d 982 (Fla. 3d DCA 1983). See, Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896, 388 So.2d 1022, 43 L.Ed.2d 103 (1975).

Although Appellant's counsel at trial did not formally request a hearing or determination of competence to stand trial and specified that his request for appointment of experts was as to the issue of sanity at the time of the charged offenses (R.1439), the Court should nonetheless have ordered a full competency hearing, especially since experts appointed to evaluate sanity were only appointed on March 22, 1988 (R. 1431-1440), less

than one week prior to the commencement of Appellant's first trial that ended in a mistrial and only two weeks prior to the trial that resulted in the instant convictions and sentences. Appellant was facing multi-count indictments including nine counts of first degree murder (R. 16-34a; 1059-1060a), and during the course of proceedings in both the guilt and penalty phases took the stand and testified over objection of his trial counsel. (R. 3561-3586; R. 4179-4185). The Court observed the demeanor of Appellant in not being able to assist his counsel in, but rather possibly attempt to undermine, his affirmative defense of insanity. Prior to his testimony in the penalty phase, trial counsel informed the Court that he had doubts as to Appellant's competence. (R.4182). Furthermore, prior to the jury being charged during the penalty phase, counsel for Appellant informed the Court that the jail psychiatrist that Appellant had a mental disorder. (R. 4188).

In addition, cameras were present in the courtroom during some proceedings (See, e.g., R. 3762) and the record does not reflect sufficient consideration of the camera's potential and actual impact on Appellant's competence throughout the proceedings. See, State v. Green, 395 So.2d 532, 536 (Fla. 1981).

Rule 3.210(a), Florida Rules of Criminal Procedure, provides that a person accused of a crime who is mentally incom-

petent to stand trial shall not be proceede against while he is incompetent. Rule 3.210 (b), gives the trial court the authority and the directive, to set a competency hearing on its own motion, at any time before or during the trial. The circumstances presented in the instant case should have created a reasonable doubt in the trial court's mind as to Appellant's competence to stand trial. It was clear that Appellant did not have sufficient present ability to consult with and aid his attorney in the preparation of a defense with a reasonable degree of understanding, the test for determining competency to stand trial. Ferguson v. State, 417 So.2d 631, 634 (Fla. 1982); Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986). Thus, reversible error has been demonstrated as to this point.

II

APPELLANT IS ENTITLED TO ACQUITTAL AS THE STATE DID NOT OVERCOME THE REASONABLE DOUBT RAISED BY HIM AS TO HIS SANITY AT THE TIME OF ALL OF THE OFFENSES FOR WHICH HE WAS CHARGED.

It is well settled that in Florida a person is presumed sane and that in a criminal prosecution, the burden is on the defendant to present evidence of insanity. Preston v. State, 444 So.2d 939 (Fla. 1984). Where the defendant introduces evidence sufficient to present a reasonable doubt of sanity, the presumption of sanity vanishes and the accused's sanity must be proven beyond a reasonable doubt by the State. Yohn v. State, 476 So.2d 123, 126 (Fla. 1985); Holmes v. State, 374 So.2d 944 (Fla. 1979), cert. denied, 446 U.S. 913, 100 S. Ct. 1845, 64 L.Ed.2d 267. Where the State does not overcome the reasonable doubt, the defendant is entitiled to acquittal. Sirianni v. State, 411 So.2d 198 (Fla. 5th DCA 1981).

It is equally well established that one cannot be held legally responsible for an act committed by him while insane although that same act would be criminal if done by a sane person. Hixon v. State, 165 So.2d 436 (Fla.2d DCA 1964). The test for insanity as a defense to a criminal charge in this State is a modified version of the M'Naghten Rule, namely whether at the time of the offense the defendant had a mental infirmity,

disease, or defect and, as a result, did not know what he was doing or did not know what he was doing was wrong. Miller v. State, 532 So.2d 1290, 1292 (Fla. 4th DCA 1988) (Glickstein, J., dissenting), citing to State v. McMahon, 485 So.2d 884 (Fla. 2d DCA 1986) and Wheeler v. State, 344 So.2d 244 (Fla. 1977).

During the guilt phase of the trial, Appellant overcame the presumption of sanity by cross-examination of state witnesses and by presenting the testimony of Dr. Syvil Marquit. (R. 3464-3557). Dr. Marquit testified that she was a clinical psychologist licensed to practice in Florida. (R. 3464). Her career as a psyuchologist was extensive and her experience predated World War II and continued through the time of her testimony. (R. 3465,66). She has served on the Board of Examiners of the State of Florid. (R. 3467).

Dr. Marquit examined Appellant on four different days, for a total of approximately eight hours. She performed various psychological tests on him, such as the Rorshach Test, the Unconscious Association Probe, the Verbal Thematic Productivity Test (R. 3475). After taking an extensive history from Appellant, the doctor ascertained that because of a particular mental formation, Appellant was impelled from within himself to kill drug dealers. The doctor went on to note that this was Appellant's insanity and that he surrounded himself with a delusion that when he was killing a drug dealer, he was merely

exterminating vermin, he was not murdering.(R. 3502). The answers that Appellant gave to the Rorshach test were definitely of a psychotic, one suffering from a severe mental disorder that is a major insanity. According to the doctor, the word "psychosis" usually refers to a person who not only is grossly insane, but believes that he is sane. (R. 3505). Appellant was diagnosed as having a D.S.M. 3 disorder in The Diagnostic and Statistical Manual of Disorders, paranoid schizophrenia with grandiose delusions. (R. 3506). The doctor further stated that in her opinion, Appellant was insane before the crimes were committed, during the crimes, and at the time of her testimony.

Although the State did present other expert witnesses in rebuttal of Dr. Marquit's testimony and the testimony of Appellant himself wherein he commended the State Attorney's Office for their prosecution (R. 3561-87), Appellant submits that the State did not sufficiently rebut the reasonable doubt raised by Appellant. As such, the jury verdicts cannot stand and Appellant is entitled to acquittal as to his convictions, as jeopardy had attached and the State did not prove the "intent" elements of the offenses in question.

III

THE TRIAL COURT ERRED IN DENYING APPELLANT/CROSS-APPELLEE'S MOTION FOR MISTRIAL WHERE PREJUDICIAL COMMENTS DEROGATORY OF HIS INSANITY DEFENSE WERE MADE BY THE PROSECUTOR DURING CLOSING ARGUMENT IN THE GUILT PHASE.

Appellant/Cross-Appellee Pardo submits that the trial Court committed reversible error in denying his motion for mistrial where the prosecutor made prejudicial comments derogatory of his insanity defense during closing argument in the guilt phase of the proceedings. The following statements were made by the prosecutor at the outset of the closing argument:

> MS. WEINTRAUB:...In opening statements, defense counsel told you that the defendant was admitting that he did these things but that he should escape criminal responsibility.
>
> MR. GURALNIK: Objection to the word escape.
>
> THE COURT: Sustain the objection.
>
> MR. GURALNIK: And I ask for a curative instruction.
>
> THE COURT: Ladies and gentlemen, what the attorneys say is not evidence and what the attorneys say is not law. So don't attach any significance to what the attorney said or didn't say concerning that.
>
> You may continue, ma'am.
>
> MS. WEINTRAUB: Defense counsel told you that the defendant did nine murders for which he is charged but that because of his state of mind, in Florida, called insanity, that you shouldn't hold him responsible, he will escape criminal responsibility.

MR. GURALNIK: Objection.

That is absolutely--1 am going to move for a mistrial right now.

Your Honor, that is absolutely not the law. He will not escape.

Your Honor has the final say in this case even if he is found not guilty.

MS. WEINTRAUB: Your Honor, I said criminal responsibility.

MR. GURALNIK: And again, she used the word escape.

THE COURT: Your using the word escape is improper, ma'am.

The jury should disregard any escape on the part of the defendant.

MR. GURALNIK: Your Honor, she has already left the imprtession--

THE COURT: Your motion for a mistrial is denied, sir.

Have a seat, sir.

(R. 3951-53)

It is clear that these comments, although "clothed" in a form resembling a response to defense counsel's argument, were in reality a personal attack on the accused and his insanity defense so as to appeal to the jury's sympathies and prejudices.

Improper prosecutorial comment will warrant a new trial where a prosecutor indulges in personal attacks upon an accused, his defense or his counsel. Rosso v. State, 505 So.2d 611, 614

(Fla. 3d DCA 1987). In Rosso, supra, the Court, in reversing the trial court, found that the prosecutor in his opening statement was discounting the defendant's insanity defense as a subterfuge employed by him to evade justice and that this call to prejudice was exacerbated by the prosecutor's intimation in closing argument that the defendant's insanity defense was just a sham designed to relieve him of all criminal responsibility. That is precisely the situation presented in the instant case.

In Garron v. State, 528 So.2d 353, 357 (Fla. 1988), this Court made it clear that once the Legislature has made the policy decision to accept insanity as a complete defense to a crime, it is not the responsibility of the prosecutor to place that issue before the jury in the form of repeated criticism of the defense in general. In particular, this Court went on to state:

> ...Whether that criticism is in the form of cross-examination, closing argument, or any other remark to the jury, it is reversible error to place the issue of the validity of the insanity defense before the trier of fact. To do so could only helplessly confuse the jury. The insanity defense is a policy question that has plagued courts, legislatur-tes, and governments for decades. It is unnecessary to similarly plague injuries [sic].

528 So.2d at 357.

Although in State v. Murray, 443 So.2d 955, 956 (Fla. 1984), this Court held that "prosecutorial error alone does not

warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless," the prosecutor's comments in this case are of the very nature that should never be treated as harmless. The State in undermining the validity of Appellant's lawful defense was so improper and prejudicial, that the Court's attempt to cure the harm was in vain. it cannot be said beyond a reasonable doubt that the instant appellant would have been convicted without the taint of impermissible remarks made to the jury, thereby rendering Appellant's trial unfair. See: State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Redish v. State, 525 So.2d 928, 931 (Fla. 1st DCA 1988).

Appellant therefore submits that reversible error has been demonstrated. The appellant's convictions and sentences should be reversed and the cause remanded to the trial court for a new trial.

IV

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH.

Appellant/Cross-appellee Pardo respectfully submits that the trial court erred in sentencing him to the death penalty for nine murders. Appellant submits that the record does not support, beyond a reasonable doubt, the finding of the aggravating circumstance of commission of the murder of Mario Amador for pecuniary gain, nor the finding that the murder of Michael Millot was to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. It is further submitted that the aggravating circumstance that each of the nine murders was committed in a cold, calculated manner without any pretense of legal or moral justification should not have been applied in light of the evidence introduced by the defense as to Appellant's state of mind and mental problems. In addition, Appellant contends that the Court should not have rejected the mitigating circumstance that Appellant did not appreciate the criminality of his conduct. Thus, assuming arguendo that Appellant's convictions are not vacated in accordance with the relief requested in Points I, II and 111, infra, the case should be remanded for resentencing under the rationale of Elledge V. State, 346 So.2d 998 (Fla. 1977), as the Court found both aggravating and mitigating circumstances to exist.

A. The State Failed To Show Beyond A Reasonable Doubt That The Murder of Mario Amador Was Committed For Pecuniary Gain

Appellant submits that there was a reasonable doubt that the murder of Mario Amador was for pecuniary gain. (R. 4275). The very wording of statutory section enumerating this aggravating factor, Section 921.141(5)(f), Florida Statutes, consittutes an inherent limitation. The language indicates a legislative intent to limit application of this aggravating circumstance to those murders primarily motivated by a desire for pecuniary gain. See, Peek v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S. Ct. 2036, 68 L.Ed.2d 342 (1981). Proof of murder for pecuniary gain, to support imposition of the death penalty, cannot be supplied by inferences from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance. Simmons v. State, 419 So.2d 316 (Fla. 1982).

In the instant case, Appellant admitted killing the victim and stated that his primary motive was to kill drug dealers, not to obtain pecuniary gain. Any evidence involving tranmsactions for drugs, money or weapons was tangential to Appellant's primary purpose. (R. 3561-3586). It was therefore improper for this aggravating factor to be considered in sentencing Appellant.

B. The State Failed To Show Beyond A Reasonable Doubt That The Murder Of Michael Millot Was Committed To Disrupt Or Hinder The Lawful Exercise Of Any Governmental Function

Appellant also submits that there was a reasonable doubt that the murder of Michael Millot was committed to disrupt or

hinder the lawful exercise of any governmental function, in accordance with the aggravating circumstance enumerated in Section 921.141(5)(g), Florida Statutes. Appellant testified that he murdered Millot ("Frenchy") when he discovered that he was involved in drugs. (R. 3614-3617), not to avoid from being informed against. This conclusion is at best speculative. It was not demonstrated beyond a reasonable doubt that Appellant that Appellant even knew, let alone believed the victim to be a federal informant. This is especially true in light of the bragging statements that could be attributed to Appellant, his initial co-defendants and the lead government witness, Carlo Ribera, as well as other witnesses testifying in the instant case. This factor is clearly meant to apply to direct obstruction of a governmental officer of sorts, not to murder of an individual who happened to act as a government informer on occasion, unless the killer actually knows the victim is an active informant and other factors are present. Compare: Francis v. State, 473 So.2d 672 (1985).

C. The State Failed To Show Beyond A Reasonable Doubt That The Murders Of All Nine Murder Victims Were Committed In A Cold, Calculated, And Premeditated Manner Without Any Pretense Of Leaal Or Moral Justification

There was a reasonable doubt that all nine capital murders were committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification.

While it might appear that the murders were calculated or committed in an "execution" style, this aggravating factor requires not only the coldness, calculation and premeditation, but that the manner has no pretense of legal or moral justification. This Court has determined that this aggravating circumstance focuses more on the perpetrator's state of mind than on the method of killing. Johnson v. State, 465 So.2d 499 (Fla. 1985). In the instant case, Appellant's state of mind was such that he believed that there was a moral justification for killing the victims, as he believed them all to be drug dealers and a menace to society.

D. The Court Should Not Have Rejected As A Mitigating Factor That The Capacity Of The Appellant to Appreciate The Criminality Of His Conduct Or To Conform His Conduct To The Requirements Of The Law Was Substantially Impaired

Although it is within the trial court's province to decide whether a mitigating circumstance is proven and the weight to be given it, Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984); Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988), Appelllant submits that the trial court abused its discretion in rejecting this mitigating circumstance. The statutory provision, Section 921.141(6)(f), Florida Statutes, clearly reads in the disjunctive. Thus, the evidence of Appellant's mental condition and behavior clearly demonstrate that his capacity to conform his

conduct to the requirements of the law was substantially impaired, even if one believes that there was evidence that Appellant may have appreciated the criminality of his conduct. Nowhere is this more apparent than in Appellant's own words to the jury where he states, "Apparently, you missed, in my opinion, the motive behind what I did. So be it. You found me guilty, fine." (R. 4184).

Appellant therefore submits that to apply the death penalty sentencing statute to Appellant Pardo, as the Court's Order now stands would constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. Should Appellant's convictions be affirmed, Appellant submits that the instant case should be remanded to the trial court for resentencing.

CONCLUSION

Based upon the foregoing reasons and citations of authority, Appellant/Cross-Appellee respectfully submits that the convictions and death sentences imposed by the trial court be reversed and vacated and the case remanded to the trial court for new proceedings.

Respectfully sumbitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant/Cross-Appellee was served by mail upon RALPH BARREIRA, Assistant Attorney General, 401 N. W. Second Avenue, Suite N-921, Miami, Florida 33128 on this 2nd day of August, 1989.

CALIANNE P. LANTZ, ESQUIRE