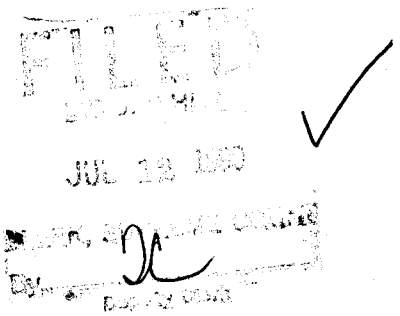
IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
OF THE STATE OF FLORIDA

WILLIAM B. CRUSE, JR., Appellant,	)	
vs.	)	CASE NO. 74,656
STATE OF FLORIDA, Appellee.	)	



APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

WILLIAM B. CRUSE, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 74,656

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

The defendant was charged by indictment with six counts of first degree murder, twenty-eight counts of attempted first degree murder with a firearm, and two counts of kidnapping with a firearm. (R 8319-8328) The defense filed a notice of intent to rely on an insanity defense. (R 8450, 8462)

The defendant filed a motion to compel the state to provide the defense with favorable evidence pursuant to Brady v. Maryland, 373 U.S. 83 (1963). (R 8483-8486) More specifically, the defendant filed a motion to compel the state to produce information favorable to the accused which was in the state's possession regarding the defense of insanity and evidence which

tended to show a reduction in the degree of responsibility, which would mitigate punishment, or which would otherwise be beneficial in penalty phase, at sentencing, or to impeach state's witnesses at trial. (R 8483, 8546-8548) The state contended that any such information obtained from psychiatric experts was work product. (R 5414-5417, 8546-8548)

The court, at the defendant's insistence, held an in camera hearing. (R 5114-5117, 8546-8548; In Camera Hearing Transcript [hereinafter referred to as "IC"] 1-38) At the hearing, the state, in response to the court's questions, indicated that it had talked with two additional experts, one of which was employed as a state consultant (Dr. Wilder) and another (Dr. Miller) which the state rejected as a witness since it was concerned about the expert's focus. (IC 9-10, 13-14) Both experts indicated that the defendant was suffering from a chronic mental illness. (IC 20-21) The state admitted to the court that it did not wish to inform the defense of the experts because "there might possibly be something they could learn" (IC 10) and that the state attorney "did not really want to provide more fuel to the Defense." (IC 14)

Following the hearing, the court denied the defendant's Brady motion, ruling that no psychiatrist had rendered an opinion to the state regarding insanity other than those listed by the state on its witness list nor had any psychiatrist rendered an opinion to the state that the defendant's "actions or verbal state (sic)" were inconsistent with the elements of the offenses

charged. (R 8564) Further, the court ruled that the state was not exclusively possessed of knowledge of matters or evidence favorable to the accused and that the state was not required to disclose conversations it had with non-testifying experts or consultants. (R 8564)

Pursuant to a defense motion, venue was changed to Polk County for trial. (R 8524-8529, 8533) Trial by jury was held before the Honorable John Antoon II, Judge of the Circuit Court of the Eighteenth Judicial Circuit, in and for Brevard County, Florida. (R 1-5000) After the state admitted that it had presented no evidence as to four of the attempted first degree murder charges, the trial court granted judgments of acquittal as to those four counts (Counts 24, 26, 28, and 32). (R 3171-3172)

During the trial and over the defendant's objections and motions for mistrial, the state argued to the jury and introduced evidence that one of the victims of the attempted first degree murder charges, Mary Amos, had lost a fetus due to the shooting. (R 1516-1517, 2401-2403, 4393-4395, 4941-4941) Also during the guilt phase of the trial, the court sustained a defense objection but denied a motion for mistrial following the state's intentional elicitation of testimony comparing the defendant to the movie character "Rambo." (R 2174)

During the defendant's case, the court refused to allow testimony from a police officer who investigated an incident a week prior to the shootings who opined to the defendant's neighbors that, based on his experience with Baker Act patients,

the defendant was "wacky" or crazy. (R 3240-3241, 3243-3244, 3246, 3254-3256, 3290, 3327-3328) During testimony of a defense psychiatrist, the state questioned the witness as to his knowledge of the William Ferry case (a notorious multiple murder case from the area in which the defense of insanity was rejected by the jury). (R 3763-3766) The defendant's objection to the question was sustained, but the motion for mistrial was denied. (R 3763-3766) Also during cross-examination of a defense psychiatrist, the state questioned the witness, over objection, as to the defendant's lack of remorse towards his male victims. (R 3783-3784)

The state presented psychiatric testimony to rebut the defendant's insanity defense. The court refused to allow the defense to question one state psychiatrist about a case, State v. Henry Sireci, 536 So.2d 231 (Fla. 1988), in which the courts had ruled that the same psychiatrist had rendered an incompetent mental evaluation of the defendant. (R 3862-3897, 3900-3903, 4009-4010) The defense argued to no avail that such testimony was relevant to allow the jury to adequately weigh the psychiatrist's opinion, especially in light of the testimony elicited by the state as to the witness's years of experience and the number of times the doctor had been qualified as an expert. (R 3864-3869, 3891-3897) After presentation of the state's case to rebut the defense of insanity, the court refused to allow the defense to call a psychiatrist in surrebuttal to counter information offered by the state experts. (R 4203-4206, 4319,

4337-4375)

The jury found the defendant guilty of the six counts of first degree murder; guilty of attempted first degree murder on Counts 7-23, 25, 27, 29, 33, and 34; guilty of attempted second degree murder on Counts 30 and 31; guilty of false imprisonment on Count 35; and guilty of kidnapping on Count 36. (R 8611-8642) The court adjudicated the defendant guilty of those counts. (R 4508-4511)

During opening statements for the penalty phase of the trial, the state told the jury that, in making their recommendation on the death sentence, they could consider the effect of the crimes on the victims. (R 4531) The defendant's motion for a mistrial was denied and the court instead instructed the jury that the only impact they could consider was the impact on those who were killed as opposed to the impact upon the survivors. (R 4532-4535) The state also told the jury that they could find as an aggravating circumstance the fact that two of the victims were police officers who were engaged in the performance of their duties. (R 4541-4542) The defendant objected, arguing that the factor was only enacted after the crime was committed and therefore could not be applied ex post facto. (R 4542-4561) The court sustained the objection but denied the motion for mistrial, instead instructing the jury that the killing of a law enforcement officer was not, in and of itself, a separate aggravating circumstance. (R 4561-4565)

The state told the jury during closing argument in the

penalty phase that the mitigating circumstance of age of the defendant was not an issue here because it usually applied to teenagers. (R 4902) The defendant objected, arguing that the state was mischaracterizing the law. (R 4902-4903) The court, stating that the state's characterization was correct and that this was the argument portion of the trial, overruled the objection. (R 4902-4903) Further, the state reminded the jury of the loss of the fetus sustained by Mary Amos (a victim of an attempted murder charge). (R 4933) The defendant's objection to the comment as being a non-statutory aggravating factor and prejudicial and designed to inflame the jury was sustained, but the court denied the motion for mistrial. (R 4933-4935)

Also, the state urged the jury not to recommend life imprisonment with the twenty-five year minimum mandatory since to do so would cheapen the value of human life. (R 4990) The court sustained the objection and instructed the jury to disregard the comment, but denied the motion for mistrial. (R 4940-4942)

The defendant objected to the court instructing the jury on the aggravating circumstance of cold, calculated, and premeditated, arguing that the circumstance was unconstitutionally vague and overbroad. (R 4689-4691) The court ruled that it would instruct the jury on that circumstance despite the defendant's objections on its constitutionality and despite the defense argument that, as a matter of law, the factor was not present since the uncontroverted evidence showed that the defendant had acted out of a "pretense" of moral or legal

justification based on the defendant's delusions that people were out to physically harm him. (R 4691, 4793, 4795-4798, 4836-4837)

The jury recommend that the death penalty be imposed on the six counts of first degree murder by a vote of 11 to 1 on Counts 1, 2, 4, and 6; by a vote of 10 to 2 on Count 3; and by a vote of 12 to 0 on Count 5. (R 8732-8737) Following a sentencing hearing, the court imposed the death penalty on Counts 4 and 5 (where the victims were the two police officers) and imposed consecutive life imprisonment sentences on Counts 1, 2, 3, and 6. (R 8813-8862)

As aggravating circumstances on Counts 4 and 5, the court found: prior (contemporaneous) convictions for violent felonies; great risk of death to many persons, to avoid or prevent a lawful arrest, and cold, calculated, and premeditated. (The court found the same aggravating circumstances on the remaining murder convictions with the exception of "to avoid a lawful arrest.") (R 8818-8849) The court found only one mitigating circumstance: extreme mental or emotional disturbance, which it found to have significant weight. (R 8849-8852) It specifically rejected the statutory mitigating circumstances of lack of capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, and the defendant's age of 59 (finding no link between the defendant's age and other characteristics). (R 8849-8852) The trial court, despite finding the factors established by the preponderance of evidence, rejected as mitigating circumstances all of the

undisputed non-statutory mitigating evidence that was presented including: the defendant was a loving husband who cared for his invalid wife, the defendant had been a loving son who had cared for his ailing mother, the defendant suffered from chronic alcohol abuse (rejected merely because the defendant was not drunk at the time of the crime), the defendant suffered from organic brain damage (which the court rejected despite noting that the malady caused the defendant's impulses to be lowered and caused poor judgment), the defendant exhibited remorse (which the court simply rejected as a mitigating factor without explanation despite evidence of it), and the defendant, while living in Kentucky performed yard work for elderly neighbors who were unable to perform such work themselves. (R 8852-8854)

As to the remaining counts, the court sentenced the defendant to life imprisonment with the three-year firearm minimum mandatory sentence on Counts 7 through 23, 25, 27, 29, 33, 34, and 36; to thirty years with the three-year minimum mandatory on Counts 30 and 31; and to fifteen years with a three-year minimum mandatory on Count 35, all of these sentences to run concurrently with each other and with the sentence on Count 6. (R 8867-8900)

The defendant's motion for new trial was denied. (R 8753-8758, 8811) A notice of appeal from the judgments and sentences was timely filed. (R 8901-8904) This appeal follows.

STATEMENT OF THE FACTS

The defendant suffers from a severe mental illness and has for approximately thirty years prior to the shooting incident, becoming increasingly severe. (R 3361-3363, 3516-3518, 3620, 3635, 3988, 4018, 4615) On many occasions in the past, the defendant has exhibited bizarre behavior indicative of paranoid schizophrenia. (R 3361-3363, 3516-3517, 3541-3545, 3988) The defendant, while still living in Kentucky in 1978, was extremely paranoid of the mailman, the electric company workers and all strangers, believing that they had the power to do him severe harm. (R 3223-3224, 3517) Cruse believed that the postal, phone company, and electric company workers were all spreading rumors that he was a homosexual and were trying to persecute him. (R 3224-3225, 3516-3520) Doctors treating him for a prostate problem and psychiatrists who examined him at the time were also involved in spreading the lies about him, according to the delusional system. (R 3362, 3375, 3518-3519)

Cruse, a librarian with a master's degree, was forced to quit his job at the library because he was afraid of the general public and was forced to hide from them in the library stacks. (R 3356-3358, 3642, 3974) The defendant would jump from his porch and run away to hide when the mailman would come. (R 3223-3224) The defendant believed that people were spying on him through the windows and would jump up and yell for them to get away from the window when, in fact, no one was there. (R 3226)

Anytime the defendant saw a stranger, he would do whatever was necessary, including knocking over furniture, to get out of the way to avoid being seen. (R 3228-3229) Cruse believed that someone wanted to hurt him and he feared for himself and his wife. (R 3235, 3475)

The defendant moved several times, finally to Palm Bay, Florida, leaving no forwarding address and receiving his mail at a post office box in another town, in attempts to escape his "persecutors." (R 3368, 3518, 3640, 3648-3650) Each time, however, his troubles followed, and, according to Cruse, his new community took up the persecution, spreading the lies and trying to make him a homosexual. (R 3368, 3518-3520)

The defendant firmly believed that everyone in the community was out to harm him, and he armed himself for protection. (R 3374, 3391, 3475, 3585, 3666, 4659-4660) When grocery shopping, the defendant always made sure he had some canned goods in the cart to throw at anyone who attacked him. (R 4353-4354) While walking around his house, he had ready access to a kitchen knife. (R 3244, 4660) According to the defendant and psychiatrists, the defendant purchased a few guns (including the ones used in the shooting incidents), large capacity clips, and ammunition as further protection from those he felt would harm him and his wife. (R 3374, 3585, 4351-4352, 4659-4660)

During the time he was living in Palm Bay, his neighbors observed a quiet, reclusive man, who occasionally acted in a bizarre manner. (R 3257-3260, 3278, 3294-3295, 3303-3305,

3988) On several occasions, he was observed yelling at himself and running full speed in circles around his house about ten to fifteen times. (R 3259-3260, 3281-3284) On one occasion, Cruse stood on his neighbor's porch, yelling at his neighbor's house, "What do you have on me?" (R 3278, 3282) Another time, he was seen standing in the middle of the sidewalk holding a running chainsaw above his head, revving the engine. (R 3295-3296, 3312-3313) Once, when a car sped down his street at night, the defendant came out with his shotgun and, standing in the middle of the street, fired it straight up into the air. (R 3296-3297, 3306) Another time, the defendant was observed by a neighbor sitting on his porch at night clapping at the sky for about five minutes. (R 3311-3312) One day, in response to a neighbor child walking in his yard, the defendant walked up and down the neighbor's property line, screaming, "How do you like it if I run across your property line?" (R 3313, 3317, 3324-3325)

Neighborhood children would come into the defendant's yard, throw stones at his house, and taunt the defendant. (R 3260) The defendant, flustered by the harassment, would occasionally come outside to yell at the children to leave him alone. (R 3260-3261) A week before the shootings, this scenario repeated itself and the defendant came outside, yelled an obscenity at the boys, and grabbed his crotch. (R 3237-3238, 3248-3252) The police were called, investigated the incident, and spoke with the defendant and the neighbors. (R 3237-3247) The police referred the incident to the state attorney's office

for review. (R 3245)

On April 23, 1987, two neighborhood boys again taunted William Cruse, running through his yard and yelling for him to come out. (R 1751, 3264-3265) Red-faced and agitated by the teasing, Cruse came out of his house at least twice, telling the boys to leave him alone and stay out of his yard. (R 1751, 3265) The boys did not listen to the defendant and continued the harassment, eventually tiring of the game and leaving. (R 3266) A neighbor observed the defendant yelling down the street, "What's the new shit on the grapevine?" (R 3325)

As the boys were leaving, the defendant got into his car and pulled out of the driveway. (R 3266) The defendant later told police and the examining psychiatrists that he remembered the boys teasing him and remembered going to his car, but does not remember anything after that until he was in the Winn Dixie store with his guns and with a hostage. (R 3363-3364, 3498, 3609, 3668-3669, 3994) The psychiatrists testified that they believe the defendant is truthful in his lack of knowledge of the events. (R 3364, 3377, 3609, 3668-3670, 3994)

After backing out of the driveway, the defendant opened his window and fired a shotgun at John Rich IV, a neighbor boy who was playing basketball in his driveway, striking him with the single shot of birdshot. (R 1745-1749, 1755) He also fired the weapon at John Rich III and David Rich, who had just pulled up into the driveway in their car. (R 1718-1720) John Rich III got out of his car, approached the defendant, and yelled at him. (R

1720, 1736-1737, 1755-1756) The defendant started to drive away and fired a couple of shots from another gun at the Rich house, missing Mrs. Helen Rich who was hiding behind her car. (R 1720-1721, 1757)

Driving erratically down the street, Cruse narrowly missed hitting a jogger and another vehicle. (R 1792-1795) He drove to the Publix shopping center, exited the car with a semi-automatic rifle, and shot and killed two shoppers, Nabil Al-Hameli and Emad Al-Tawakuly, and wounded Faisel Al-Mutairi. (R 1554-1557, 1564, 1893-1900) He shot into a passing automobile, striking and killing the driver, Ruth Green. (R 1567, 1947-1948) Cruse also shot at Douglas Pollack who ran along the walkway of the shopping center. (R 1933-1937)

Reentering his car, the defendant drove across the street to the Winn Dixie shopping center, again exiting his car with the rifle, clips, and a pistol. (R 1804, 1907) There, the defendant shot into the windshield of Officer Ronald Grogan, who had approached in his police car, killing him. (R 1807, 2005, 2047, 2057-2059, 2078-2079, 2109) The defendant also shot and killed Officer Gerald Johnson, who had entered the lot just behind Grogan and who had exited his car and was shooting at the defendant. (R 1808, 2047, 2080-2085, 2124-2125) Outside the front of the store, the defendant shot at others in the parking lot. (R 1814, 1832, 2136)

Cruse entered the Winn Dixie store, causing those inside to flee out the back door of the store. (R 2087,

2181-2182, 2294, 2317-2318, 2354-2357, 2478-2481) Going to the back door, he fired at some of the fleeing patrons, hitting and killing Lester Watson and wounding others. (R 2296-2297, 2362-2368, 2390-2392, 2406-2409, 2421-2425, 2458-2461, 2473-2474, 2484, 2520, 2553-2554, 2567-2569) The defendant found two women hiding in the rest room and took them hostage. (R 2596-2599, 2618-2627) He allowed Judy Larson to leave the store and kept Robin Brown, an employee of Winn Dixie with him to help him get the lights in the store off and to communicate with the police outside. (R 2600-2603, 2627-2637) It was at this point that the defendant regained his senses and recalls the remainder of the events of the night. (R 2646, 3363-3364, 3448-3450) The defendant asked Robin Brown and the police if he had hurt anyone. (R 2646-2647) Cruse expressed dismay over whether he had injured anyone, saying, "What if I killed people? What if I paralyzed people?" (R 2646) In response to Brown's questions, he was puzzled as to whether he had shot into the air or if he had shot at people. (R 2646)

The defendant tried unsuccessfully to have police drive his car to the back so that he could leave the scene and drive out of the county. (R 2637) Once out of the county, he said, he would surrender and allow the police to kill him. (R 2637, 2765) After this idea failed, the defendant released Robin Brown, who left the building and who pleaded with the police to not harm the defendant. (R 2654-2657, 2661, 2760-2761) Robin Brown indicated that the defendant was nice to her and not mean at all. (R

2678-2679)

The police shot tear gas and stun grenades into the store after Brown's release. (R 2776-2780) This forced the defendant to exit the store, where he was immediately apprehended, without resistance. (R 2781-2782, 2791-2793, 2801-2803)

The defendant suffers from organic brain damage and paranoid schizophrenia which appear to be hereditary and which were compounded by age and by chronic alcohol abuse. (R 3353-3354, 3512, 3541-3545, 3645-3648, 3651, 3973, 4616, 4639, 4642, 4651-4652, 4726) The use of alcohol by the defendant is an attempt by a schizophrenic to tranquilize and medicate himself to "control some of the insanity." (R 3367) As a symptom of his disease, the defendant experienced auditory, visual, and tactile hallucinations in addition to the paranoid delusions. (R 3648, 4646-4647, 4657-4659) The defendant, as a paranoid schizophrenic, would frequently be out of contact with reality; he would not follow general thought patterns. (R 3354-3355, 3497-3498, 3615, 3648) He also felt that people were out to get him or do something to him. (R 3354, 3648) This included that people would attack him, kill him, or hurt him in some way. (R 3355-3356, 3475, 4659-4661, 4728-4730) The defendant was not able to control this disease; rather it controlled him. (R 3360, 3381-3382, 3473-3475, 3550-3551, 3639, 3661) As is typical of paranoid schizophrenics, the defendant was disoriented, confused, and suspicious, hiding in the shadows until something triggered

him off, and he blew up. (R 3356-3359, 3377-3378) Cruse would have periods of increased agitation and uncontrollable, irrational psychotic rage; he would have unrealistic ideas and unrealistic emotional reactions. (R 4355-4356, 3582-3585, 4664-4666) The intense, irrational anger was not the same type of anger as in a normal person; rather it was a disturbed and independent emotional process, caused by the biological processes that caused his psychosis. (R 4357-4358)

Defense experts opined that the defendant did not know right from wrong and was, therefore, legally insane at the time of the shootings. (R 3381-3382, 3389-3390, 3615-3620, 3658-3661, 3711-3712, 3777-3778) State experts, in rebuttal, offered that the defendant, although seriously mentally ill, was suffering from delusions and did not meet the test for legal insanity. (R 3941, 3947-3952, 4017) Both state psychiatrists testified that they felt the defendant was sane and would not be excused under the existing law because the delusions from which the defendant suffered were not of a nature to justify the defendant acting in self-defense. (R 39674117-4118, 4129-4131) During the penalty phase, the defense psychiatrist whom the court would not allow to testify during the guilt phase of the trial stated that the defendant was suffering from hallucinations and delusions which would make the defendant believe that he was acting in self-defense. (R 4660-4663) One state psychiatrist admitted that there was certainly evidence present in the case that would support a finding of legal insanity, and that it is possible that

he could believe that the defendant was insane. (R 4045-4047)

SUMMARY OF ARGUMENT

Point I. The trial court erroneously denied the defendant's motion for production of favorable evidence, where, following an in camera hearing, it was clear that the state had in its possession the names of expert witnesses who could have provided the defendant with evidence which tended to negate his guilt. Such failure deprived the defendant of his Florida and federal constitutional rights to due process. The information in the state's possession was not work product; it was factual information as opposed to the state attorney's mental impressions, conclusions, opinions, or theories. Accordingly, the conviction must be reversed and the matter remanded for a new trial.

Point II. The trial court's refusal to allow defense counsel to impeach a state expert witness with evidence which directly related to his credibility denied the defendant due process of law and a fair trial by jury as guaranteed by the federal and Florida Constitutions. A finding by a court that the doctor conducted an inadequate mental examination which bore on his ability to render an accurate opinion in a prior, similar case is highly relevant and material to the weight which the jury should give his expert opinion in the instant case. A new trial is required.

Point III. The court erred in instructing the jury on a test for insanity which is no longer recognized in Florida. Florida no longer includes the "insane delusions" instruction in

its list of standard jury instructions to determine the defendant's sanity. To give this jury instruction on the issue could only serve to confuse the jury and divert their focus from the proper consideration of the correct standard for determining insanity. Since the jury's determination of sanity could have been based on this erroneous, outdated instruction, a new trial is required.

Point IV. The trial court abused its discretion in the defendant's capital trial by disallowing the defendant to rebut matters presented by the state. Although surrebuttal may be discretionary, where the state, in a capital case, presents new evidence in its rebuttal case which materially affects the defense case, due process of law requires that the defendant be permitted to rebut such evidence with relevant, material evidence which was not merely cumulative of the evidence presented in its case in chief and which evidence destroyed the foundation for the state's expert opinions. Such abuse of discretion mandates a new trial.

Point V. Lay opinion testimony regarding the defendant's insanity is admissible at trial. The court's exclusion of such evidence deprived the defendant of his federal and Florida constitutional right to present witnesses in his own behalf

Point VI. The state may not elicit testimony during a capital trial which indicates that the defendant may not have exhibited remorse over some of his actions. Such evidence is

totally irrelevant to issues during the guilt or penalty phase of the trial. To elicit such testimony unduly prejudices the jury and deprives the defendant of a fair trial.

Point VII. The cumulative effect of the admission of irrelevant and prejudicial testimony and improper references by the prosecutor to irrelevant and inflammatory matters deprived the defendant of a fair trial. The state may not introduce evidence at a trial which does not serve to prove a material issue or disprove a defense to the charges. Testimony concerning the loss of a woman's fetus is irrelevant to the guilt or penalty phase of a trial and is overly prejudicial. The intentional elicitation by the state of a witness' inflammatory characterization of the defendant necessitates a mistrial. The state's reference to and comparison with a highly publicized, and much criticized, case tried in the same area served to inflame the jury. These matters have no place in a capital trial and only served to deprive the defendant of his constitutional right to a fair trial by an impartial jury.

Point VIII. The trial court erred in denying the defendant's motions for mistrial where the prosecutor improperly argued inflammatory, non-statutory aggravating circumstances and misstated the law on aggravating and mitigating circumstances to the jury. A jury's recommendations of death are tainted by the prosecutor's arguing the impact of the victim's death as an aggravating factor, contending that the jury could consider as an aggravating circumstance the mere fact that two of the victims

were police officers, arguing that the jury could consider the loss of a fetus by an attempted murder victim in making its recommendation, contending that a jury recommendation of life would cheapen the victims' lives, and incorrectly stating that the law provides for age to be a mitigating factor only if the defendant is young.

Point IX. The aggravating circumstance of cold, calculated, and premeditated is unconstitutionally vague. A jury recommendation, which is given great weight by the sentencer and the reviewing court, and which may be based, in part, on this aggravating circumstance, is unreliable since a layman could honestly believe that this aggravating circumstance would automatically apply to every first degree premeditated murder. There is nothing in the definition of this circumstance to enable it to be applied in a meaningful, non-arbitrary fashion. Where the jury was given the opportunity to consider this circumstance, the recommendation is invalid and the death sentence must be vacated. Similarly, where the judge's sentence of death is based in part on this vague and overbroad aggravating circumstance, the death sentence must be vacated.

Point X. The sentence of death was based on inappropriate aggravating circumstances. The court failed to consider and give proper weight to relevant statutory and non-statutory mitigating factors. The sentence of death imposed on the defendant is disproportionate to the crime committed when compared with other capital sentencing decisions.

Point XI. Although this Court has previously rejected numerous attacks on the constitutionality of the death penalty in Florida, the appellant urges reconsideration, particularly in light of the evolving body of caselaw which, in some cases, has served to invalidate the very basic tenets on which the death penalty was upheld in this state.

ARGUMENT

POINT I

THE TRIAL COURT VIOLATED THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, BY DENYING THE DEFENDANT'S MOTION FOR PRODUCTION OF FAVORABLE EVIDENCE IN THE POSSESSION OF THE STATE WHICH EVIDENCE WAS NOT WORK PRODUCT AND WHICH EVIDENCE TENDED TO EXCULPATE HIM OF CRIMINAL RESPONSIBILITY FOR THE CRIMES.

Prior to trial, the defendant filed a motion for production of favorable evidence pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and a motion for an in camera hearing seeking any favorable psychiatric evidence which the state possessed. (R 8483-8486, 8546-8548) The state had refused to provide any information concerning its discussions with mental health experts which it had consulted, but which it chose not to call at trial, contending that any such information it had received from the experts was work product. (R 5414-5417, 8546-8548) During the in camera hearing, the state admitted to the court that it did not wish to inform the defense of two experts it had consulted because "there might possibly be something they could learn," (IC 10) and that the state attorney "did not really want to provide more fuel to the Defense." (IC 14) Because the court refused to order disclosure of this admittedly favorable information, a new trial is required.

Brady v. Maryland, 373 U.S. 83 (1963), stands for the proposition that the nondisclosure of evidence favorable to the defense either as to guilt or to punishment, when requested, results in a violation of due process when the suppressed evidence is material to the defendant's guilt or punishment. See also United States v. Bagley, 473 U.S. 667 (1985); State v. Hall, 509 So.2d 1093 (Fla. 1987); Boshears v. State, 511 So.2d 721 (Fla. 1st DCA 1987); Cipollina v. State, 501 So.2d 2 (Fla. 2d DCA 1986).

Rule 3.220 (b) (1) and (2), Florida Rules of Criminal Procedure, require that, upon demand, the state must furnish a list of all witnesses whom the prosecutor knows to have relevant information concerning the charged offense or any defense thereto, and to provide to defense any material which tends to negate the accused's guilt. Rule 3.220 (b) (1) (x) specifically includes among those materials which the state must furnish "statements of experts made in connection with the particular case, including the results of physical or mental examinations and of scientific tests, experiments or comparisons."

The non-disclosed evidence, which the state admitted at the in camera hearing was in the possession of the state (IC 10, 14) were statements from mental health experts. The state conceded that it had furnished information and evidence regarding the case, including the defendant's videotaped statement to the police, witness reports, and reports of other psychiatrists, to two psychiatrists for their review and impressions on the issues

in the case. (IC 7-8, 10-11) The state spoke with the experts and obtained information from them. This evidence meets the test of materiality announced in United States v. Bagley, 473 U.S. at 678 and 682. There, the Court held the government's failure to disclose information which might have been helpful in conducting cross-examination was reversible error if "the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial" and that there exists a reasonable probability that, had the evidence been disclosed, the result would have been different.

The focus for determining whether the information possessed by the state must be disclosed under Brady v. Maryland, supra, is broader than whether the evidence is in the strictest sense exculpatory; rather Brady used the phrase "favorable evidence." See State v. Gillespie, 227 So.2d 550, 554, 556 (Fla. 2d DCA 1969). As noted in Gillespie, supra at 556, "favorable evidence" can be considered as "that evidence which a reasonably skilled prosecutor should know could be fairly and probably used to advantage by the accused on the issues of guilt or punishment." Here, it is clear from the state's admission at the hearing that the information met this test. (IC 10, 14)

In Boshears, supra, a case strikingly similar to the instant case, the court reversed for the state's failure to disclose the contents of an investigative interview with an examining physician which "could have provided defense counsel with evidence which was to some degree exculpatory" and which

would at the very least have afforded counsel the means to challenge the credibility of a witness. Boshears v. State, supra at 724.

In Cipollina v. State, supra, the court reversed for failure to divulge to the defense the name and address of a witness. The court found the missing evidence material in that it "may very well have been the final piece of the puzzle to complete the picture of [the defendant's] defense." Id. at 5. Similarly, in Arango v. State, 497 So.2d 1161, 1162 (Fla. 1986), this Court ruled that there was a reasonable probability that a different result would have been reached had evidence which tended to support the defendant's version of the events been disclosed and introduced at trial. The suppression of facts or the secreting of witnesses capable of assisting the defense in establishing his lack of guilt or culpability is, as the Gillespie court noted, "highly reprehensible." State v. Gillespie, supra at 555, n.14.

In Smith v. State, 372 So.2d 86, 88 (Fla. 1979), and Williams v. State, 513 So.2d 684 (Fla. 3d DCA 1987), the courts ruled that, upon the allegation of a Brady violation, the trial court must conduct an adequate inquiry into the cause for the state's failure and the potential prejudice to the defense; such a hearing, the courts ruled, cannot be held on a post-conviction proceeding or upon remand from the appellate court. See also McDonnough v. State, 402 So.2d 1233 (Fla. 5th DCA 1981).

In Robinson v. State, 522 So.2d 869 (Fla. 2d DCA 1987),

the court reversed a conviction and ordered a new trial where the trial court conducted only a cursory review of the discovery violation during the hearing on the motion for new trial. This was ordered despite the fact that the non-disclosed reports were of debatable exculpatory value.

Here, it is contended, the trial court failed to conduct an adequate inquiry and further explore the precise nature of the statements of the experts with which the state had consulted or to examine the notes of the prosecution with regard to those conversations. Instead, the court chose to rule such information non-discoverable because such statements were part of the state's work product. (R 8564)

This contention has been specifically rejected by State v. Gillespie, supra at 556-557. In Gillespie, the court correctly noted that most, if not all, Brady materials are essentially "work product" in the strictest sense since the information is obtained by the work of the state in the preparation of the its case. Gillespie holds that, while the opinions, strategies, or mental impressions of the prosecuting attorney are non-discoverable work product, evidence or factual matters which tend to prove or disprove a material fact in issue are discoverable and must be disclosed under Brady. Id.

> Work product can be divided into two categories: "fact" work product (i.e., factual information which pertains to the .. . case and is prepared or gathered in connection therewith), and "opinion" work product (i.e., the attorney's mental impression, conclusions, opinions, or theories concerning his . . . case). In re

> Sealed Case, 676 F.2d 793, 810-11 (D.C. Cir. 1982). A clear distinction has been drawn between these two types of work product with respect to the degree of protection provided. Western Fuels Association v. Burlington Northern Railroad, 102 F.R.D. 201, 204 (D. Wyo. 1984). Generally, fact work product is subject to discovery upon a showing of "need," whereas opinion work product is absolutely, or nearly absolutely, privileged.

State v. Rabin, 495 So.2d 257, 262 (Fla. 3d DCA 1986).

Rule 3.220 (c) (1), Florida Rules of Criminal Procedure, supports this distinction between non-discoverable and discoverable materials where it excludes from discovery as "work product" legal research or records, correspondence, reports or memorandum only "to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney, or members of his legal staff." Therefore, the names of doctors who have reviewed the case to look into the issue of the defendant's insanity or decreased culpability and the factual information they disclosed to the state are not protected work product. Where the information is material and may be favorable and useful to the defendant on the issue of guilt or punishment, it must be disclosed.

Because the state failed to provide material, favorable information in its possession to the defense which the defense could have used to its advantage at trial, a new trial is required. Given the state's assertion at the in camera hearing that the information it had received and the names of the mental

health experts "might provide fuel to the defense", there can be little doubt that the names and information must be disclosed to the defense under Brady v. Maryland, supra. The lower court's failure to conduct a full and adequate inquiry into the precise nature of the information further mandates a new trial.

POINT II

THE TRIAL COURT ERRED IN PRECLUDING IMPEACHMENT OF A STATE'S KEY EXPERT WITNESS WITH EVIDENCE WHICH DIRECTLY RELATED TO THE WITNESS' CREDIBILITY AND WHICH MATERIALLY AFFECTED THE WEIGHT WHICH THE JURY SHOULD GIVE HIS OPINION TESTIMONY.

The state called as an expert witness Dr. Robert Kirkland, a psychiatrist, to rebut the defendant's claim of insanity. (R 3857) The state offered Dr. Kirkland to the court and the jury as a witness qualified to give expert opinion testimony in the field of forensic psychiatry, eliciting testimony from the doctor on his educational background and his medical career, including the fact that the psychiatrist had been conducting mental examinations for, and testifying in, various state and federal courts for the past twenty-eight years. (R 3857-3861) The defense sought to examine the doctor regarding an incident where he had examined a defendant and had testified in a capital case as to the defendant's mental health. (R 3862-3897, 3900-3903, 4009-4010) In that case, State v. Sireci, 536 So.2d 231 (Fla. 1988), the courts had ruled that Dr. Kirkland had rendered an incompetent mental evaluation of the defendant by failing to diagnose a mental disease which was present. (R 3862-3897, 3900-3903, 4009-4010) The trial court refused to allow the defendant to cross-examine the psychiatrist regarding this information. (R 3862-3897, 3900-3903, 4009-4010) The defense argued to no avail that such testimony was relevant to allow the jury to adequately weigh the psychiatrist's opinion,

especially in light of the testimony elicited by the state as to the witness' years of experience and the number of times the doctor had been qualified as an expert. (R 3864-3869, 3891-3897)

The trial court's curtailment of defense inquiry into matters regarding impeachment of the doctor's mental health examination and opinions constituted a deprivation of his absolute and fundamental right to cross-examine a witness against him, as guaranteed by the Sixth Amendment of the federal constitution and Article I, Section 16, of the Florida Constitution. Coco v. State, 62 So.2d 892 (Fla. 1953). See also Section 90.608 (1), Florida Statutes (1989). This is especially true here in a capital case, where this crucial witness' testimony condemned the appellant to die in the electric chair. Coxwell v. State, 361 So.2d 148 (Fla. 1978).

The fundamental right to confrontation includes the opportunity to cross-examine witnesses, affording the jury the occasion to weigh the credibility, demeanor, ability, and veracity of the witness. Davis v. Alaska, 415 U.S. 308 (1974); Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965); Coco v. State, supra; Baker v. State, 150 So.2d 729 (Fla. 3d DCA 1963). See also Section 90.608 (1) (d), Florida Statutes (1989).

In Davis v. Alaska, supra, the Supreme Court of the United States held that the right to cross-examination includes as its essential ingredient the right to impeach one's accusers by showing bias, impartiality, and lack of ability, and by

discrediting the witness:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but **the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.**

415 U.S. at 316 (emphasis added).

Whenever any witness takes the stand, he ipso facto places his credibility in issue, whether he is a lay witness or an expert witness. Mendez v. State, 412 So.2d 965 (Fla. 2d DCA 1982); Baxter v. State, 294 So.2d 392 (Fla. 4th DCA 1974). A full and fair cross-examination of a witness upon the subjects opened by the direct examination is an absolute right. Coco v. State, supra. Limiting the scope of cross-examination in a manner which keeps from the fact-finder relevant and important facts bearing on the trustworthiness of crucial prosecution testimony constitutes "error of the first magnitude." Davis v. Alaska, 415 U.S. at 318; Truman v. State, 514 F, 514 F.2d 150 (5th Cir. 1975); Williams v. State, 472 So.2d 1350, 1352 (Fla. 2d DCA 1985); Mendez v. State, supra; Williams v. State, 386 So.2d 25 (Fla. 2d DCA 1980).

The proposed cross-examination of Dr. Kirkland directly related to his credibility and trustworthiness. A finding by a court that the doctor had conducted an inadequate mental

examination and the circumstances surrounding that inadequate medical diagnosis in a prior, similar case bears directly on his ability to render an accurate opinion in the instant case. Thus, it is highly relevant and material information which the jury, as fact-finders, should have in order to determine the weight to be given Dr. Kirkland's "expert" opinion in the instant case. The state's case could "stand or fall on the jury's belief or disbelief" of his testimony. Napue v. Illinois, 360 U.S. 264, 269 (1959).

Courts have held that evidence indicating a witness' actions in other, similar situations pertaining to the issues in the case are relevant items for cross-examination and impeachment of the witness by a defendant. Mendez v. State, supra; Ivester v. State, 398 So.2d 926 (Fla. 1st DCA 1981). Questioning concerning his ability to accurately detect and diagnose mental illnesses was a proper and vital line of inquiry which was highly relevant to the credibility of Kirkland's diagnosis and opinions in the instant case, which the defendant should have been allowed to reveal to the jury.

> [T]o make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.

Davis v. Alaska, 415 U.S. at 318.

The right of full cross-examination is absolute; its denial here easily constitutes reversible error. Coxwell v.

State, supra. A new trial is required.

POINT III

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE APPLICABLE LAW.

Rule 3.390, Florida Rules of Criminal Procedure, states:

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel. . . .

In addition to the standard instruction dealing with insanity (R8674), the trial court also gave a special jury instruction dealing with insane delusions.

> A person may be legally sane in accordance with the instructions previously given and still yet, by reason of mental infirmity, have hallucinations or delusions which cause him to honestly believe to be facts things which are not true or real. The guilt of a person suffering from such hallucinations or delusions is to be determined just as though the hallucinations or delusions were actual facts. If the act of the Defendant would have been lawful had the hallucinations or delusions been the actual facts, the Defendant is not guilty of the crime.

(R8675) The state requested a jury instruction dealing with insane delusions. The defense objected to the instruction arguing that it was a mischaracterization of the law. The defense contended that the instruction channeled the issue dealing with insane delusions into a self-defense argument. The

defense pointed out that, under the state's requested instruction, a sane person suffering from delusions still had the burden of proving self-defense. (R4274-81) The trial court eventually decided to give the above instruction over defense objection. (R4328,8675) The objectionable instruction is taken almost verbatim from what used to be a standard jury instruction on this issue. Moody v. State, 418 So.2d 989 (Fla. 1982); Fla.Std.Jury.Instr. (Crim.) 2.11(b)-2 (1980). However, it should be noted that this instruction has since been dropped from the Florida Standard Jury Instructions. Fla.Std.Instr. (Crim.) 3.04. The trial court cited ancient Florida case law and law from other jurisdictions in support of the instruction.

Appellant submits that, although sometimes necessary, a trial judge should avoid straying from the standard jury instructions. This is especially true when an instruction has the tendency to mislead the jury. See e.g. Kelly v. State, 486 So.2d 578 (Fla. 1986). Appellant submits that the special instruction had that tendency. The danger lies in the jury focusing on the special instruction before resolving the issue of insanity as defined by the standard jury instructions. The jury should have first determined whether Cruse knew right from wrong under the M'Naghten criteria. If the jury concluded that Cruse knew right from wrong, they should have then turned to the question of insane delusions. Appellant submits that their verdict indicates that they skipped the initial determination and focused on Cruse's insane delusions. The special instruction was

misleading and tended to confuse the jury. The trial court should not have departed from the standard jury instructions without the consent of the defense.

An additional problem arises when one closely examines the language of the special instruction given to the jury. A person falling under the instruction would clearly not understand the nature and quality of his actions. Appellant submits that this would be the equivalent of failing to differentiate right from wrong, thus meeting the M'Naghten standard. Despite this clear meaning of the instruction, the paragraph begins with the premise that the person is "legally sane" but suffers from these hallucinations or delusions. Appellant contends that those two concepts are mutually exclusive. One cannot be "legally sane" and still suffer from hallucinations or delusions which render a person incapable of understanding the nature and quality of his actions.

It is clear from the above analysis that the special instruction read to the jury is a misstatement of Florida law. If this were not the case, the instruction would still be a standard instruction, which it is clearly not. The instruction was undoubtedly omitted from the standards because it was both misleading and confusing. The trial court erred in giving the instruction over a timely and specific defense objection. Amends. VI and XIV U.S. Const.; Art. I, ss.9 and 16, Fla. Const.

POINT IV

THE TRIAL COURT ERRED IN DISALLOWING THE DEFENDANT SURREBUTTAL EVIDENCE WHERE THE STATE PRESENTED NEW EVIDENCE IN ITS REBUTTAL CASE CONCERNING THE ISSUE OF INSANITY THEREBY DEPRIVING THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE AND HIS RIGHT TO A FAIR TRIAL.

During its rebuttal case, the state presented testimony from mental health experts that the defendant's actions may have been the result of controlled anger and that there was no evidence of hallucinations prior to the event, but merely hallucinations while in jail. As a result, the state's psychiatrists diagnosed the defendant as suffering merely from jail psychosis, rather than having some type of illness at the time of the offense. (R 4014, 4141-4142, 4178) The state psychiatrist admitted that if there were evidence of hallucinations prior to or during the incident, his opinion on insanity might be different. (R 4030-4031, 4178-4180) The defense sought to offer testimony in surrebuttal to counter the state's evidence. The court, after initially approving the surrebuttal to specifically rebut the above-mentioned items, granted the state's request for a proffer of the testimony. (R 4203-4206, 4319, 4336) After the proffer (R 4337-4362), the court changed its mind, expressing concern over the length of time it would take for Dr. Berland, the surrebutal witness, to testify and that the jury had had enough. (R 4320, 4354, 4375) The court ruled that the surrebuttal testimony should have been

presented in the defendant's case in chief and would not be permitted now. (R 4371-4375) The refusal to allow this relevant, new testimony was an abuse of discretion, mandating a new trial.

It is true that the trial judge has wide discretion on whether to allow surrebuttal evidence, but only where the surrebuttal evidence does not contradict anything the state produced in rebuttal, or where the state has not brought new matters to the jury's attention during rebuttal. However, where, as here, the state has brought forth new evidence on rebuttal, the defense has the right to counter that with surrebuttal. See, e.g., 23 C.J.S. Criminal Law 1050 and United States v. Sadler, 488 F.2d 434 (5th Cir.1974)

Here, as proffered by the defense, the testimony of Dr. Berland specifically countered new matters first addressed by the state's experts regarding the defendant's lack of hallucinations at the time of the offense (which would have indicated a more serious mental disease) and his actions being in response to anger. Also, the state psychiatrists testified to the defendant's delusions which, they opined were not of a sufficient nature to warrant a defense under the insane delusions test (see Point III, supra). However, Dr. Berland would testify that the defendant's delusions specifically went to a fear for physical harm, which would be of the nature to qualify under the insane delusions standard. (R 4351-4353, 4659-4662)

In United States v. Wilson, 490 F.Supp. 713 (E.D. Mich. 1980), a prosecution witness testified during rebuttal as to a

statement made to him by one of the defendants. That defendant was granted surrebuttal to explain or deny the statement, because, otherwise, he would have been denied his rights to confrontation, due process, and fundamental fairness.

In Merrill v. United States, 338 F.2d 763 (5th Cir. 1964), the defendant presented an insanity defense. The prosecutor introduced rebuttal testimony that the defendant was not insane, and additional evidence that he had told a doctor that he was faking insanity. The defense wanted surrebuttal, to counteract this new testimony. The court reversed because the defendant had no opportunity to explain his statement to the doctor.

The same is true in the instant case, because appellant had no opportunity to show the jury the inaccuracy of the state's psychiatrists' versions of a lack of hallucinations prior to the incident and the inaccurate resulting diagnosis. Moreover, the finding by state experts that the defendant's delusions were not enough to constitute excusable insane delusions was not able to be rebutted by showing the correct facts that the defendant did express fears of physical harm from the community. Finally, the defendant was not permitted to rebut the state experts' diagnosis, brought up for the first time during the state's rebuttal, that the defendant was merely acting out of controlled anger. Even where evidence is to some extent cumulative, surrebuttal can still be allowed. Williamson v. State, 92 Fla. 980, 111 So. 124, 126 (1926); Donaldson v. State, 369 So.2d 691,

695 (Fla. 1st DCA 1979).

A trial judge does not have the discretion to exclude relevant testimony unless it is inadmissible by virtue of some recognized rule of evidence, such as hearsay. Spencer v. Spencer, 242 So.2d 786 (Fla. 4th DCA 1970). Especially in a case such as the one at bar, a rule allowing wide latitude in the presentation of evidence by the defendant in a capital trial should be applied. A trial judge may not frustrate a defendant's legitimate right to present his defense by strict adherence to the state evidentiary rules. Chambers v. Mississippi, 410 U.S. 284 (1973). No such rule prevails over the fundamental demand of due process of law as guaranteed by the Florida and federal constitutions in the fair administration of criminal justice. United States v. Nixon, 418 U.S. 683, 713 (1974). In the weighing process, the fundamental constitutional right to present witnesses should prevail. The Sixth Amendment right to present evidence is supreme, and any doubts must be resolved in favor of that fundamental right. Case law in Florida is clear that it is error for the trial court to exclude evidence which tends in any way to prove a criminal defendant's innocence, and that all doubt of admissibility of this type of evidence should be resolved in favor of admitting the evidence. Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982).

The excluded surrebuttal testimony went to the very heart of the appellant's defense of insanity to clarify obvious errors in fact and in diagnosis presented during the state's

rebuttal case. The trial court committed reversible error in arbitrarily ruling here that there would be no surrebuttal. Although surrebuttal may be discretionary, where the state, in a capital case, presents new evidence in its rebuttal case which materially affects the defense case, due process of law requires that the defendant be permitted to rebut such evidence with relevant, material evidence which was not merely cumulative of the evidence presented in its case in chief and which evidence destroyed the foundation for the state's expert opinions. Such abuse of discretion mandates a new trial.

POINT V

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE OPINION EVIDENCE OF A POLICE OFFICER CONCERNING THE MENTAL CONDITION OF THE DEFENDANT DURING THE DAYS LEADING UP TO THE SHOOTINGS.

The defense sought to elicit testimony from Officer Gregory Bowden concerning the defendant's actions and appearances during the days leading up to the shootings. (R 3240-3241, 3243-3244, 3246, 3254-3256, 3290) The court, pursuant to a state objection refused to allow the defense to present testimony from the police officer that the defendant appeared to be losing self-control and that the defendant was exhibiting behavior indicative of mental illness. (R 3240-3241) The court further refused to allow testimony concerning the officer's opinions of the insanity and dangerousness of the defendant and the policeman's warning of neighbors about the defendant's mental stability. (R 3246, 3254-3256, 3290) Additionally, the court refused to permit testimony of Ellen Rich, a neighbor and victim of an attempted murder charge, as to her opinion of the defendant's mental condition on the day of the incident. (R 3327-3328) This refusal denied the defendant his constitutional rights under the Florida and federal constitutions to due process of law, to present testimony in his behalf, and to a fair trial.

As argued in Point IV, supra, a defendant has a constitutional right to present relevant evidence in his own behalf to establish his defense. United States v. Nixon, supra;

Washington v. Texas, 388 U.S. 14 (1967); Roberts v. State, 370 So.2d 800 (Fla. 2d DCA 1979); Campos v. State, 366 So.2d 782 (Fla. 3d DCA 1979). The court abridged that right by refusing to allow the defense to present lay opinion testimony concerning the defendant's mental condition immediately preceding the shooting incident, thereby depriving him of showing, by those who would know best -- eyewitnesses -- that the defendant was, in fact, insane during the commission of the offenses.

Section 90.701, Florida Statutes (1989), allows the opinion testimony of lay witnesses when such testimony is based on what the witnesses have perceived. See also Beck v. Gross, 499 So.2d 886, 889 (Fla. 2d DCA 1986). It is well-established law in Florida that a non-expert witness may indeed testify about a person's mental condition where the basis for the testimony is personal knowledge or observation. Garron v. State, 528 So.2d 353, 356 (Fla. 1988); Rivers v. State, 458 So.2d 762, 765 (Fla. 1984); Sealey v. State, 89 Fla. 439, 105 So. 137 (1925); Hixon v. State, 165 So.2d 436 (Fla. 2d DCA 1964).

> In a criminal prosecution, a lay or nonexpert witness may be permitted to give an opinion regarding the sanity or insanity of the person whose mental condition is in issue, but he cannot express general opinions as to sanity nor give opinions independent of facts and circumstances within his own knowledge. The opinion, rather, is to be given after the witness has testified with regard to appearances, actions, and conduct of the person whose sanity is being investigated; and such a witness must testify from personal knowledge and observation. Thus, a nonexpert witness who bases his testimony upon relevant facts and circumstances known

> to and detailed by him may give an opinion as to sanity.

Hixon v. State, supra at 441.

In the instant case, the criteria for the admission of this type of opinion testimony was established and the proper foundation laid. The police officer and the victim/neighbor both would have testified to their observations of the defendant and the facts known to them. Further, the police officer's proffered testimony was that he had detained mentally ill persons pursuant to the Baker Act (Chapter 394, Part 1) on numerous occasions and was able to recognize signs of mental illness. He testified to his conversations with the defendant on the occasion a few days prior to the incident.

In both of these witness' opinions, the defendant was losing control of his mental faculties, was exhibiting signs of mental illness and paranoia, that the defendant was potentially dangerous because of his mental illness, and that he was, simply put, "wacky" or "crazy." (R 3240-3241, 3243-3244, 3246, 3254-3256, 3290, 3327-3328) This testimony from witnesses who were able to observe in close proximity to the time of the shootings the defendant's demeanor and mental condition is perhaps the most reliable and crucial evidence of the defendant's insanity at the time of the offenses.

This evidence was also imperative since it shows the defendant's mental state prior to the crimes. The state had elicited testimony that Robin Brown (the kidnapping victim) had

told the defendant about a friend who had gotten into trouble and then acted crazy so that he would not have to go to jail. (R 2654) The clear inference of this state evidence was to attempt to show that the defendant was faking his mental illness after the event. The excluded testimony of the defendant's mental unbalance prior to the shooting spree becomes all the more important to rebut this inaccurate inference.

To exclude this relevant and clearly admissible evidence is error of enormous magnitude. This Court must reverse the judgments and sentences and remand for a new trial.

POINT VI

THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S OBJECTION TO THE STATE SPECIFICALLY ELICITING TESTIMONY DURING THE GUILT PHASE OF THE TRIAL INDICATING THAT THE DEFENDANT DID NOT EXHIBIT REMORSE OVER HIS ACTIONS.

The state specifically elicited testimony during the guilt phase of the trial from Dr. Jonas Rappeport that the defendant did not exhibit any signs of remorse over his actions concerning his male victims. (R 3783-3784) Defense counsel objected to the questions and answers, arguing that the testimony was totally irrelevant. (R 3783, 3784) The court, while sustaining a partial objection on another basis, overruled the objection as to relevancy and allowed to prosecutor to continue to question the witness as to the defendant's alleged lack of remorse for his male victims. (R 3783-3784)

As argued by defense counsel below, any consideration of lack of remorse is extraneous to the issues in a capital trial. Robinson v. State, 520 So.2d 1, 6 (Fla. 1988); Pope v. State, 441 So.2d 1073, 1077-1078 (Fla. 1983). Lack of remorse is not an aggravating factor in and of itself, nor does it have any place in the consideration of any aggravating factors. Robinson; Pope; McCampbell v. State, 421 So.2d 1072 (Fla. 1982). "Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor." Pope, supra at 1078.

The introduction of evidence of lack of remorse was hence irrelevant and inadmissible at the guilt or penalty phase of the defendant's trial. Its introduction during the guilt phase could only serve to prejudice the jury against the defendant. Sections 90.401, 90.403, Fla. Stat. (1987). A new trial is required.

POINT VII

APPELLANT IS ENTITLED TO A NEW TRIAL WHERE THE CUMULATIVE EFFECT OF NUMEROUS PREJUDICIAL COMMENTS AND INADMISSIBLE EVIDENCE PRESENTED DURING HIS TRIAL RESULTED IN A VIOLATION OF HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION.

In its opening statement, the prosecutor told the jury that as a result of being shot, Marian Amos lost the fetus she was carrying. (R 1516-1517) Prior to the witness' testimony, defense counsel requested a motion in limine seeking to prevent the state from eliciting any testimony with regard to state witness Marian Amos' loss of her fetus as a result of being shot. (R 2401-2403) The trial court denied the motion. (R 2402-2403) Marian Amos testified to the fact. (R 2415)

As a result of the trial court's decision to change venue, Appellant's trial was held in Bartow in Polk County. During cross-examination of Dr. Jonas Rappeport, the defense psychiatrist, the state asked him if he was familiar with the William Ferry case. (R 3964) Defense counsel objected on the grounds of relevancy and moved for a mistrial on the ground that the question was designed solely to inflame the jury and prejudice Appellant. (R 3764-3765) The trial court sustained the objection but denied the motion for mistrial, although he did give a curative instruction. (R 3766)

Finally, during the direct examination of Carolyn Knam, the State asked her if there was anything which indicated that Appellant had control of the weapon. (R 2174) Defense counsel objected on the grounds that the question called for a conclusion, but the trial court overruled the objection. (R 2174) The witness then answered, "I guess the best comparison would be that of Rambo." (R 2174) Defense counsel immediately objected and moved for a mistrial on the grounds that this comment was highly inflammatory and prejudicial. Counsel further noted that this comment was the same one given by the witness in deposition and that the state was intentionally trying to elicit this comment. The prosecutor admitted that he knew the witness would give that answer. (R 2175) The trial court sustained the objection but denied the motion for mistrial. However, the trial court did give a curative instruction. (R 2176-2177)

Appellant submits that in each of these instances, the trial court erred in permitting the state to elicit irrelevant and highly prejudicial testimony. These comments and testimony combined to destroy any semblance of due process and a fair trial.

Section 90.402, Florida Statutes (1989), provides that all relevant evidence is admissible except as provided by law. By implication, therefore, evidence which has no relevance is inadmissible. Section 90.403, Florida Statutes (1989), further provides that even relevant evidence may be inadmissible if its probative value is substantially outweighed by the danger of

unfair prejudice or where such evidence may confuse the issues being presented. The three instances cited above have no relevance to any material issue. Even if there is some minimal relevance, Appellant submits that this is far outweighed by the overwhelming prejudice resulting from its admission.

Appellant was charged with numerous offenses. Appellant's defense was insanity. By its very nature, this defense admits that Appellant committed the acts set forth in the indictment. Appellant was charged with, inter alia the attempted murder of Marian Amos [Count VII]. (R 8321) The fact that Ms. Amos lost the fetus she was carrying at the time is totally irrelevant. It is further inadmissible inasmuch as it constitutes evidence of a crime for which Appellant was never charged. Section 782.09, Florida Statutes (1987) proscribes the offense of killing an unborn child by injury to the mother and provides that such offense is a second degree felony. In Williams v. State, 110 So.2d 654 (Fla. 1959), this Court held that similar fact evidence which tends to reveal the commission of a collateral crime is admissible only if it is relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused. The Williams rule has been codified in Section 90.404(2)(a), Florida Statutes (1987). The evidence of the killing of the fetus is clearly inadmissible as it has no relevance to any material fact in issue. The state's theory was that it was admissible to show the injury to Amos which it contended would prove the offense was attempted

murder as opposed to aggravated battery. This argument is totally meritless. In Smith v. State, 501 So.2d 139 (Fla. 2d DCA 1987), the Court ruled that victim injury is not an essential element of attempted first degree murder. Therefore, the extent of injury to Ms. Amos was totally irrelevant. The prejudicial effect of telling the jury that Appellant killed an unborn child cannot be understated.

The question propounded to Dr. Jonas Rappeport, the defense psychiatrist, by the state with regard to his familiarity with the William Ferry case is another example of irrelevant comment meant only to inflame the jury. Because of the incredible amount of publicity and negative public opinion generated by the instant case, venue was changed to Bartow in Polk County. Bartow is only 50 miles from Tampa which was the scene of the notorious arson/murders for which William Terry was convicted and sentence to death. As this Court can note from its own decision in Ferry v. State, 507 So.2d 1373 (Fla. 1987), the defense presented therein was also insanity. However, the issues raised in Ferry have no bearing on any issue before the jury in the present case. Certainly it cannot be said that because the insanity defense failed in Ferry it must also fail in the instant case. Additionally, there is no evidence that Dr. Rappeport ever examined William Ferry. Therefore, the question propounded by the state was totally irrelevant. However, the reference to the notorious Ferry case did serve to inflame the jury and confuse the issue before them -- the sanity/insanity of

William Cruse.

The final objectionable comment elicited by the State was Carolyn Knam's comparison of Appellant to Rambo, an ultra-violent character popularized by actor Sylvester Stallone. Once again, this comment had no relevance in the instant case and only served to inflame the jury. The trial court recognized the impropriety and instructed the jury to disregard the comment. However, the damage had already been done. What makes this comment even more egregious is that the prosecutor knew in advance what Knam would say and intentionally elicited it. As Justice Terrell so eloquently stated in Stewart v. State, 51 So.2d 494 (Fla. 1951), "The trial of one charged with a crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament." In Washington v. State, 86 Fla. 533, 542, 98 So. 605, 609 (1923), this Court spoke of the high standards which are expected of a prosecutor. The prosecutor is a sworn officer of the government with great duty imposed on him of preserving intact all the great sanctions and traditions of law:

> It matters not how guilty a defendant in his opinion may be, it is his duty under oath to see that no conviction takes place except in strict conformity to law. His primary considerations should be to develop the evidence for the guidance of the court and jury, and not to consider himself merely as attorney of record for the state, struggling for a verdict.

By intentionally eliciting this highly prejudicial and totally irrelevant comment, the prosecutor abrogated his responsibility

in his zeal to secure a conviction.

Appellant submits that the above-discussed comments were highly improper, totally irrelevant and combined to destroy all semblance of due process and fair trial. It cannot be said that these comments were harmless beyond a reasonable doubt. See State v. DiGuillio, 491 So.2d 1129 (Fla. 1986). This is especially true where the evidence of Appellant's insanity was substantial. Consequently, this Court must reverse Appellant's convictions and sentences and remand the cause for a new trial.

POINT VIII

IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, AND 17, OF THE FLORIDA CONSTITUTION, THE COURT FAILED TO GRANT A MISTRIAL FOLLOWING IMPROPER AND HIGHLY PREJUDICIAL COMMENTS BY THE PROSECUTOR DURING THE PENALTY PHASE OF THE TRIAL.

Over defense objections and motions for mistrial, the prosecutor repeatedly engaged in highly inflammatory and improper argument to the jury during the penalty phase of the trial. The prosecutor repeatedly told jurors that they could consider non-statutory aggravating circumstances including: (1) the loss of the fetus of Mary Amos (a victim of attempted first degree murder); (2) the impact caused by the deaths of the victims; (3) the mere fact that two of the victims were police officers; and (4) that a life recommendation would cheapen the lives of the victims. (R 4531-4535, 4564-4565, 4933-4935, 4940) Although the court sustained objections to these improper references, the taint of the comments could not be removed absent a mistrial. Additionally, the prosecutor improperly and inaccurately told the jury that the mitigating factor of age applies only where the defendant is of a young age. (R 4902-4903) The trial court overruled the defendant's objection, agreeing with the prosecutor. (R 4903) Death recommendations made by a jury following these improprieties cannot stand. A new penalty phase is necessary.

It is a well-settled rule that a prosecutor must

refrain from making arguments that are inflammatory and abusive. Collins v. State, 180 So.2d 340, 343 (Fla. 1965). It is equally clear that a prosecutor's emotional arguments to the jury which bring into consideration non-statutory aggravating factors have no place in a capital penalty phase, and will necessitate reversal. Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985); Teffeteller v. State, 439 So.2d 840, 844-845 (Fla. 1983); State v. Dixon, 283 So.2d 1, 8 (Fla. 1973).

Once it is established that a prosecutor's remarks are offensive, this Court in Pait v. State, 112 So.2d 380, 385 (Fla. 1959), emphasized that "the only safe rule appears to be that unless this court can determine from the record that the conduct or improper remarks of the prosecutor did **not** prejudice the accused, the judgment must be reversed." Such inflammatory comments are violative of an accused's fundamental right to a fair trial, free of argument condemned. Pait, supra. Further, such argument renders the resulting death sentences cruel and unusual punishment. Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986); Trawick, supra. See also Porter v. State, 347 So.2d 449 (Fla. 3d DCA 1977), wherein the court held that where such improper comments are so highly prejudicial as to deprive the accused of his right to a fair trial, neither the sustaining of the defendant's objection nor the use of a curative instruction can lessen the impact of those remarks.

Turning to the specific infirmities of the prosecutor's remarks, as mentioned above it is highly improper to

argue to a jury and to base a death sentence on non-statutory aggravating factors. Fitzpatrick; Trawick; Teffeteller. The highly inflammatory arguments concerning the loss of a woman's fetus (see also Point VII, supra), the mere fact that the victims were police officers is a sufficient aggravating factor by itself, and the contention that a person's life is worth more than a life recommendation are non-statutory aggravators designed solely to inflame the jury. As in Teffeteller, supra at 845, "[t]here is no place in our system of jurisprudence for this argument." See also Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976).

The prosecutor's discussion of the impact of the victim's death has been specifically and strongly denounced in Booth v. Maryland, 482 U.S. 496 (1987). Comment to the jury on this topic violates the Eighth Amendment to the United States Constitution.

Furthermore, the prosecutor's argument to the jury that they could not consider the defendant's advanced age as a mitigating factor since it is youthful age which is a mitigator (R 4902-4903) is a complete misstatement of the law which cannot be countenanced. Echols v. State, 484 So.2d 568 (Fla. 1985); Agan v. State, 445 So.2d 326 (Fla. 1983); and State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), all recognize that advanced age when coupled with infirmities or other factors may be considered in mitigation. The erroneous argument and the court's concurrence in the misstatement improperly taints the death recommendations

and the capital sentences.

The totality of the prejudicial and unfounded arguments by the prosecutor more than justified a declaration of a mistrial of the sentencing portion of the defendant's trial. The trial court's refusal to declare a mistrial mandates a reversal for a new sentencing hearing.

POINT IX

SECTION 921.141(5)(i), FLORIDA STATUTES (1987) IS UNCONSTITUTIONALLY VAGUE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION AND THE COURT ERRED IN INSTRUCTING THE JURY THAT, IN DETERMINING WHAT SANCTION TO RECOMMEND, IT COULD CONSIDER WHETHER THE MURDER WAS COMMITTED IN A COLD, CALCULATED, OR PREMEDITATED MANNER, AND FURTHER ERRED IN FINDING THE UNCONSTITUTIONAL FACTOR THEREBY RENDERING THE DEATH SENTENCE UNRELIABLE.

This Court's vacillation in its interpretation of Section 921.141 (5) (i), Florida Statutes (1987), cannot help but breed confusion to those seeking to consistently apply the aggravating circumstances. For instance, in Caruthers v. State, 465 So.2d 496 (Fla. 1985), this Court disallowed a finding of a cold, calculated, and premeditated murder where a robber shot a store clerk three times. This Court stated, "the cold, calculated, and premeditated factor **applies to a manner of killing** characterized by heightened premeditation beyond that required to establish premeditated murder." Caruthers, supra at 498 (emphasis added). Nine pages later, in the next reported decision, this Court contradicted its Caruthers holding and, approving the same factor, stated, "this factor **focuses more on the perpetrator's state of mind than on the method of killing.**" Johnson v. State, 465 So.2d 499, 507 (Fla. 1985) (emphasis added). Then, in Provenzano v. State, 497 So.2d 1177 (Fla. 1986), this Court reverted to the prior standard, stating, "as the statute indicates, if the murder was committed in a **manner**

that was cold, calculated, the aggravating circumstance of heightened premeditation is applicable." Provenzano, supra at 1183. In Banda v. State, 536 So.2d 221 (Fla. 1988), this Court again returned to the subjective intent of the murderer. This flip-flopping on the proper focus of the factor has caused confusion and inconsistency in the application of the aggravating circumstance.

Further, there is patent inconsistency in the application of the second prong of the "cold, calculated, or premeditated without any **pretense** of moral or legal justification" factor. In Banda v. State, supra at 225, this Court stated, "We conclude that, under the capital sentencing law of Florida, a 'pretense' of justification is **any** claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." (emphasis added). In Cannady v. State, 427 So.2d 723 (Fla. 1983), this Court disapproved the finding of a cold, calculated, or premeditated murder because, according to the defendant, the victim rushed at him before he was shot five times. "During his confession appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that appellant had a least a pretense of a moral or legal justification, protecting his own life." Cannady v. State, supra at 730. Yet, in Provenzano v. State, 497 So.2d 1177 (Fla. 1986), this Court approved that aggravating factor and rejected as a **pretense** of moral

justification the uncontroverted fact that the victim (a courtroom bailiff) was repeatedly firing a pistol at the defendant when the bailiff was shot. See also Turner v. State, 530 So.2d 45 (Fla. 1988) (no pretense of moral justification where defendant believed victims [his wife and another woman] had a lesbian relationship resulting in the defendant losing his family).

The vacillation in the application of this statutory aggravating factor shows that the operative terms are not sufficiently definite so as to adequately channel the discretion of the sentencing court, the jury, or of this Court. This factor is unconstitutionally vague and overbroad under the Eighth and Fourteenth Amendments, as set forth in Maynard v. Cartwright, 486 U.S. 356 (1988); Zant v. Stephens, 462 U.S. 862 (1983); and Godfrey v. Georgia, 446 U.S. 420 (1980), and under Article I, Sections 9, 16, and 22, of the Florida Constitution, in that it fails to genuinely narrow the class of persons eligible for the death penalty.

The submission of this impermissibly vague and overbroad aggravating factor to the jury and the finding of it by the court renders the appellant's death sentences unconstitutional.

POINT X

THE APPELLANT'S DEATH SENTENCES ARE IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCES UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The sentences of death imposed upon William Cruse must be vacated. The trial court found improper aggravating circumstances, failed to consider (or gave only little weight to) highly relevant and appropriate mitigating circumstances, and improperly found that the aggravating circumstances outweighed the mitigating factors. These errors render Cruse's death sentences unconstitutional in violation of the Eighth and Fourteenth Amendments.

A. The Trial Judge Considered Inappropriate Aggravating Circumstances.

It is well established that aggravating circumstances must be proven beyond a reasonable doubt by competent, substantial evidence. Martin v. State, 420 So.2d 583 (Fla. 1982); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The state has failed in this burden with regard to at least two of the aggravating circumstances found by the trial court. The court's findings of fact, based in part on matters not proven by substantial, competent evidence beyond a reasonable doubt, do not support

these circumstances and cannot provide the basis for the sentences of death.

1. Cold, Calculated, and Premeditated Manner Without Any Pretense of Moral or Legal Justification

The trial court found that this aggravating circumstance was present with regard to all of the killings. The court cited Herring v. State, 446 So.2d 1049 (Fla. 1984), as the standard for determining whether this factor applies, to-wit: whether there existed "heightened premeditation" for the killings. (R 8824)

As noted in Point IX, supra, this aggravating circumstance has been applied inconsistently. It appears that the current state of the law has receded from the holding in Herring, supra, so heavily relied upon by the trial judge, to look instead at the mental state of the defendant and whether (1) the killings took place following a "careful plan or prearranged design," and (2) whether there was a "pretense" of moral or legal justification. Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). This test must thus evaluate the mental state of the perpetrator rather than looking merely at the manner of the killing. Banda v. State, 536 So.2d 221, 225 (Fla. 1988); Johnson v. State, 465 So.2d 499, 507 (Fla. 1985); Mason v. State, 438 So.2d 374 (Fla. 1983); Cannady v. State, 427 So.2d 723 (Fla. 1983).

Looking to the facts of the instant case, we find that the trial court, in finding heightened premeditation, totally

ignored the evidence presented by the expert and lay witnesses in the case that the defendant, when purchasing the weapon and clips, was not doing so with any pre-thought plan to kill people. Rather, he was reacting to his delusions and hallucinations and was merely arming himself for protection. (R 3244, 3373-3374, 3391, 3475, 3585, 3666, 4351-4354, 4659-4660) The uncontroverted evidence firmly establishes that the defendant was suffering from a severe mental illness (even the state's expert witnesses agree) which would preclude him from the type of "careful plan or prearranged design" necessary for this aggravating circumstance. (R 3361-3363, 3516-3518, 3620, 3635, 3988, 4018, 4615) As one mental health expert said, the defendant did not commit these crimes in the sense of a knowing, understanding, appreciating, knowledgeable person. (R 3659)

While there is some indication that the defendant recalled putting his weapons in the car, there is no showing beyond a reasonable doubt that he did so planning to shoot people. As the defendant told the police in his videotaped interview and as related by a psychiatrist, the defendant had done this before for the purpose of driving around in his car so that people could see his guns, would know that he "was someone to be reckoned with," and would leave him alone. (R 3565-3566, 3569; State's Exhibit #117 - videotaped interview) There simply is a lack of substantial evidence to support the trial court's finding of this factor.

Additionally, the second prong of the test shows that

the defendant did have a "pretense" of moral or legal justification. As recounted above, the defendant, because of his mental illness, honestly believed that the members of the community were out to do him and his wife serious bodily harm. His actions based on his delusions, while not amounting to a strict self defense claim, surely provide the pretense of moral or legal justification needed to defeat this aggravating factor. (R 4660-4663) Even the state's psychiatrists admitted that the defendant was reacting out of "rage." (R 3583-3585, 3966, 4017-4018, 4355-4358, 4664-4666) Recently, this Court has held that a defendant's highly emotional mental state negates this factor's requirement for a contemplative or reflective state of mind. Thompson v. State, 15 FLW S347, 349-350 (Fla. June 14, 1990). In Thompson, the defendant confessed to having an argument with his girlfriend at night because Thompson had decided to go back to his wife. Place (the girlfriend) objected and threatened to blow up the house. When the defendant awoke the next morning, his confession stated, he decided to kill Place and commit suicide. Despite this evidence, this Court rejected the aggravating factor of cold, calculated, and premeditated.

> The state relies heavily on the fact that Thompson awoke at 8 a.m. and killed the victim at 8:30 a.m., arguing that Thompson had thirty minutes to think about what he was doing before he killed Place. But there is no evidence in the record to show that Thompson contemplated the killing for those thirty minutes. To the contrary, the evidence indicates that Thompson's mental state was highly emotional rather than contemplative or reflective. **It is an equally reasonable hypothesis** that Thompson

> hit his breaking point close to 8:30 a.m., reached for his gun and knife, and killed Place instantly in a deranged fit of rage. "Rage is inconsistent with the premeditated intent to kill someone," unless there is other evidence to prove heightened premeditation beyond a reasonable doubt. Mitchell v. State, 527 So.2d 179, 182 (Fla.), **cert. denied**, 109 S.Ct. 404 (1988). Thus, the evidence does not support beyond a reasonable doubt a finding that this aggravating circumstance exists.

Thompson v. State, 15 FLW at S350.

As in Thompson, there is no record evidence, other than mere speculation, that the defendant consciously and deliberately planned to drive to the grocery stores and kill people and that he had developed this plan months before when he purchased the rifle and clips. Rather, as supported by the testimony, and as held in Thompson, it is equally plausible (indeed it is extremely likely given the testimony concerning Cruse's mental problems) that the defendant's mental state was highly emotional and that he proceeded to shoot at people in a deranged fit of rage. Not only do the defense experts and lay witnesses say so, but, as cited above, so do the state's own mental health witnesses.

This factor must fall.

2. For the Purpose of Avoiding or Preventing a Lawful Arrest

The trial court found this one additional aggravating factor in the two counts for which it imposed death concerning the police officer victims. (R 8835-8836, 8842) From the court's

recitation of the facts, it is clear that the court imposed this factor merely because of the status of the victims as police officers, and not based on any substantial competent evidence which would support this factor beyond a reasonable doubt.

For this factor to be present it must be shown beyond a reasonable doubt that the defendant's motive in killing these two victim's was in fact to avoid lawful arrest. Perry v. State, 522 So.2d 817 (Fla. 1988); Rembert v. State, 445 So.2d 337 (Fla. 1984). Although these cases involve non-police officer victims, it is clear that the status as police officers is not, in and of itself, an automatic determiner of this circumstance. To hold otherwise would make the subsequent legislative enactment of Section 921.141 (5) (j), Florida Statutes (1989) ("The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties."), an unnecessary and duplicitous act.

Rather, as is the case discussed above concerning cold, calculated, and premeditated, this factor, too, must focus on the mental intent of the defendant in committing the shootings. See Perry, supra. As is clear from the record, because of the defendant's severe mental illness, he was unable to carefully plan, consider, and design his actions to consciously seek to avoid lawful arrest. (R 3361-3363, 3516-3518, 3620, 3635, 3659, 3988, 4018, 4615) The record reveals that the defendant, at the very least in a deranged fit of rage, went on a rampage, shooting everything that moved. He did not shoot solely at police

officers (which, if he had, may have indicated a plan to avoid arrest). The shots were fired at the police cars immediately upon their entry onto the scene, just as the defendant had previously fired at Ruth Green's car and the shoppers at Publix. See also Cook v. State, 542 So.2d 964, 970 (Fla. 1989), wherein this Court rejected the finding of this aggravator where it appeared, as here, the shooting of the victim appeared to be instinctive and spur-of-the-moment rather than a calculated plan. The trial court, in its sentencing order, chooses to ignore all of the mental health testimony, including that presented by the state, in finding that the defendant had some conscious plan to avoid detection or arrest.

There is absolutely no evidence that Officers Grogan and Johnson were singled out because of their function as law enforcement officers. Should the defendant really have sought to avoid arrest, he would have left the entire area upon hearing the first sirens while he was still at the Publix store, rather than merely crossing the street and shooting at the Winn Dixie store. He had ready access to his car at both the Publix store and later at the Winn Dixie store after shooting the officers. Yet he made no attempt to "avoid apprehension" by leaving the area in his car. Rather, he entered the store, despite the certainty that other police officers would be arriving. Despite the trial court's absurd finding to the contrary, the defendant's actions are in no way consistent with a conscious, rational, desire to avoid a lawful arrest.

This aggravating factor must be rejected because of the lack of substantial evidence to prove the factor beyond a reasonable doubt.

B. Mitigating Factors, Both Statutory and Non-Statutory, Are Present Which Outweigh Any Appropriate Aggravating Factors

Recently, this Court has reiterated the correct standard and analysis which a trial court must apply in considering mitigating circumstances presented by the defendant. In Campbell v. State, 15 FLW S342 (Fla. June 14, 1990). In Campbell, 15 FLW at 344-345, the Court quoted from prior federal and Florida decisions to remind courts that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. See Eddings v. Oklahoma, 455 U.S. 104, 114-115 (1982); Rogers v. State, 511 So.2d 526 (Fla. 1987). Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court must find as mitigating that factor. Although, the Court said, the relative weight given each factor is for the sentencer to decide, once a factor is reasonably established, it cannot be dismissed as having no weight as a mitigating circumstance. Campbell, supra. For a trial court's weighing process and its sentencing order to be sustained, that weighing process must be detailed in the findings of fact and must be supported by the evidence.

It is submitted that the trial court's sentencing order here totally fails to meet this standard necessitate by the

capital sentencing scheme. The trial court, although correctly finding the mental mitigating factor of "extreme mental or emotional disturbance" and although properly giving it great weight, glossed over the other statutory and non-statutory mitigating factors and rejected them. In addition to the one factor found by the trial court, the court should also have found as mitigating factors entitled to great weight the following.

1. The Capacity of the Defendant to Appreciate the Criminality of His Conduct or to Conform His Conduct to the Requirements of the Law Was Substantially Impaired

The court erroneously rejects this factor solely because the defendant was found to be sane by the trial jury. (R 8850) In doing so, the court clearly applied the wrong standard. In Ferguson v. State, 417 So.2d 631 (Fla. 1982), this Court remanded the case for resentencing because the trial judge had applied the wrong standard in determining the applicability of the mental mitigating factors. This Court noted:

> The sentencing judge here, just as in Mines [v. State, 390 So.2d 332 (Fla. 1980)], misconceived the standard to be applied in assessing the existence of mitigating factors (b) and (f). From reading his sentencing order we can draw no other conclusion but that the judge applied the test for insanity. He then referred to the M'Naughten Rule which is the traditional rule in this state for determination of sanity at the time of the offense. It is clear from Mines that the classic insanity test is not the appropriate standard for judging the applicability of mitigating circumstances under section 921.141 (6), Florida Statutes.

Ferguson, supra at 638.

It is also clear that all of the mental health experts agreed that the defendant had a severe mental illness. The details of that illness and the specific testimony of the substantial control and effect it had on the defendant in impairing his behavior has been recounted throughout this brief. It should be noted that the mental illness suffered by William Cruse is quite similar to that suffered by the defendant in Ferry v. State, 507 So.2d 1373 (Fla. 1987).

Ferry, like Cruse, was diagnosed as a paranoid schizophrenic who believed that all were out to harm him, by, among other things, poisoning his food. Cruse and Ferry both believed that other people were trying to control his thought processes. Both were said by the mental health experts to have extreme mental illnesses. Cruse's behavior leading up to the time of the incident was described as "bizarre" and the delusions suffered by the defendant were controlling him. This mental illness was coupled with the infirmities of old age and chronic alcohol abuse, which one doctor testified was the defendant's way of medicating himself in an attempt to control the mental illness. Even the police officer who spoke to the defendant six days before the incident recognized that the defendant's mental impairment could soon no longer be held in check and the defendant would explode. (R 3239-3247, 3255-3256) As in Ferry the mitigating factor of a substantial impairment to conform his conduct to the requirements of the law was established and must

be found.

2. The Age of the Defendant at the Time of The Crime

The court refused to find age at a mitigating factor, stating that the defendant's age of 59 at the time of the offense is not a mitigating unless coupled with other factors, which the court failed to find. (R 8851-8852) In this regard, the court completely ignores the evidence of the mental health experts and lay witnesses who testified that the defendant's mental infirmities were directly related to advanced age and would continue to get worse as he got older. This factor is thus appropriate for consideration as a mitigating factor.

As this Court has said in Echols v. State, 484 So.2d 568, 575 (Fla. 1985), age should be given significant weight if it is "linked with some other characteristic of the defendant or the crime such as immaturity **or senility.**" See also State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), wherein the Court indicated that the "possible effect of great age with its attendant weaknesses and infirmities" is a mitigating circumstance to be given serious consideration.

3. The Defendant Expressed Sincere Remorse and Other Other Relevant Non-Statutory Factors

As indicated in the introduction to this section on mitigating factors, the trial court did not apply the correct standards and supply reasoned judgment in finding that although

the evidence established the factors argued by the defendant they were not mitigation. The trial court has obviously ignored a multitude of cases in which the same factors were found in mitigation and held to have substantial weight.

The Courts have held that the remorse of the defendant for his actions is a valid statutory mitigating factor. Smalley v. State, 546 So.2d 720, 723 (Fla. 1989); Songer v. State, 544 So.2d 1010 (Fla. 1989). Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983).

The defendant also presented evidence of chronic alcohol abuse, which, as noted above, was caused by and in response to the defendant's mental illness, and which psychiatrists noted may have contributed to the disease and the incident. See Songer v. State, supra. Additionally, other factors which are entitled to substantial weight in mitigation include that the defendant was a loving husband who cared for his invalid wife and had cared for his ailing mother, and who had, prior to his mental deterioration, shown kindness and acts of charity for his neighbors. (R 4582-4609) See Lockett v. Ohio 438 U.S. 586, 604 (1978); Campbell v. State, 15 FLW at S344, n.6; McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Walsh v. State, 418 So.2d 1000 (Fla. 1982); and Washington v. State, 362 So.2d 658 (Fla. 1975).

A multitude of highly relevant statutory and non-statutory mitigating circumstances are established here which, applying the correct standards for weighing these factors,

should militate against death for Mr. Cruse.

C. Summary

William Cruse's death sentences are disproportionate to his crime (when properly considered along with his severe mental illness) and his character. The evidence is strong: the trial court impermissibly found two aggravating circumstances, which are not supported by the law or the facts. The trial court rejected and/or ignored a plethora of mitigating factors. This Court must reverse his death sentences with directions to the trial court to impose life.

POINT XI

IN CONTRAVENTION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or implicitly rejected each of these challenges to the constitutionality of the Florida statute and that detailed briefing would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U. S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to arbitrary and capricious imposition of the death penalty.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent

manor. See Godfrey v. Georgia, supra; Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980) (England, J. concurring.). Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984)(Ehrlich, J. concurring in part and dissenting in part).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1975) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

The failure to provide the defendant with notice of the aggravating circumstances which make the offense a capital crime and on which the state will seek the death penalty deprives the defendant of due process of law. See Gardner v. Florida, 430 U.S. 349 (1977); Argersinger v. Hamlin, 407 U.S. 25 (1972); Amend. VI and XIV, U.S. Const.; Art. 1, Sections 9 and 15(a), Fla. Const.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968).

The Elledge Rule [Elledge v. State, 346 So.2d 998 (Fla. 1977)], if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the Eighth and Fourteenth Amendments to the United States Constitution.

Section 921.141(5)(d), Florida Statutes (1985) (the capital murder was committed during the commission of a felony), renders the statute unconstitutional in violation of the Eighth an Fourteenth Amendments to the United States Constitution, because it results in arbitrary application of this circumstance and in death being automatic in felony murders unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating.

Additionally, a disturbing trend has become apparent in this Court's decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 459 U.S. 895 (1982)(Brennan and Marshall, J.J.,

dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra, at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833, 934 (Fla. 1978) cert. denied, 414 U.S. 956 (1979)(emphasis added).

In two recent decisions, this Court has recognized previous decisions were improperly decided. In Proffitt v. State, 510 So.2d 896 (Fla. 1987) this Court reduced a death sentence to life despite having previously affirmed it on three prior occasions in Proffitt v. State, 315 So.2d 461 (Fla. 1975) affirmed 428 U.S. 242 (1976); Proffitt v. State, 360 So.2d 771 (Fla. 1978); and Proffitt v. State, 372 So.2d 1111 (Fla. 1979). The basis of the holding was this Court's duty to conduct

proportionality review. Similarly in King v. State, 514 So.2d 354 (Fla. 1987) this Court invalidated a finding of the aggravating factor that the defendant caused a great risk of death to many persons despite having approved it in King's direct appeal, King v. State, 390 So.2d 315 (Fla. 1980). In so doing, this Court acknowledged that the factor had not been proven beyond a reasonable doubt. What these two cases clearly demonstrate is that the death penalty as applied in Florida leads to inconsistent and capricious results.

In view of the arbitrary and capricious application of the death penalty at every level of the criminal justice system, the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated argument, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

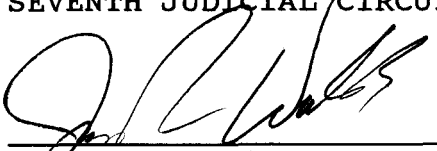
BASED UPON the cases, authorities, and policies cited herein, the appellant requests that this Honorable Court reverse the judgments and sentences and grant the following relief:

1. As to Points I - VII, remand for a new trial;

2. As to Point VIII-XI, remand for imposition of life sentences or, in the alternative, a new penalty phase trial.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, Westwood Center, 7th Floor, 2002 N. Lois Avenue, Tampa, FL 33607, and mailed to: Mr. William B. Cruse, Inmate Number 117051, Corrections Mental Health Institution, P.O. Box 875, Chattahoochee, FL 32324, this 10th day of July, 1990.

JAMES R. WULCHAK
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