IN THE SUPREME COURT OF FLORIDA



HAROLD W. HOOPER,

Appellant,

v.

CASE NO. 64,999

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR NASSAU COUNTY, FLORIDA

# INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

HAROLD HOOPER is the appellant in this case. Because the victims in this case were relatives, there may be some confusion about names. To clarify any possible confusion that may exist the following clarification is presented: Harold Hooper will be referred to throughout the brief as Hooper. James Hooper, Hooper's brother, will be referred to as James Hooper. Jimmy Hooper, James Hooper's adopted son will be referred to as either Jimmy or Jimmy Hooper. Rhonda Hooper will be referred to as either Rhonda or Rhonda Hooper. Kathaleen Hooper will be referred to as either Kathaleen, Kathy, or Kathaleen Hooper.

References to the record on appeal will be by the symbol "R" followed by the appropriate page number in parentheses. References to the transcript of testimony will be by the symbol "T" followed by the appropriate page number in parentheses.

## II STATEMENT OF THE CASE

An indictment filed by the grand jury of Nassau County on September 17, 1982, charged Harold Hooper, the appellant, with two counts of first degree murder and one count of attempted first degree murder (R-2900-2901). Subsequently, Hooper filed several pretrial motions, but the ones of particular relevance to this appeal were:

1. Motions for physical and psychiatric examination of James Scott Hooper (R-3034-3037) Denied (T-185,219,224)

2. Motion in limine to prohibit questioning of jurors regarding their attitudes towards capital punishment (R-3051-3054). Denied (T-232,305).

3. Motion for additional peremptory challenges (R-3060-3061). Denied with leave to renew at the conclusion of voir dire (R-276).

4. Motion for appointment of expert to assist defense and motion for taxing of costs (R-3066-3068). Denied (R-3175, T-213,216).

5. Motion for a proffer of testimony and supplement to motion for appointment of expert to assist the defense counsel and to tax costs (R-3146-3147). Denied (R-3172).

6. Motion to waive Hooper's presence during voir dire (R-299). Denied (R-302).

Hooper proceeded to trial on June 20, 1983, before the Honorable James L. Harrison, and after hearing the evidence, law, and argument, the jury found Hooper guilty of two counts of first degree murder and one count of attempted second degree murder (R-3308).

Additional testimony was heard during the sentencing phase of the trial, and the jury returned, by a vote of 9 to 3, a death recommendation (R-3336).

The court, following the jury's recommendation, sentenced Hooper to death for each murder and 15 years for the attempted second degree murder conviction to run consecutively to each death sentence (R-3400-3405).

In aggravation, the court found:

1. As to Kathaleen Hooper and Rhonda Hooper:
   a. Hooper had a conviction for a prior violent felony (R-3424-3426).

b. The murder was committed in an especially heinous, atrocious, and cruel manner (R-3428-3429).

2. As to Rhonda Hooper:
   a. Hooper committed the murder to avoid or prevent lawful arrest (R-3426-3427).
   b. Hooper committed the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (R-3430-3431).

In mitigation, the court found:

1. Hooper had served in the Army.
2. Hooper had served in the Salvation Army.
3. Hooper had a present dedication to Christian principles (R-3423).

This appeal follows.

## III STATEMENT OF THE FACTS

August 19, 1982, was a long day for 12 year old Jimmy Hooper (T-1409), his sister Rhonda, and his mother. About 9:00 p.m. they had gone to a Flash Food Store in Fernandina Beach where Kathaleen worked so she could do a money check (T-1415). Jimmy left them and wandered about for a while, but eventually, his mother picked him up and they returned to their home at the Marsh Cove Apartments, also in Fernandina Beach (R-1416).

Jimmy made himself a sandwich then went to his room to listen to some music (R-1418-1419). After a while, he turned off the music and went to sleep (T-1424). Before falling asleep, however, he heard Harold Hooper, his uncle, enter the apartment (T-1421). Hooper was living with his brother, James Hooper, Jimmy's adoptive father (T-1411,1412), while he looked for work (T-1629). After a few minutes, Hooper came into Jimmy's darkened room (T-1421) to get something out of a closet (T-1422). Jimmy pretended he was asleep (T-1423). A short time later Hooper returned but only opened the door to Jimmy's room; his breathing was ragged like he was out of breath (T-1423). Hooper left and Jimmy drifted off to sleep (T-1424).

Sometime later Jimmy was awakened by someone beating him over the head with

something hard covered by a white pillow case (T-1424-1425). Jimmy thought it was Hooper (T-1424).[1] His attacker hit him on the head seven or eight times (T-1425), causing serious injuries. As the assailant left, Jimmy was crying and hollering (T-1425). Jimmy then apparently fainted (T-1427).

He was awakened in the morning, however, by his father, a truck driver, who had just returned from work (T-1428,1626,1635). In the living room, James Hooper found the body of his wife, and in the master bedroom he found his daughter's body (T-1636,1638). His wife had several stab wounds in her neck, chest, and back (T-1367-1369) plus some superficial "defensive" wounds on her arms (T-1375). One of her fingers was almost severed, as if she had tried to grab the knife of her attacker (T-1380).[2] Rhonda also had some stab wounds in her neck (T-1386), but the cause of her death was strangulation (T-1389).

Blood was all over the bedroom and living room, and blood consistent with Hooper's blood type was found in the hallway (T-1770,1772), master bedroom (T-1777), bathroom (T-1787), near the stereo (T-1771), on a white garbage bag in the living room (T-1775), on Jimmy's clothes (T-1790), and on the garrote used to strangle Rhonda (T-1793).

For Hooper, the 19th of August was also a long day. Since coming to Florida from Ohio he had regularly eaten at the Seahut Restaurant in Jacksonville (T-1892, 1906). He had struck up a friendship with George Rivenbark, the manager of the restaurant (T-1891), and eventually the two agreed to go into business together (T-1898). Hooper, however, misled Rivenbark, and by the 19th Hooper was depressed about what to do (T-1905,2102).

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[1] At trial, George Delmar, an acquaintance of Jimmy's, said that Jimmy told him he was unsure that Hooper attacked him (T-2043,2049).

[2] While some burn marks were on Kathaleen Hooper's neck (T-1372), the cause of her death was the knife wounds (T-1380). Moreover, while death would have occurred within five to ten minutes (T-1383), unconsciousness would have been lost within five to ten seconds (T-1383).

Unfortunately Hooper was an alcoholic (see presentence investigation report), and starting sometime in the afternoon of the 19th, he began drinking (T-1880, 2102). One employee of the Seahut saw him drink three beers, which was unusual because she had never seen Hooper drink liquor (T-1880). Over the next several hours as Hooper brooded over what to tell Rivenbark (T-2102), he drank 10 to 12 beers, at least a half bottle of wine (T-2140) (and perhaps as much as three bottles of wine), and a considerable amount of whiskey (T-2102,2102,2140-2141, 2155).[3] He was, as he put it, "feeling no pain." (T-2141).

Hooper was supposed to pick Rivenbark up at the bus station about 1:40 a.m. on the morning of the 20th (T-1893). About 1:00 a.m., however, Hooper decided to avoid a confrontation with Rivenbark by returning to Ohio (T-2102). He wandered about, drank some more liquor (T-2103), and finally went to his car where he blacked out (T-2103). Later, he regained consciousness when his car hit the back end of a truck (T-2103). Little damage was done, and eventually he drove to the Marsh Cove Apartments (T-2104).

When he got there, however, the door to Hooper's apartment was locked, and after a few minutes he walked through the sun porch door (T-2108). He hollered for Kathy, James Hooper's wife, but got no response (T-2108).

He heard some feet running and was suddenly confronted by a man who hit him on the head, knocking him out (T-2108,2109). When he came to, he staggered about for some time, wiping blood out of his eyes (T-2145). He saw Kathy's and Rhonda's bodies and felt for their pulses (T-2172). He became sick and went to the bathroom where he vomited (T-2107,2111). He could not find a telephone, and he got in his car and blacked out (T-2112). Somewhere he hit a tree (T-2112). That was the last thing he remembered until he was outside of Macon, Georgia (T-2112).

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[3] At this time Hooper weighed 325 pounds and was six feet eight inches tall (T-2141).

By then he did not recall what he had seen in the apartment, and he drove to a Salvation Army Building in Cincinnati (T-2112-2113) where he signed in using his name (T-2115).

A few days later, the Ohio police began looking for Hooper and eventually they focused upon Hooper's residence at the Salvation Army. Several policemen converged upon the building, and when someone told Hooper they were looking for him, he told that person that he had only taken money but not the gun (T-1236,2116).[4] He ran to the second story roof of the building (T-1912), and several times he went to the edge, apparently deciding whether to jump (T-1914,1915). Finally, he broke a window, picked up a piece of the broken glass and started to slash his wrists (T-1915).

By this time, a policeman was near him and talked to Hooper, trying to get him to surrender (T-1951), and eventually he did (T-1953).

When questioned initially Hooper said he wanted to see a lawyer (T-2273). The police stopped questioning, but shortly thereafter they gave him a copy of a search warrant (T-2279). Shaken by what he had read (T-2283), Hooper asked to see the police, and when brought before them he asked if what was in the affidavit was true (T-2283). When told he had beaten Jimmy Hooper, he was physically shaken, and he broke down and cried (T-2320). The police said they wanted to talk with him, but Hooper only wanted to know "if this is right, I want to know if this is true?" (T-2283). After Hooper signed a rights waiver form (T-2284), he told the police that he had drunk a lot of beer and wine on the 19th and had experienced blackouts (T-2300).[5] He denied, at that time, that he went

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[4] Apparently this was a reference to the money he had taken from the Seahut Restaurant (T-2116).

[5] Later, Hooper's memory of what happened on the 19th and 20th partially returned (T-2126).

to the Marsh Cove Apartments although he said he could have (T-2301). When he drank, things got worse (T-2317), he had "flashes," and something finally breaks, it did so every time (T-2313).[6] Three months later, his memory of what happened on the 19th returned in bits and pieces, and then, for the first time, he mentioned the attack on him (T-2126). Significantly, he had a scar on his head where he said he had been hit (T-2212).

James and Kathaleen Hooper's marriage apparently had some rough spots. They had had several arguments about James hitting Jimmy as a means of discipline (T-1661).[7] Also, on the day before the murder, the couple had had another argument over a speeding ticket James Hooper had recently received (T-1664).

James also was the beneficiary of a $21,000.00 insurance policy he had taken out on his wife and daughter (T-1649). He had paid some bills and bought a car with the money; he had, however, paid none of the funeral expenses for his wife and daughter (T-1651).

While in Ohio making funeral arrangements (T-1650), James began sleeping with Cindy Hooper, Hooper's ex-wife (T-1650). Since October 1982 they have lived together (T-1649,1650).

Moreover, Hooper admitted falsifying his driving log for the 19th and 20th of August (T-1665-1666).

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[6] Counsel moved for a mistrial when the state witness said Hooper said "Something finally breaks, it does so every time." (T-2160).

[7] The court excluded the rest of this statement of the facts as irrelevant (T-1657). Hooper was very close to Jimmy and Rhonda, and he often took Jimmy fishing or to a video arcade (T-1442,1469). Rhonda occasionally would hug and kiss Hooper (T-1435).

## IV ARGUMENT

### ISSUE I

THE COURT ERRED IN REQUIRING HOOPER'S PRESENCE DURING INDIVIDUAL VOIR DIRE IN CHAMBERS WHEN HOOPER MADE A VOLUNTARY AND KNOWING REQUEST NOT TO BE PRESENT, IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Immediately before the Court started individual voir dire of prospective jurors in its chambers, Hooper waived his right to be present during this part of the jury selection (T-299-300). He did so because of his "extremely large size" (Hooper is six feet eight inches tall and weighed 325 pounds) (R-2141) which he believed might intimidate the jurors (T-300). Initially, the court granted the motion (T-300), but upon state argument that Rule 3.180(a), Florida Rules of Criminal Procedure prevents a waiver of defendant's presence (T-301-302), the court reversed itself and denied the motion (T-303,311) even after Hooper, under oath, said he did not want to be present at the "preliminary stages" of the jury questioning[8] (T-341). The court, however, erred by requiring Hooper's presence.

Hooper, of course, has a constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Francis v. State, 413 So.2d 775 (Fla. 1983). Nevertheless, because requiring Hooper's presence is for his benefit and not necessarily for the state's, he can, if he so chooses to do so,[9] voluntarily absent himself from all or portions of his trial. Id. at 1177. Adopting a position that he cannot waive his rights would inpinge severely upon his right to present his defense, to have effective assistance of counsel, and

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[8] The jury selection was divided into two parts. The first part included an in chambers examination of individual jurors regarding their knowledge of the case and opinions concerning capital punishment. The second phase focused upon the traditional voir dire examination.

[9] Although this has been held to be true for non-capital cases, Hooper can think of no legal reason why a capital defendant cannot likewise waive his presence. Id. fn.2.

with respect to this case, to have an impartial jury.

> There is little support in the law or in common sense for the proposition that an informed waiver of a right may be ineffective even where voluntarily made. Indeed, the law is exactly to the contrary,
>
> * * *
>
> Unless an individual is incompetent, we have in the past rejected any paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case. To do so would be to "imprison a man in his privileges," and to disregard "that respect for the individual which is the lifeblood of the law."
>
> Michigan v. Moseley, 423 U.S. 96, 46 L.Ed. 2d 313, 96 S.Ct. 321 (1975) (White, concurring) (cites omitted).

Accordingly, the U.S. Supreme Court in Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938) held that a properly waived right can waive any jurisdictional impediment to the right to assistance of counsel. Moreover, not only may the right to counsel be waived, but also the right to have the judge present during jury selection may be waived. Peri v. State, 426 So.2d 1021 (Fla. 3d DCA 1983). In fact,

> A party may waive any right to which he is legally entitled whether secured by contract, conferred by statute or guaranteed by the Constitution.
>
> Belaire Securities Corp. v. Brown, 124 Fla. 47, 83, 168 So. 625, 639 (1936).

Consequently, Hooper could waive his right to be present during part of jury selection, and he can think of no legal reason why the state should be able to control Hooper's defense tactics by insisting he be present.

Evidently, it was a tactical decision for Hooper to be absent. The reasons for this decision were obvious. The voir dire was conducted in chambers, and owing to Hooper's size, and presence relatively near any prospective juror, counsel and Hooper legitimately believed that the jurors might be intimidated

by Hooper if he was present. With him being present, the jurors might not be completely candid in their responses. Of course short of asking the jurors if they were intimidated, there is no way that counsel could show such apprehension. Yet, the court denied counsel's attempts to inquire into the possibility of juror intimidation (T-437). Counsel, therefore, was precluded from discovering if any actual prejudice existed. Nevertheless, because of Hooper's size and the in chambers inquiry, the court denied Hooper's constitutional right to an impartial jury by forcing him to exercise his constitutional right to be present at the critical stages of his trial. Because this Court cannot assess the extent of the prejudice, if any, Hooper may have sustained by the trial court's ruling, this Court must reverse for a new trial. Francis at 1179.

ISSUE II

THE COURT ERRED IN NOT EXCLUDING VENIREMAN HAGAN BECAUSE OF HIS UNAMBIGUOUS DECISION TO AUTOMATICALLY RECOMMEND THE DEATH SENTENCE FOR ANY MURDER.

[10]

The accused in a capital case, just as much as the state and maybe more so, has a right to a jury composed of persons who can and will consider the full range of punishment; consequently, the refusal to grant a challenge for cause to a juror who would automatically vote for a death sentence in every case, or in a particular kind of case regardless of whatever mitigating circumstances might be presented, violates the accused's right to an impartial jury, guaranteed by the federal and Florida Constitutions. See Thomas v. State, 403 So.2d 371, 375-376 (Fla. 1981); Crawford v. State, 395 F.2d 297,303-304 (4th Cir. 1968);

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[10] The accused's right may be considered even more compelling than the state's, since the state has no constitutional right to the imposition of capital punishment in any particular case [Crawford v. Bounds, supra, at 312], while the accused has a constitutional right to an impartial jury.

Spinkellink v. Wainwright, 564 F.Supp. 459,487 (M.D. Fla. 1983); Patterson v. State, 283 S.E.2d 212,214-16 (Va. 1981); Smith v. State, 573 S.W. 2d 543 (Tex. Cr.App. 1977). See especially Cuevas v. State, 575 S.W.2d 543 (Tex.Cr.App. 1978) (defense challenge for cause to prospective juror who would automatically vote for death penalty in all cases of intentional murder unless insanity was proven should have been granted; judgment and sentence reversed); Pierce v. State, 604 S.W. 2d 185 (Tex.Cr.App. 1980) (defense challenge for cause to prospective juror who would automatically vote for death penalty in all cases of robbery-murder should have been granted; judgment and sentence reversed).

Bias against the defendant in the sentencing aspect of a capital case amounts to a "fundamental violation . . . [of] the express requirements in the sixth amendment to the United States Constitution and in Article I, section 16, of the Florida Constitution, that an accused be tried by 'an impartial jury'" Thomas v. State, 403 So.2d 371,375 (Fla. 1981). It is error to deny a challenge for cause to a prospective juror who harbors such a bias. Thomas v. State, supra; Smith v. State, supra; Cuevas v. State, supra; Pierce v. State, supra. Where there is any reasonable doubt as to a juror's possessing the requisite state of mind as to render an impartial verdict (as to guilt or penalty or both), the defendant must be given the benefit of the doubt, and the juror should be excused for cause. See Blackwell v. State, 101 Fla. 997, 132 So. 468 (1931); Singer v. State, 109 So.2d 7, 23 (Fla. 1959); Leon v. State, 396 So.2d 203,205 (Fla. 3d DCA 1981). A juror's statement that he can and will return a verdict according to the evidence and the law is not determinative of his competency, if it appears from other statements made by him that he is not possessed of a state of mind which will enable him to do so. Singer v. State, supra; Leon v. State, supra; see Irvin v. Dowd, 366 U.S. 717 (1961); Johnson v. Reynolds, 97 Fla. 591, 121 So. 793 (1929); Williams v. State, 440 So.2d 404 (Fla. 1st DCA 1983).

In reviewing a trial court's refusal to excuse for cause prospective jurors who acknowledged having "automatic death penalty" beliefs, the appellate court must look at "the overall picture presented by the voir dire examination" of the challenged juror, to determine whether "[his] testimony as a whole indicated an inability to consider the full range of punishment." Smith v. State, supra, at 765; Cuevas v. State, supra, at 545; Pierce v. State, supra, at 187.

In Pierce v. State, supra, prospective juror Crenshaw clearly indicated in voir dire that he would automatically vote for the death penalty in any case in which the defendant was convicted of robbery-murder. The Texas Court of Criminal Appeals, in reversing the judgment and death sentence, wrote:

> The appellant contends that venireman Crenshaw's voir dire responses indicate that he was only able to consider the death penalty, and not life imprisonment, for a capital murder committed during a robbery. He urges that reversal is therefore required under Cuevas v. State, supra, and Smith v. State, supra. He also contends that the record in the instant case is more compelling for reversal than the records in Cuevas and Smith, in which reversals of capital murder convictions were required. We agree.
>
> In Smith, we held that the trial court committed reversible error in overruling the defendant's challenge for cause of a prospective juror. We found:
>
> > "The overall picture presented by the voir dire examination of Payne is one of a person holding strong convictions that death is the only punishment he could consider for a person guilty of capital murder, and that life imprisonment is not adequate punishment and would not be considered."
>
> 573 S.W.2d at 765. During attempts to rehabilitate the venireman in Smith, he indicated that he could consider both life imprisonment and the death penalty in answering the penalty issues, and that he would hold the State to its burden of proof on the punishment issues. Nevertheless, we concluded that the venireman's testimony as a whole indicated an inability to consider the full range of punishment.

> Reviewing the voir dire responses of venireman Crenshaw in light of our holdings in Smith v. State, supra, and Cuevas v. State, supra, we must conclude that he demonstrated an inability to consider the full range of punishment for a capital murder committed during a robbery. . . .
>
> Pierce v. State, supra, at 187.

In this case, venireman Hagan, when asked by defense counsel, said he would automatically recommend the death sentence if Hooper was guilty of murder, or if the victim was a child (T-537).

> Q. Do you feel in a first degree murder case -- for the sake of argument and only for the sake of argument -- if Mr. Hooper should be found guilty, death should automatically be imposed?
>
> A. Yes.
>
> Q. Do you feel that because a child is the victim in the case, death should automatically be imposed?
>
> A. Yes.
>
> (T-537)

Hagan, however, also said that he could put aside his views and follow the law (T-538). Nevertheless, counsel challenged him for cause which the court denied (T-539). Counsel, however, was unable to excuse him peremptorily because he had exercised all of his peremptory challenges, and the court refused to give him more (T-1242). Finally, after the jury had returned their verdict, counsel renewed his objection to Hagan, which the court again denied (T-2672). Consequently, the problem presented to Hooper by Hagan was real and not in any fashion imaginary or forced. See Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983).

From the record, Hagan's unequivocal willingness to automatically vote for death in any first degree murder case, especially those involving children, and his "eye for an eye" philogosphy rendered him constitutionally unacceptable to serve as a juror in this case. Fitzpatrick at 1076.

Moreover, attempts at rehabilitating Hagan failed to remove the taint of his earlier automatic death vote. Specifically, he said he could follow the law (T-539). Yet, the question, as framed by the court, was such that only a devoted anarchist would answer negatively, and from the totality of the circumstances Hagan remained unqualified to serve.

Hagan's ambiguous rehabilitation could have been clarified by examining the situations or circumstances under which Hagan would recommend life. But simply asking him if he could follow the law was ambiguous and never clarified his view regarding his automatic death position. Consequently, the court erred in denying Hooper's challenge for cause and for refusing to grant him additional peremptory challenges.

ISSUE III

THE COURT DENIED HOOPER DUE PROCESS OF LAW AS GUARANTEED IN THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT EXCUSED FOR CAUSE VENIREMAN MUSGROVE BECAUSE HE WAS A SLOW READER.

During the examination of venireman Musgrove, Musgrove said that he could not read or write (T-588). More accurately, he said:

> I can figure out what is going on, but something you all might learn in 30 seconds, it might take me three or four or five minutes.
>
> (T-589)

The court, upon motion of the state (T-591), and over defense objection (T-593) excused Musgrove because:

> I don't believe, with his limited education, that his ability to grasp possibly complex legal problems is sufficient.[11]
>
> (T-593)

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[11] The court also believed that Musgrove did not understand its instruction on the bifurcated trial (T-581,591). But, the record clearly refutes this (T-585). Musgrove's "confusion" arose from the possibility of imposing death, a penalty he could nevertheless impose if the circumstances warranted (T-586).

The court erred, however, by excusing Musgrove because no inquiry was made into his education, and in any event his education or reading ability was not a lawful reason to excuse him from jury service. Thus, excusing Musgrove because he read slowly amounted to an arbitrary exclusion of an otherwise qualified person for jury service and is grounds for a new trial. Monte Cristi Condominium Association v. Hickey, 408 So.2d 671 (Fla. 4th DCA 1982).

Of course, the purpose served by the challenge of veniremen for cause is to obtain a jury that in appearance as well as in fact is fair and impartial. Walsingham v. Singer, 61 Fla. 67, 56 So. 195 (1911). Nevertheless, the initial presumption is that all persons called for jury duty are qualified. Ammons v. State, 61 Fla. 166 (1913). The legislature, however, has determined that certain prospective jurors, for various reasons, are not fit to serve as jurors. Section 913.03, Florida Statutes (1981). Significantly, for purposes of this appeal, a person's inability to read or write or lack of education is not a legal challenge for cause.

Florida courts generally do not recognize limited education as a legal objection to a venireman serving as a juror. Rollins v. State, 148 So.2d 274 (Fla. 1963). But, as with most rules, this general statement has an exception:

> (3) When the nature of any civil action requires a knowledge of reading, writing and arithmetic, or any of them, to enable a juror to understand the evidence to be offered, the fact that any prospective juror does not possess the qualifications is a ground of challenge for cause.[12]
>
> Jefferson County v. B.C. Lewis, 20 Fla. 980 (1884).

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[12] 912.12 Qualifications of jurors.—The qualifications of jurors in criminal cases shall be the same as their qualifications in civil cases.

In this case, jurors did not need any ability to read as most of the evidence introduced at trial was either objects gathered at the crime scene or pictures. The most difficult testimony to understand was probably that of the medical examiner and serologist, both of whom were admitted as expert witnesses (T-1334, 1741). But the difficulty of their testimony was due to the technical and specialized nature of their fields, and such testimony would have been difficult for anyone not trained in these areas to understand regardless of their educational level.

The rest of the trial testimony, however, demanded only that the juror use their common sense and judgment in analyzing the evidence, qualities which life's experiences uniquely provide.

In short, this was not a tax fraud or anti-trust case involving mountains of paper. Instead, it was a murder case similar in prosecution to other murder cases which have been tried since the Magna Carta first formally provided for jury trial. Literacy, now as then, was not a requisite essential in order to pass judgment upon the acts of another. Consequently, Musgrove's slow reading was not a legitimate cause for excusing him from jury duty, and by excusing him the court arbitrarily excused an otherwise qualified juror from selection for jury service. See Monte Cristi Condominium Association, supra.

Thus, the general rule that Hooper was entitled to only a qualified jury and not a particular juror, Ammons, supra, must give way to the constitutional prohibition against arbitrary actions of the state. Monte Cristi, supra. If a single juror is arbitrarily (i.e. without legal reason) excused for cause, the court denied Hooper a fair trial. Monte Cristi, supra. Cf. Davis v. Georgia, 429 U.S. 122, 50 L.Ed.2d 339, 97 S.Ct. 399 (1976).

Further, by excusing Musgrove for cause, the trial court forced Hooper to accept an objectionable juror (T-540,2672); Leaptrot v. State, 51 Fla. 57,

46 So. 616 (1906); Chandler v. State, 442 So.2d 171 (Fla. 1983) (Atkins, dissenting), which by itself requires reversal for a new trial.[13]

ISSUE IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO GIVE APPELLANT'S REQUESTED JURY INSTRUCTION REGARDING VOLUNTARY INTOXICATION, WHERE VOLUNTARY INTOXICATION WAS A DEFENSE TO THE CRIME OF FIRST DEGREE PREMEDITATED MURDER AND WHERE THERE WAS EVIDENCE AT TRIAL OF APPELLANT'S INTOXICATION DURING THE RELEVANT TIME PERIOD, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION IN THAT APPELLANT WAS DENIED DUE PROCESS OF LAW AND TRIAL BY JURY.

For almost a century the State of Florida has recognized and upheld the continuing viability of the voluntary intoxication rule first adopted in Garner v. State, 28 Fla. 113, 9 So. 835 (1891). Chief Justice Raney stated the rule as follows:

> Whenever...a specific or particular intent is an essential or constituent element of the offense, intoxication, though voluntary, becomes a matter for consideration, or is relevant evidence, with reference to the capacity, or ability of the accused to form or entertain the particular intent, or upon the question whether the accused was in such a condition of mind to form a premeditated design. Where a party is too drunk to entertain or be capable of forming the essential particular intent, such intent can of course not exist, and no offense of which such intent is a necessary ingredient, be perpetrated.
>
> 28 Fla. 153,154.

The Court further explained the rule as it applied to homicide cases, stating

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[13] Hooper exhausted his peremptory challenges, and the court denied his request for more (T-1242). The issue of a particular venireman's competence to sit as a juror is a mixed question of law and fact, lying within the trial court's discretion. Singer v. State, 109 So.2d 7 (Fla. 1959). Nevertheless, assuming the facts in the light most favorable to the state (i.e., Musgrove was illiterate) the court was wrong in excusing Musgrove as a matter of law, and Hooper asks this Court to correct the trial court's application of a known rule of law. Canakaris v. Canakaris, 382 So.2d 1197, 1202 (Fla. 1980).

that voluntary intoxication was relevant evidence only regarding first degree premeditated murder and that where a jury concludes the accused lacked the requisite intent to commit that crime due to intoxication, such does not operate as an outright acquittal, but, assuming the jury is otherwise convinced beyond a reasonable doubt that the accused was responsible for the killing, it operates so as to reduce the crime to second degree murder or manslaughter. Id. at 156. This Court has repeatedly stated the rule consistent with the Garner, supra, holding. Gurganus v. State, __So.2d__ (Case No. 62,432; opinion filed May 3, 1984) [voluntary intoxication relevant to ability to entertain specific intent to commit first degree murder and attempted first degree murder]; Gentry v. State, 437 So.2d 1097,1099 (Fla. 1983) [while not a defense to second degree and third degree murder, voluntary intoxication may negate requisite specific intent such as that involved in first degree premeditated murder]; Jacobs v. State, 396 So.2d 1113,1115 (Fla. 1981) [in first degree premeditated murder cases intoxication "may make the killer incapable of the reflection called for by the requirement of premeditation"]; Cirack v. State, 201 So.2d 706,709 (Fla. 1967) ["while not a complete defense, voluntary intoxication is available to negative specific intent, such as the element of premeditation essential in first degree murder."].

The Garner Court further held that the accused therein, having been charged with murder in the first degree, was entitled to a jury instruction which accurately stated the law as it applied to the voluntary intoxication defense, since "...the law does not presume a killing with a premeditated design; this, like every other element of murder in the first degree, is to be inferred by the jury from the facts proved." Garner v. State, supra, at 157. (emphasis in original text; citation deleted). In consistent fashion, the courts in Florida have long maintained that a defendant is entitled to

have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instruction. Smith v. State, 424 So.2d 726,732 (Fla.), cert.denied, __U.S.__, 103 S.Ct. 3129 (1983); Bryant v. State, 412 So.2d 347,350 (Fla. 1982); Palmes v. State, 397 So.2d 648,652 (Fla.), cert. denied, 454 U.S. 882 (1981); Motley v. State, 155 Fla. 545, 20 So.2d 798 (1945); Holley v. State, 423 So.2d 562,564 (Fla. 1st DCA 1982); Hudson v. State, 381 So.2d 344,346 (Fla. 3d DCA 1980); Laythe v. State, 330 So.2d 113,114 (Fla. 3d DCA), cert.denied, 339 So.2d 1172 (Fla. 1976); Koontz v. State, 204 So.2d 224,226-227 (Fla. 2d DCA 1967).

Bearing in mind the above introductory authorities, appellant submits: (a) that he was indicted on two counts of first degree premeditated murder and one count of attempted first degree premeditated murder; (b) that said crimes unquestionably require specific intent as an essential element;[14] (c) that substantial evidence of appellant's intoxication during the relevant time period was introduced at trial; (d) that appellant repeatedly, both in writing and orally, requested that the jury be instructed on the rules of law applicable to the voluntary intoxication defense; and (e) that the trial court committed reversible error in failing to so instruct the jury and the trial court's reasons for denying appellant's request are clearly erroneous.

Appellant's trial testimony revealed that he began drinking alcoholic beverages the day of the homicides (R-2101). This was abnormal behavior on his part, but he was worried about a lie he had told his employer (R-2102). During the afternoon and evening hours appellant consumed some portion of at least one bottle of wine, two pints of Johnny Walker Red whiskey, and 10 to 12 beers (R-2140,2141). Appellant began

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[14] Counts I and II of the indictment alleged that appellant killed Kathaleen and Rhonda Hooper from a premeditated design (R-2900). See: Sireci v. State, 399 So.2d 964,967 (Fla. 1981), cert.denied, 456 U.S. 984 (1982). Count III alleged appellant attempted to kill James S. Hooper with a premeditated design (R-2901). See: Gentry v. State, supra; Fleming v. State, 374 So.2d 954 (Fla. 1979); Deal v. State, 359 So.2d 43 (Fla. 2d DCA 1978).

drinking while at the Sea Hut Restaurant and, after leaving that establishment between 12:15 and 1:15 a.m., he drank two or three beers while walking around a beach area. He drank more whiskey during the same time period (R-2103). Not long thereafter appellant began feeling "woozy," suffered a black-out while driving which resulted in his striking another vehicle, and had to pull over and rest on the side of a road due to his condition (R-2102,2104). Appellant then proceeded to his brother's apartment with the intention of resting before engaging in a planned trip to Ohio. Appellant was too drowsy to begin the trip without the rest (R-2104-2106).

Appellant's testimony thereafter related to his running into an intruder in the apartment, being knocked unconscious by the intruder, and waking up sick to his stomach (R-2108,2109). Appellant became physically ill and vomited into the toilet (R-2112). In the midst of all this appellant discovered the victims. Appellant left the apartment and got in his car. In the process of leaving he hit a tree. The collision was the last thing appellant remembered until he gained some measure of coherence somewhere around Macon, Georgia (R-2112). During cross-examination appellant testified that he did not begin remembering the scene at the apartment until he remembered bits and pieces during flashbacks some months later (R-2129-2135). Also during cross-examination, appellant was asked if he was drunk after drinking a half-pint of wine, two bottles of whiskey, and 10 or 12 beers. Appellant responded that he was "feeling no pain" (R-2141). Appellant at one point stated that after discovering the victims everything in his mind was "completely confused" and that he didn't know what he was doing (R-2146,2147). Appellant testified that he had suffered black-outs prior to the night of the homicides (R-2163). Appellant acknowledged telling someone that if he had known what he had done, he would not have been caught so easily (R-2163,2164). On re-direct examination appellant stated that it was three months after the homicides when he first began remembering his actions of that evening (R-2171).

Deputy Sheriff Jack Culpepper testified on behalf of the prosecution and identified three beer cans which were found at the crime scene (R-1727,1728). During rebuttal Culpapper testified that appellant told him during an interview that he had been drinking wine, beer, and whiskey the day of the homicides. At the time of the interview, which was prior to appellant's flashes of memory, appellant stated that the last thing he remembered about August 19, 1982, was planning to drive to Ohio and thinking about retrieving his clothing from his brother's apartment (R-2301). Appellant told Culpepper about blacking out and not remembering much of anything about his actions until he was on I-95 in Georgia, heading toward Ohio (R-2300). Appellant could not recall coming into contact with the victims during that time, but stated he could have gone to the apartment (R-2301).

Henry L. Hines, Jr., formerly a captain with the Nassau County Sheriff's Office, also testified for the prosecution during rebuttal. Hines interviewed appellant on August 30, 1982, after his return from Ohio. When informed of the charge against him, appellant reacted with disbelief and broke down. Appellant further reacted by saying "I wouldn't doubt it, if I got drunk," (R-2312), or "Oh, God, no. No. I may have done it if I got drunk." (R-2319). Appellant referred to flashes of anger which he suffered upon becoming intoxicated and that they became worse the more he drank (R-2316,2317). Appellant told Hines he had experienced loss of memory for up to three or four hours on prior occasions (R-2318).

Margaret McGinnis, a cook at the Sea Hut Restaurant, testified that she saw appellant at the restaurant during the hours of 2:00 to 10:00 p.m. on the day of the homicides. She saw appellant drink three beers, but she did not serve him so she couldn't vouch for how much beer he drank. Appellant's drinking surprised her since she had never observed him do so before. Appellant had told her he "couldn't" and "didn't" drink alcohol

(R-1879-1883).

Culpepper also testified that he was involved in the search of appellant's vehicle in Norwood, Ohio and that numerous articles were seized. This occurred on August 27, 1982, or within a day or two thereafter - approximately one week after the homicides (R-1985-1988). The seized articles were turned over to the Florida Department of Law Enforcement Crime Lab in Jacksonville for analysis by a serologist, James Pollack (R-1988,1989). Pollack identified defendant's exhibit number three as being among the items he received from Culpepper (R-2066). The Clerk's Memorandum of Trial indicates that said exhibit was a Johnny Walker Red whiskey bottle (R-3237) and Pollack referred to it as a half-liter bottle of Johnny Walker whiskey (R-2068).

The prosecutor made extensive use of this evidence of intoxication during the guilt phase closing arguments. It was pointed out that appellant's finger-print was found on a beer can retrieved from the apartment (R-2406). It was argued that appellant drank between one-half bottle and three bottles of wine the night the offense occurred (R-2410). The prosecutor referred to appellant drinking the wine and a quart of Scotch (Johnny Walker Red) (R-2411). Over defense objection, the prosecutor referred to appellant's alleged statement: "When I get drunk, I go crazy." (R-2418).

The prosecutor went much further in arguing appellant's intoxication. He told the jury that he believed they could "...find from the evidence that Harold Hooper had been drinking a lot that day and that evening..." (R-2421). The prosecutor went so far as to state that appellant was "very drunk" and that such might have been the cause of an alleged argument with Kathaleen Hooper (R-2422). The prosecutor referred to appellant's condition when he left the apartment: "And then Harold Hooper left. And he was so drunk and he was in such a rage when he left...that he hit a tree..." (R-2424).

Prior to the closing arguments, after all evidence had been received, the court took a two and one-half hour recess during which jury instructions were discussed (R-2325). The court ruled that there was no evidence to support a first degree felony murder theory and thereafter the jury was to be instructed as to first degree murder by premeditated design only (R-2443). Apparently during that same time period, but off the record, the trial court denied defense requested jury instruction number 15: voluntary intoxication (R-2427; R-3271).

Prior to engaging in its closing argument, the defense moved the court to reconsider its ruling on the voluntary intoxication instruction in light of the state's closing argument, noting that the state's theory seemed to be that "...the jury could find from the evidence that Mr. Hooper did these acts in an intoxicated rage." (R-2427,2428). Counsel for appellant stated that voluntary intoxication was one of appellant's theories of defense, that the instruction was supported by the evidence, and that "...it would be the difference between first degree murder and second degree murder." (R-2428). The trial court denied the instruction once again, basing his ruling on a perceived inconsistency between appellant's trial testimony and a defense based upon intoxication. The trial court essentially ruled that if one desires to defend himself on the ground of voluntary intoxication he must abandon or forego any other defenses and openly admit to the offense(s) charged (R-2428). Paradoxically, the trial court deemed the prosecutor's closing argument to be proper since there was testimony to the effect that appellant was drinking and "...the jury may infer from his testimony the degree of his intoxication..." (R-2428). When counsel for appellant sought to debate the issue further the trial court made it clear he didn't want to hear any more argument (R-2429).

Another charge conference was held at the conclusion of closing arguments (R-2509). Once again a voluntary intoxication instruction was requested. Once again the request was denied (R-2515-2517). The trial court's position was that voluntary intoxication amounts to a complete, affirmative defense - like entrapment - which requires that the accused admit the offenses before asserting the defense (R-2516).

During the hearing of appellant's motion for new trial appellant once again asserted that "...there was ample evidence during the trial [that appellant] was intoxicated..." (R-2753), and, the state having conceded that no motive for the offenses existed, the voluntary intoxication instruction most certainly should have been given (R-2754,2755). The prosecution took the amazing position that there was no evidence that appellant was too intoxicated to intend his actions (R-2781). Appellant provided the court with seven cases, including Garner v. State, supra, which supported his position (R-2784). After a brief recess, the trial court attempted to distinguish Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA), review denied, 402 So.2d 613 (Fla. 1981), from appellant's case on the basis of the different offenses charged and apparently because a police officer supplied the evidence of intoxication in Mellins, supra (R-2787). Appellant's counsel repeatedly asserted the general rule regarding entitlement to a voluntary intoxication instruction, but the trial court ultimately stated that while he appreciated the offer of authority on the subject, "I will, however, reject that authority and, as I stated, adhere to my prior ruling." (R-2792).

The trial court, resolute in its decision to deny appellant the requested instruction, not only rejected and strayed from established precedent in Florida, but in effect allowed the prosecution to rely on appellant's intoxicated condition as an explanation for the otherwise motiveness offenses while precluding appellant from relying on that same

intoxicated condition for the purpose of negating the essential element of premeditated design inherent in the charged offenses. By its ruling the trial court diluted appellant's jury trial by removing the issue of appellant's mental condition from the jury's consideration and further deprived appellant of due process of law in that one of his theories of defense was never allowed to be evaluated by the finders of fact.

Appellant relied upon Mellins v. State, supra, during his arguments in support of the granting of a new trial. In Mellins several police officers responded to a disturbance call and discovered Cassandra Mellins lying on the ground, the victim of a beating. While helping her to a friend's apartment, a police officer noted a strong odor of alcohol on appellant's breath. Thereafter the perpetrator of the beating arrived on the scene and appellant began screaming obscenities. She was then arrested for disorderly intoxication and proceeded to kick and strike the police officers. She was ultimately charged with battery on a police officer and convicted. Id. at 1208.

There was testimony at trial that Mellins was intoxicated at the time of the incident, but she testified she was not. The trial court denied defense counsel's request for a voluntary intoxication jury instruction because of appellant's testimony, which was deemed inconsistent with any such defense. Id. at 1208,1209.

Appellant contended that there was some evidence of her intoxication at trial and therefore she was entitled to a jury instruction on that theory of defense. The district court of appeal agreed and reversed, holding that a requested instruction on intoxication must be given even when the only evidence of it comes from cross-examination of a state witness, it is not supported by empirical evidence, and the defendant denies being intoxicated. Id. at 1209.

The district court of appeal recognized that voluntary intoxication is a defense to the charge of battery on a police officer and other crimes involving specific intent and held:

> Where intent is a requisite element of the offense charged and there is some evidence to support this defense, the question is one for the jury to resolve under appropriate instructions on the law. [citation deleted].
>
> The law is very clear that the court, if timely requested, must give instructions on legal issues for which there exists a foundation in the evidence. [citation deleted].
>
> Id. at 1209.

The court rejected two arguments by the state. First, the fact that appellant's counsel sufficiently apprised the jury of the effect of intoxication on the element of specific intent did not render the error harmless since the jury "is admonished to take the law from the court's instructions, not from argument of counsel."[15] Id. at 1209. Second, the state relied upon entrapment cases which hold that one cannot deny committing the offense charged and also claim entrapment as a defense. Acknowledging and agreeing with the law regarding the affirmative defense of entrapment, the court found that rule inapplicable to voluntary intoxication cases and held that in such cases inconsistencies in defenses are allowable so long as proof of one does not necessarily disprove the other. Id. at 1210.

[15] The trial court at Hooper's trial instructed the jury that they "must follow the law as it is set out in these instructions" (R-3301) and that "[t]here are no other laws that apply to this case." (R-3303). See also: Gurganus v. State, supra [where this Court refused to deem error in excluding expert testimony regarding effects of drugs and alcohol harmless even where jury was instructed on voluntary intoxication and such was argued by defense counsel]; Bryant v. State, supra, at 350 ["Although during argument to the jury, defense counsel made clear his position as to the theory of independent act, the jury was not apprised of any legal basis upon which it could consider this position since the court refused to give an instruction on independent act."]; Motley v. State, supra, at 800.

The trial court in the instant case denied appellant's requested jury instruction due to a perceived inconsistency between appellant's trial testimony and a partial defense based on voluntary intoxication. Appellant submits that his defenses were not inconsistent and, further, even if some inconsistencies are deemed to have existed, there was substantial evidence of appellant's intoxication during the relevant time period, and he was therefore entitled to an instruction which accurately explained the law pertaining to his theory of defense.

Appellant testified at trial regarding the massive amount of alcohol he consumed the day and evening of the offenses. Appellant testified that black-outs, wooziness, and drowsiness resulted. By concluding that appellant's testimony regarding an intruder in the apartment was inconsistent with the theory of defense based upon voluntary intoxication, the trial court ignored the evolution of the case which culminated in appellant's jury trial.

That appellant's trial testimony was more detailed than his statements to police shortly after the offenses is understandable in light of his three month memory loss. The probability of appellant's severe intoxication and the possibility of an intruder actually striking appellant in the apartment are not mutually exclusive factual accounts of the night of the offenses. The jury could have easily found from the facts that appellant's intruder testimony was not credible, deeming it self-serving memory three months after the offenses, but nevertheless found that the substantial evidence of intoxication (as elicited at trial from appellant, Margaret McGinnis, Jack Culpepper, Henry L. Hines, Jr., and the physical evidence of beer cans and a whiskey bottle) negated any premeditated design on the part of appellant to kill his in-laws. However, a scenario wherein one becomes incapacitated due to alcohol and then goes home to be met by an intruder is certainly within the realm of possibility. Thus, it is apparent that these

dual theories of defense were not factually inconsistent.

Nor were they legally inconsistent. As held in Mellins, supra, voluntary intoxication is not an affirmative defense like entrapment, which requires admission to the offense prior to invoking the defense. Ever since Garner, supra, this Court has recognized that voluntary intoxication is never an excuse for a criminal act, but is relevant only as to one's capacity to form the requisite specific intent to commit the crime charged. See also: Gentry v. State, supra, at 1099. Thus, the trial court erroneously viewed voluntary intoxication as an affirmative defense (R-2428), referring to it as "almost like entrapment" (R-2516). It was in Cirack v. State, supra, wherein this Court stated that voluntary intoxication was not a "complete defense," but was only available to negative specific intent, "such as the element of premeditation essential in first degree murder." Id. at 709. See also: O'Quinn v. State, 364 So.2d 775,777 (Fla. 1st DCA 1978). The law did not require appellant to admit the offenses prior to being entitled to a jury instruction regarding voluntary intoxication and the trial court's ruling that appellant's defenses were legally inconsistent on that basis was clearly erroneous.[16]

Appellant contends that his intoxication did not necessarily preclude or disprove his intruder theory of defense; nor did the latter necessarily preclude or disprove the former. Mellins, supra, at 1210. There being some evidence of appellant's intoxication, the jury should have been instructed in that regard. Mellins, supra, at 1209.[17]

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[16] Although not made entirely clear by the court in the Mellins v. State, supra, opinion, it appears that Cassandra Mellins denied battering the police officer during her trial testimony. Such a conclusion is supported by the Court's analysis of entrapment cases relied upon by the prosecution. Id. at 1209-1210. It is unlikely that the defendant took the stand simply to deny her intoxication at the time of the offenses.

[17] See also: Fish v. Los Angeles Dodgers, 128 Cal.Rptr. 807 (Ct.App.2d 1976) [when considering a denied jury instruction, a reviewing court must view the evidence in support of the instruction in the light most favorable to the party who requested the instruction during trial].

Mellins, supra, is not an isolated case. In Edwards v. State, 428 So.2d 357 (Fla. 3d DCA 1983), the defendant was convicted of first degree murder and robbery. The defendant did not testify at trial, but there was some evidence that he had been drinking rum and coke at an all-night party which ended shortly prior to the offenses. The trial court denied a request for a voluntary intoxication instruction and the district court of appeal reversed, citing to Mellins, supra, and holding that the law is well settled that "a defendant is entitled to have the jury instructed on the law applicable to his theory of defense where there is any evidence introduced in support thereof." Edwards, supra, at 358. (emphasis supplied).

The Edwards court also cited to Frazee v. State, 320 So.2d 462 (Fla. 3d DCA 1975), for the often repeated maxim that juries resolve factual issues. In Frazee, supra, the jury was instructed regarding voluntary intoxication, but nevertheless convicted the defendant of the crime charged. On appeal it was argued that Frazee had been too intoxicated to form the specific intent required to be guilty of the crime charged. The court rejected that argument and held that "where a defense is interposed that the defendant was too intoxicated to form a specific intent to commit the crime and there is sufficient competent evidence adduced on this issue the resolution of such question is solely for the trier of facts." Id. at 463 (emphasis supplied).

In concluding its discussion of the intoxication issue, the Edwards court held that "[e]ven if the evidence was not convincing to the court, it was sufficient to go to the jury as an issue of fact." Edwards, supra, at 359.

In Fouts v. State, 374 So.2d 22 (Fla. 2d DCA 1979), overruled on other grounds in Parker v. State, 408 So.2d 1037 (Fla. 1982), the defendant was convicted of escape. At trial there was evidence that the defendant ingested LSD prior to leaving lawful confinement. The trial court properly instructed the jury on voluntary intoxication, but erred in excluding expert testimony

regarding the effects of LSD. Id. at 28. The Fouts court stated the general rule regarding the partial defense of voluntary intoxication and noted this Court's recognition of its continuing viability in Cirack v. State, supra. Id. at 25.

In the recent opinion of Gurganus v. State, supra, this Court cited to Fouts, Garner, and Cirack with approval. Although Gurganus involved exclusion of expert testimony much like Fouts, this Court stated that whenever "specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant." Slip opinion at 7-8. The jury therein was properly instructed on voluntary intoxication, but relevant expert testimony was excluded by the trial court. Finding the testimony "crucial" to the defendant's defense, this Court reversed and remanded for new trial. Id. at 9.

Fouts and Gurganus involved juries sufficiently apprised of the principles of law regarding voluntary intoxication, but deprived of relevant evidence which should have been admitted and evaluated by them in light of the instructions. Appellant was prejudiced in that his jury had heard relevant evidence regarding his intoxication, but were not apprised of any legal basis upon which it could consider it as a partial defense. If anything, the prosecution's closing argument misled the jury into believing intoxication was an explanation for the offenses, but certainly not a partial defense to them.

In Heathcoat v. State, 430 So.2d 945 (Fla. 2d DCA), approved, State v. Heathcoat, 442 So.2d 955 (Fla. 1983), the trial court failed to instruct the jury on voluntary intoxication despite the fact that the evidence (the victim's testimony and impeachment) warranted it and the defendant requested it. The court reversed, citing the general rule as contained in Mellins, supra,

and other cases.

Thus, voluntary intoxication is a well recognized partial defense to crimes involving specific intent. Even in Linehan v. State, 442 So.2d 244 (Fla. 2d DCA 1983) [pending on review of certified question, Case No. 64,609, Florida Supreme Court], where the court espouses radical changes in judicial interpretation of the voluntary intoxication defense, the defense is left intact as applied to first degree premeditated murder. The court stated:

> The existence of a subjective intent to accomplish a particular prohibited result, as an element of a "specific intent" crime, is perhaps most clearly evident in the crime of first degree, premeditated murder. (citation deleted)

Id. at 248.

The court, in discussing policy considerations, urged adoption of "...the view that voluntary intoxication is not a defense to any crimes other than first degree premeditated murder..." Id. at 253 (emphasis supplied). Thus, even in such an extreme opinion, wherein a century of established law is questioned, the voluntary intoxication defense is considered appropriate in first degree premeditated murder cases.

The foregoing cases, as well as the federal and foreign jurisdiction cases to be discussed subsequently, point to another error the trial court made while rejecting appellant's request for the jury instruction. By examining the trial court's questioning of appellant's counsel during the hearing on motion for new trial, it becomes apparent that the trial court was of the opinion that the evidence of intoxication had to convince him that the defense was viable before an instruction was warranted (R-2786-2792) (specifically, see R-2789 where the trial court asked counsel: "Do you equate drunken rage with a state of intoxication which would prevent one from forming the necessary intent for first degree murder?") The trial court ignored the rule of law that juries resolve factual issues, Frazee, supra, and the admonition

that "[e]ven if the evidence was not convincing to the court, it was sufficient to go to the jury as an issue of fact."[18] Edwards, supra, at 359. (emphasis supplied); Bryant v. State, supra.

Appellant's entitlement to a jury instruction on voluntary intoxication is not altered by the fact that most of the evidence of intoxication came during his trial testimony. In addition to the well settled rule that the credibility of witnesses and the weight to be given testimony is for the jury to decide,[19] the opinion in Chapman v. State, 391 So.2d 744 (Fla. 5th DCA 1980), is instructive.

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[18] The instant case is easily distinguishable from this Court's opinion in Jacobs v. State, supra. Therein, while noting the general rule that voluntary intoxication may render a killer incapable of the reflection called for by the requirement of premeditation and ruling that a defendant charged with first degree felony murder may defend himself on the basis that he was too intoxicated to entertain the intent required by the underlying felony (robbery) this Court found no error in the trial court's refusal to give a requested voluntary intoxication instruction because: (a) evidence at trial, including accomplice testimony, revealed that Jacobs and his companions formed the intent to rob Ed's Country Store prior to a three hour drinking and driving trip to the store; (b) there was no evidence of intoxication; and (c) there was no evidence as to the amount of alcohol consumed. In the instant case there existed no basis for a felony murder theory of proof (R-2443), there was no evidence of a preconceived plan on the part of appellant to kill his in-laws, there was no accomplice testimony supporting a conclusion that appellant had a preconceived plan to commit any offense whatsoever, there was ample evidence of appellant's intoxication [the prosecutor viewed the evidence of intoxication ample enough to refer to appellant as "very drunk" (R-2421) and as being "so drunk and...in such a rage...he hit a tree..." (R-2424)], and the amount of alcohol consumed during the relevant time period was established to be between one-half bottle and three bottles of wine, a quart of scotch whiskey, and ten to twelve beers (R-1879-1883,2140,2141,2301). Thus, the very factors which led this Court to reject Jacobs' argument compel acceptance of appellant's contention herein.

[19] Hitchcock v. State, 413 So.2d 741 (Fla.), cert.denied, __U.S.__, 103 S.Ct. 274 (1982); Alvord v. State, 322 So.2d 533 (Fla. 1975), cert.denied, 428 U.S. 923 (1976); Hudson v. State, supra at 346 ["A defendant's testimony may not be totally disregarded merely because he is the defendant. His testimony must be weighed just as that of any other witness."].

At trial Chapman apparently desired to rely exclusively on an insanity defense. Over his objection, the trial court instructed the jury on voluntary intoxication even though the only evidence in support of the instruction was Chapman's testimony during trial. The appellate court found no error due to the giving of the instruction because "[t]here was much testimony by the appellant that he had been drinking heavily the week before the shooting and that he had been drinking the evening of the shooting." Id. at 746. Thus, a defendant's testimony of intoxication during the relevant time period - standing alone - may form the evidentiary basis for a voluntary intoxication jury instruction. Further, it appears that Chapman, supra, stands for the proposition that a trial court may instruct on any defense supported by the evidence, despite the defendant's objection and regardless of any inconsistency between theories of defense created by the instruction.[20]

Appellant submits that he has clearly demonstrated reversible error on the basis of Florida precedent, but appellant would also rely upon federal law which supports his contention and reveals the constitutional magnitude of the error committed by the trial court.

In Hopt v. Utah, 104 U.S. 873 (1882), the United States Supreme Court reversed a first degree murder conviction because the trial court refused to instruct the jury on voluntary intoxication where the defendant requested it and some evidence supported that theory of defense. The Court held:

> At common law, indeed, as a general rule, voluntary intoxication affords no excuse, justification or

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[20] Chapman, charged with first degree premeditated murder, was no doubt hoping for complete acquittal based upon his asserted primary defense of insanity. The trial court's voluntary intoxication instruction could have resulted in a jury verdict of guilt as to second degree murder or manslaughter, a posture Chapman sought to avoid by objecting to the instruction.

> extenuation of a crime committed under its influence. (citations deleted). But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question, whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury...
>
> The instruction required by the defendant clearly and accurately stated the law applicable to the case; and the refusal to give that instruction, taken in connection with the unqualified instruction actually given, necessarily prejudiced him with the jury.
>
> Hopt, supra, at 874.

Similarly, appellant's written jury instruction request was a clear and accurate statement of the law regarding voluntary intoxication[21] (R-3271). Appellant was charged with crimes requiring not only specific intent, but a premeditated design (R-2900,2901) and there was an evidentiary basis for the requested instruction. Appellant's intoxication necessarily became a material subject of consideration by the jury.

In United States v. Nix, 501 F.2d 516 (7th Cir. 1974), the appellant was convicted of unlawfully and willfully attempting to escape from the United States Penitentiary at Marion, Illinois. Several inmates testified that Nix was intoxicated during the relevant time period. Id. at 517. The trial court instructed the jury that voluntary intoxication was not a defense to the crime charged. The appellate court reversed for new trial.

The court held that if a defendant "offers evidence that he was intoxicated at the time of the offense, the jury must be instructed to consider whether he was so intoxicated he could not form an intent to

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[21] Indeed, the requested instruction is identical to former Standard Jury Instruction 2.11(c).

escape." Id. at 519-520 (emphasis supplied; footnotes deleted). By failing to instruct the jury in conformity with the law, the trial court "withdrew the mental element from the jury's consideration." Id. (footnote deleted). Similarly, the mental element was withdrawn from the jury's consideration at appellant's trial.

The federal courts have, like the State of Florida, long maintained that it is reversible error for a trial judge to refuse to present adequately a defendant's theory of defense for jury consideration. United States ex rel. Means v. Solem, 646 F.2d 322 (8th Cir. 1980); Zemina v. Solem, 438 F.Supp. 455 (D. South Dakota, S.D. 1977), affirmed, 573 F.2d 1027 (8th Cir. 1978); United States v. Garner, 529 F.2d 962 (6th Cir. 1976). The same courts have held that timely requested jury instructions must be given "[e]ven when the supporting evidence is weak or of doubtful credibility." United States v. Garner, supra, at 970; Zemina v. Solem, supra, at 468-469. Even on federal habeas corpus review of a state court conviction it has been held that failure to instruct on petitioner's theories of defense so infected the entire trial that the resulting conviction violated due process and the refusal to instruct resulted in an unfair trial. Failure to give a theory of defense instruction is error of constitutional magnitude unless the failure to do so could not have affected the outcome of the trial beyond a reasonable doubt. United States ex rel. Means v. Solem, supra, at 332; Zemina v. Solem, supra, at 469,470. [trial court's refusal to instruct jury on theories of defense was error of constitutional magnitude which deprived petitioner of trial by jury and due process of law.]

Perhaps the opinion in Strauss v. United States, 376 F.2d 416 (5th Cir. 1967), best states the principles involved. In Strauss the defendant was charged with willful tax evasion and the trial court refused to give several requested instructions which centered around the value of funds

and in whose legal possession they resided. Id. at 418,419. The appellate court's opinion is worth repeating at some length:

> It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence." Perez v. United States, 5 Cir. 1961, 297 F.2d 12, 13-14 [emphasis added]. We find no requirement that a requested charge encompass, in the trial judge's eyes, a believable or sensible defense. The judge is the law-giver. He decides whether the facts constituting the defense framed by the proposed charge, if believed by the jury, are legally sufficient to render the accused innocent. The jury is the fact-finder. If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible. Bryan v. United States, 5 Cir. 1967, 373 F.2d 403. The judge must, therefore, be cautious and unparsimonious in presenting to the jury all of the possible defenses which the jury may choose to believe. We hold that where the defendant's proposed charge presents, when properly framed, a valid defense, and where there has been some evidence relevant to that defense adduced at trial, then the trial judge may not refuse to charge on that defense . . .
>
> . . . The jury did not have to believe the defenses, but it should have been given the opportunity. This is true even if the defense is fragile. A defendant cannot be shortchanged nor his jury trial truncated by a failure to charge.
>
> Id. at 419. See: Wheelis v. State, 340 So.2d 950, 951 (Fla. 1st DCA 1976).

It should be noted that the court, in citing to Tatum v. United States, 190 F.2d 612 (D.C. Cir. 1950), made it clear that the above principles applied even where the sole testimony in support of the defense comes from the defendant. Strauss v. United States, supra, at 419.

Appellant maintains that the trial court, in effect, directed a verdict against him regarding his voluntary intoxication theory of defense and thereby diluted his jury trial and denied him due process. If a defendant facing possible imprisonment for tax evasion is entitled to the benefit of

instructions on his theories of defense, surely a defendant on trial for his life should be afforded the same consideration. Since the requested instruction, if given in the instant case, could have meant the difference between sentences of death and terms of imprisonment, it was constitutional error to deny the request and a new trial should be granted. Bishop v. United States, 107 F.2d 297,301 (D.C. Cir. 1939) [where voluntary intoxication negates the essential element of premedition there is a reduction from first degree murder to second degree murder]; Garner v. State, supra.

Cases from foreign jurisdictions with similar voluntary intoxication rules also support appellant's position. In People v. Feagans, 455 N.E.2d 871 (Ill.App. 4 Dist. 1983), the defendant was convicted of murder and armed robbery. The appellate court reversed the convictions in part due to the trial court's failure to give a voluntary intoxication instruction. Id. at 875. Noting that the defendant gave "unrebutted testimony that he consumed in excess of a case of beer on the day in question," and not being persuaded by the prosecution's contention that the defendant's ability to recall the events just prior to the offenses negated the defense, the court held:

> ...if defendant's testimony is believed, his intoxication must have been extreme. The fact that the trial court did not believe that defendant was intoxicated to the extent he claimed is irrelevant. Sufficient evidence was presented to raise an issue of fact for the jury. The tendered instruction should have been given.
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> People v. Feagans, supra, at 875.

Appellant is in a similar position. If his testimony is believed (consumption of one-half to three bottles of wine; two pints of scotch whiskey, and 10 to 12 beers), his intoxication must have also been extreme. The requested instruction should have been given.

Similar to Frazee v. State, supra, the Supreme Court of Utah has ruled

that the issue of intoxication is one for the jury's consideration and, when a proper instruction in that regard is given, a jury's reasonable conclusion as to a defendant's level of intoxication will not be disturbed. State v. Sisneros, 631 P.2d 856,860 (Utah 1981). Appellant does not quarrel with such rulings; he only desires to have his defense reach the jury and be evaluated by them.

In State v. Plenty Horse, 184 N.W.2d 654 (S.D. 1971), the defendant, an American Indian, was convicted of forgery in the third degree, a specific intent crime. There was evidence that the defendant had been drinking at the time of the offense and was "slightly intoxicated." The trial court refused to instruct the jury on voluntary intoxication, which exists as a partial defense in South Dakota in the same manner as it does in Florida. The Supreme Court of South Dakota ruled that the instruction should have been given since there was sufficient proof to put the issue of intoxication within the province of the jury. Id. at 658.

State v. Plenty Horse, supra, was followed by the same court in State v. Kills Small, 269 N.W.2d 771 (S.D. 1978). In the latter case the defendant was charged with third degree burglary, a specific intent crime. The defendant denied participating in the burglary in any manner and evidence of intoxication, while not abundant, came from the defendant's testimony that prior to the burglary several people were passing around a bottle and that he was a "little" drunk and "feeling good." Id. at 773. The trial court refused to instruct the jury on voluntary intoxication.

The Supreme Court of South Dakota reversed, holding that the evidence was sufficient to create a jury question and that simply because the defendant denied participating in the burglary that did not preclude the defense of voluntary intoxication from being considered by the jury.

Id. The court relied on both its earlier decision and Zemina v. Solem, supra, in reaching its decision. (Compare with Mellins v. State, supra.)

Appellant has demonstrated that under Florida law he is entitled to a new trial and that federal law and decisions from foreign jurisdictions with similar voluntary intoxication rules support his contentions in regard to the trial court's refusal to give his requested instruction. In summary: (a) appellant was indicted for crimes requiring as essential elements premeditated design; (b) there was substantial evidence at trial of his intoxication during the relevant time period; (c) appellant's repeated requests for a jury instruction on voluntary intoxication were denied for clearly erroneous reasons; (d) insofar as the trial court's ruling diluted appellant's jury trial and deprived him of due process of law reversible error has been demonstrated; and (e) since the instruction, if given, could have meant the difference between first degree murder and second degree murder convictions, any effort to deem the error harmless is specious.

Finally, out of fundamental fairness and in the interest of justice this Court should grant appellant a new trial. The prosecution was allowed to argue that appellant's intoxication explained the offenses in the absence of any other motive even while appellant was precluded from arguing the same intoxication as a partial defense. Such a double standard should not be tolerated by this Court, particularly in a case of this magnitude.

Appellant's convictions must be reversed and a new trial ordered.

ISSUE V

THE COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO THE STATE'S "GOLDEN RULE" ARGUMENT MADE DURING CLOSING ARGUMENT, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During its final arguments to the jury, the state said:

> Mr. Baker then goes on to point out, he said he walks into the apartment by himself. That's not consistent because Ms. Lewis -- or Ms. Pruitt says Ms. Lewis walked in there with him. Ladies and Gentlemen, if you walked up and the first thing you saw was your wife stabbed seven times, both jugulars cut, how much attention can you be paying as to who's entering the apartment with you?
>
> (T-2497)

The court, over defense objection and motion for mistrial (T-2497-2498), permitted the comment:

> MR. BURGESS: [The Prosecutor] Your Honor, I'm not putting -- I'm not putting them -- I'm asking them to consider what they would do under those circumstances. I don't think that violates the golden rule.
>
> THE COURT: I heard the question and will rule that you are dangerously close. I'm going to deny the motion, but anytime you ask a juror what would you do if you were this person -- had you been in another position, you might have a different ruling. I will deny the motion at this time and find that the witness was in a unique position in that he just discovered the body. This was the testimony that about which the question was asked the defendant has been placed in issue, some disagreement between the wife and the husband, so I feel that that mitigates any adverse effect that the question might have had. All right.
>
> (T-2498)

The court in so ruling, however, abused its discretion and ignored the circumstances which made this statement so inflammatory. Miller v. State, 435 So.2d 258 (Fla. 3d DCA 1983).

The state's error here was that it asked the jury "to consider what they would do under the circumstances." (T-2498). The problem with such "Golden Rule" arguments, however, is that jurors will then abandon the "cold neutrality" expected of them and let personal interest and bias effect their decision. Bullock v. Branch, 130 So.2d 74 (Fla. 1st DCA 1961).

> It is hard to conceive of anything that would more quickly destroy the structure of rules and principles which have been accepted by the courts as

> the standards for measuring damages in actions of law, than for the juries to award damages in accordance with the standard of what they themselves would want if they or a loved one had received the injuries suffered by a plaintiff. In some cases, indeed, many a juror would feel that all the money in the world could not compensate him for such an injury to himself or his wife or children. Such a notion as this--the identifying of the juror with a plaintiff's injuries--could hardly fail to result in injustice under our law, however profitable it might be deemed by many plaintiffs in personal injury suits.
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> Id. at 76.

This case was particularly vulnerable to jury bias and impassioned feelings. That is, this case as argued by the state involved the murder of a mother and her daughter by a drunk crazy uncle they had, out of the kindness of their hearts, let live with them (T-2393,2418). The jury had already seen the photographs which the trial court said were "highly inflammatory" (T-1341, 1364) and the "most prejudicial" he had ever seen (T-1353).[22] The case, therefore, was inherently susceptible to jurors giving way to their natural feelings and passions, and the state did not need to say much to inflame the jury already predisposed against Hooper. Consequently, the prosecutor's statements exceeded the bounds of legitimate argument which in another case may have been acceptable. Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982).

Here, the prosecutor was not asking what an abstract "you" would do in this situation. Bell v. Baptist Memorial Hospital, 363 So.2d 28 (Fla. 1st DCA 1978); Lewis v. State,[23] 377 So.2d 640 (Fla. 1979). Instead, it deliberately asked the jurors to trade places with James Hooper and suffer as he did (T-2498). Such argument was impermissible. Moreover, even if the comment went to explain

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[22] The court excluded some of the inflammatory photos (T-1361).

[23] In Lewis the prosecutor said:

> Now, if you just shot a man in an alleged self defense, wouldn't you tell that to the deputy? instead of, "He's been bugging me a long time and I'm tired of it and I shot him." Id. 645.

James Hooper's lapse of memory as to who accompanied him on his rough return to his apartment, such an explanation could have been better worded to avoid involving jurors taking James Hooper's place.

Nevertheless, the court felt such comment was proper because the defendant had "placed in issue, some disagreement between the wife and the husband."[24] (T-2498).

To the contrary, from what the court let Hooper inquire into, there was little evidence to lead the jury to believe that James Hooper and his wife had unusual problems in their marriage. What few arguments they had (T-1646) apparently arose over disciplining Jimmy, and they were not bad or violent disagreements (T-1661,1675). In short, they had the same problems most parents of active children have. Consequently, it is reasonably evident that the state's Golden Rule argument, "to consider what they would do under those circumstances" (T-2498), might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done. Breedlove, supra. And, given the highly charged nature of the crime, such argument became reversible error that neither rebuke nor retraction could have destroyed. United States ex rel. Haynes v. McKendrick, 481 F.2d 152 (CA 2 1973); Miller v. North Carolina, 583 F.2d 701 (CA 4 1978); Houston v. Estelle, 569 So.2d 372 (CA 5 1978).

This Court, therefore, should reverse Hooper's judgment and sentence and

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23 (cont'd)
Rejecting Lewis' Golden Rule argument, this Court said that the state's argument was a clear reference to the inconsistency of the defense' self defense claim and what he said. Id. Here what the prosecutor clearly intended was for the jury to take the place of James Hooper and feel as he felt (T-2498).

24 Even if this was true, this particular comment was not directed at rebutting that issue.

remand for a new trial.

ISSUE VI

THE COURT ERRED IN SUSTAINING THE STATE'S OBJECTIONS TO HOOPER'S EFFORTS TO ATTACK JIMMY HOOPER'S REPUTATION FOR TRUTH AND VERACITY IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Jimmy Hooper's testimony identifying Hooper as the person who beat him, and, by implication, killed his mother and sister was the most damaging evidence of Hooper's guilt. Moreover, on cross-examination, Jimmy denied telling some of his friends that he was not sure that his uncle was the one who had beaten him (T-1443).

To some extent, Hooper weakened the strength of this testimony by presenting evidence that Jimmy had told some friends that he was unsure of this identification (T-2044). The strongest attack on Jimmy's testimony, however, would have come from Jan Pruitt, a resident of the Marsh Cove Apartments.[25] She would have testified about his reputation for truth and veracity. The court, however, repeatedly overruled Hooper's attempts to lay a foundation to admit such testimony.

BY MR. BAKER:
Q. Ms. Pruitt, did you know Jimmy Hooper?
A. Yes.
Q. Did you have occasion to talk with other people in the Marsh Cove community about Jimmy Hooper?
a. Several times.
Q. Did you become aware of his reputation in the community for truth and veracity?
A. Yes.
MR. BURGESS: Your Honor, I object. I don't think that is proper on reputation.
THE COURT: Sustain the objection.
BY MR. BAKER:
Q. Ms. Pruitt, did the people you talked to, did any of them know Jimmy Hooper or indicate they had known Jimmy Hooper?
A. Yes, they did.

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[25] She had lived there since the first part of June, 1982 (T-2034).

Q. Did they express an opinion to you as to his reputation for truth and veracity in the community?

THE COURT: Just a moment. Do you have an objection?

MR. BURGESS: Yes, Your Honor, I have.

THE COURT: The same ruling. I sustain it.

BY MR. BAKER:

Q. Ms. Pruitt, were you aware of his reputation in the community?

A. Yes.

Q. How were you aware of his reputation?

THE COURT: If there is an objection, I will sustain it.

MR. BURGESS: I don't think we actually got that far. I still have the same objection.

MR. BAKER: Your Honor, perhaps I could just move on.

THE COURT: All right, sir.

(T-2037,2038)

Hooper, however, had done all the law required for him to attack Jimmy Hooper's reputation for truth and veracity; by effectively restricting his right to examine Pruitt, the trial court violated his Sixth Amendment right to compulsory process of witnesses. United States v. Watson, 669 F.2d 1374 (CA 11 1982); Washington v. Texas, 388 U.S. 14, 18 L.Ed.2d 1019, 87 S.Ct. 1920 (1967).

Jimmy's reputation was best known by the members of the Marsh Cove Apartment community, his place of residence and also that of Jan Pruitt. Stanley v. State, 93 Fla. 372 (1927). That reputation was the members' opinion "formed and expressed based upon their knowledge of [Jimmy], which establishe[d] his general reputation." Id. Jimmy's reputation, in sum was the community's opinion of him. Opinion evidence, on the other hand, is a personal assessment of a person's character. Watson at 1382. Here, Hooper was clearly trying to determine Jimmy's reputation for truth and veracity; he was not trying to get Pruitt's opinion of it.

Sections 90.404, 90.405, and 90.609, Florida Statutes (1981) allow attacks upon a witness' character by evidence regarding that witness' reputation for truthfulness. Significantly, as demonstrated by Hooper's specific questions

regarding Pruitt's knowledge of the community's opinion of Jimmy's reputation for truth and veracity, this attack can only be upon the witness' reputation for truth and veracity. General attacks upon a witness' moral character are impermissible. Andrews v. State, 172 So.2d 505 (Fla. 1st DCA 1965).

Thus, as a general proposition, Hooper needed to show that Pruitt had such an acquaintance with Jimmy Hooper and the community in which he lived that she could authoritatively say what his reputation was. Watson, supra. Hooper clearly demonstrated these requirements.

In Dowling v. State, 268 So.2d 386 (Fla. 2d DCA 1972), Dowling satisfied these requirements by asking only the following:

> Q. Do you know Deputy DeAngelis.
> A. I have heard of him.
> Q. Do you know his reputation in the community?
> A. Yes sir.

Likewise in Antone v. State, 382 So.2d 1205 (Fla. 1980) Antone laid a sufficient predicate or foundation to impeach the reputation of a Mr. Haskew:

> Q. Mr. Walker, do you know the general reputation of Ellis Marlow Haskew for truth and veracity in the community of Bartow?
> A. I would think I do, yes.
> Q. Have you ever discussed his reputation with others in the community?
> MR. BOWDEN: Your Honor, I object to the form of the question.
> THE COURT: You may rephrase that.
> Q. (By Mr. Ferlita) Have you ever heard his reputation discussed by other people?
> A. Yes, sir, often.
> Q. What is that reputation of Ellis Marlow Haskew for truth and veracity within the community of Bartow?

Id.[26] 1213.

[26] Some commentators have said that the form of questions is important. Questions in the form of "Have you heard that..." are proper while those in the form of "Did you know that..." are improper. Erhardt, Florida Evidence, 1977 page 83. Michelson v. United States, 335 U.S. 469, 93 L.Ed. 168, 69 S.Ct. 213 (1948). The form, however, is important only to the extent that what the witness is testifying to is the community's opinion of the person under attack and not the witness' personal knowledge or opinion of that person.

In this case, Pruitt (1) knew Jimmy Hooper, (2) had talked with other people in the Marsh Cove Apartment community about Jimmy's reputation for truth and veracity, and (3) was aware what the community opinion was concerning his reputation for truth and veracity. Comparing Hooper's efforts with those in Dowling and Antone, Hooper clearly had established a sufficient predicate to inquire into Pruitt's knowledge of the community's opinion of Jimmy's reputation for truth and veracity. Section 90.901, Florida Statutes (1981), see Justice v. State, 438 So.2d 358, 365 (Fla. 1983). In short, efforts to admit such evidence should not amount to saying a few magical words which somehow open the doors to admitting evidence. Here Hooper did all the law required: He showed that Pruitt knew the community's opinion of Jimmy for truthfulness.

The court's error here was not harmless as Hooper's attacks on Jimmy's reputation went to the heart of the state's case and his defense. That is, in evaluating the value of Jimmy's testimony, the jury should have also known what the Marsh Cove Apartment community thought about his reputation for truth. Chavers v. State, 380 So.2d 1180 (Fla. 5th DCA 1980); Fulton v. State, 335 So.2d 280, 284 (Fla. 1976). Without such knowledge, they may have given his testimony more weight than it deserved.

The trial court's error, therefore, requires this Court to reverse Hooper's judgment and sentence and remand for a new trial.

ISSUE VII

THE COURT ERRED IN RESTRICTING OR PREVENTING HOOPER FROM PRESENTING A DEFENSE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Several times throughout the trial, the court limited or completely prevented

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26 (cont'd)
Clearly, the questions asked of Pruitt and her responses to them concerned only the community's opinion or reputation of Jimmy Hooper for truth or veracity.

Hooper from presenting evidence to the jury in support of his defenses that either Jimmy Hooper misidentified him or James Hooper had a motive and opportunity to commit the murders. Such restrictions denied Hooper a constitutionally guaranteed fair trial.

In Washington v. Texas, 388 U.S. 14, 19 (1967), the United States Supreme Court said:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

See also Webb v. Texas, 409 U.S. 95, 98 (1972); Chambers v. Mississippi, 410 U.S. 284,302 (1973);Johnson v. State, 408 So.2d 813, 815 (Fla. 3d DCA 1982) Parisie v. Greer, 671 F.2d 1011, 1015-16 (7th Cir. 1982).

It is a recognized defense, and a rather basic one at that, for a defendant to introduce evidence tending to show that some person other than himself committed the crime. See e.g. Chambers v. Mississippi, supra, Pettijohn v. Hall, 599 F.2d 476 (1st Cir. 1979); Siemon v. Stoughton, 440 A.2d 210 (Conn. 1981); State v. Harman, 270 S.E.2d 146, 150-51 (W.Va. 1980); State v. Hawkins, 260 N.W. 2d 150, 158-159 (Minn. 1977).[27] "The purpose [of such evidence] is not to prove the guilt of the other person, but to generate a

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[27] See also United States v. Armstrong, 621 F.2d 951, 953 (9th Cir. 1980); United States v. Robinson, 544 F.2d 110, 112-13 (2nd Cir. 1976); Laureano v. Harris, 500 F.Supp. 668, 672-73 (S.D.N.Y. 1980); State v. Belt, 631 P. 2d 674 (Kans. App. 1981); State v. Gold, 431 A.2d 501 (Conn. 1980); State v. LeClair, 425 A.2d 182, 185-87 (Maine 1981); Commonwealth v. Graziano, 331 N.E.2d 808, 811 (Mass. 1975); State v. Schecter, 352 N.E.2d 617, 625 (Ohio 1974); Beal v. State, 520 S.W.2d 907 (Tex.Cir. App. 1975); Commonwealth v. Boyle, 368 A.2d 661, 669 (Pa. 1977).

reasonable doubt of the guilt of the defendant." State v. Hawkins, supra, at 158-59.

> In such a situation, the admissibility of testimony implicating another person as having committed the crime hinges on a determination of whether the testimony tends to directly link such person to the crime, or whether it is instead purely speculative. Consequently, where the testimony is merely that another had a motive or an opportunity or prior record of criminal behavior, the inference is too slight to be probative, and such evidence is therefore inadmissible [citations omitted]. Where, on the other hand, the testimony provides a direct link to someone other than the defendant, its exclusion constitutes reversible error. [Citations omitted.]
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> State v. Harman, supra, at 150.[28]

In Florida, the above principles of law were recently recognized by Judge Grimes, dissenting in Barnes v. State, 415 So.2d 1280, 1284-86 (Fla. 2d DCA 1982). The majority in Barnes expressly noted that it did not disagree with the legal principles cited in Judge Grimes' dissent, but said "We do feel that there must be more substantial connection between the unidentified third persons and the crime than [the witness'] opinion derived from a physical comparison based on a double hearsay description." Barnes v. State, supra, at 1281. [In Barnes, the witness LaBreche would have testified that after the defendant's arrest he had seen other unidentified persons who, in his opinion, fit the description of the assailant as described to him by the

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[28] See also Coxwell v. State, 361 So.2d 148, 150 (Fla. 1978) (restriction on cross-examination was prejudicial in that it forestalled the development of defense theory that victim's death had been procured by Judy Barnes and not himself); Lindsay v. State, 69 Fla. 641, 68 So. 932 (1915) (one accused of crime may show his innocence by proof of the guilt of another, but evidence merely showing that third party had motive or opportunity to commit crime is insufficiently probative to be admissible); Corley v. State, 335 So.2d 849 (Fla. 2d DCA 1976); Watts v. State, 354 So.2d 145 (Fla. 2d DCA 1978) (evidence that fingerprints did not match those of defendant held admissible for jury to consider in evaluating defense someone else committed the crime).

investigating officer, who in turn had been furnished the description by the victim.]

In this case, Hooper had at least two defense strategies: Jimmy Hooper misidentified him as his attacker, and James Hooper had a motive and opportunity to commit the murder. The court prevented Hooper from adequately developing either strategy.

Hooper managed to present to the jury the fact that James Hooper was well over six feet tall and weighed more than 200 pounds (T-1669). (Hooper was six feet eight inches tall and weighed over 300 pounds) (T-2141). Nevertheless, despite the severe head injuries Jimmy suffered (T-1615-1616), the court denied a defense motion to conduct a mental examination of Jimmy (T-229), and then when Hooper tried to inquire into Jimmy's post attack visits to a mental health clinic, the court sustained a state objection because Hooper had no expert testimony "based upon an examination of [Jimmy Hooper] that his memory is deficient..." (R-1464). Jimmy's ability to perceive or remember what he saw was critical to this case. The lighting was poor (T-1436,2033), and Jimmy was asleep when the beating started. Yet at trial, he was sure his uncle beat him although he twice told an acquaintance that he was unsure of his identification (T-2044). Hooper should have been able to probe Jimmy's ability to perceive or recall the events of August 19 and 20.

Despite the serious questions regarding Jimmy Hooper's memory and identification, the court nevertheless refused to let Dr. Brigham, the defense eyewitness expert, testify about the problems inherent in eyewitness identifications (see Issue VIII).

The court also limited Hooper from developing his defense that James Hooper had a motive (or at least more of one than Hooper) and opportunity to commit the murders.

For example, the jury never heard about the strange relationship James Hooper and his wife had. A day or so before the murder Kathaleen Hooper and her husband had a loud argument about a speeding ticket at a food store near their home (T-1994). The jury never heard what effect that ticket might have had on James Hooper keeping his job as a truck driver. Moreover, the Hoopers occasionally argued about James Hooper's methods of disciplining Jimmy (T-1661). James Hooper's actions after the murder also indicate that he was not overwhelmed with grief at the loss of a wife and daughter. Although he received $21,000.00 in insurance money from the deaths (T-1649), he never paid all of the funeral bills (T-1651). Instead he bought a car (T-1651). Even more strange, within days of his wife's murder, he was sleeping with Hooper's ex-wife (T-1650) and since October 1982 they had been living together (T-1650). Not surprisingly, James Hooper could not control Jimmy, and Jimmy left home for a month to live with friends (T-1650-1651).

James Hooper also falsified his driving log for the 19th and 20th of August to reflect less time on the road than what he claims he actually drove (T-1667,1664,2090).

While such evidence does not directly exonerate Hooper, it nevertheless raises the possibility that James Hooper may have committed the murders. In light of James Hooper's relationship with his wife and Hooper's ex-wife, his possible opportunity to commit the murders, Jimmy Hooper's mental problems and bad reputation, the jury could have legitimately concluded that a reasonable doubt existed about Hooper's guilt.

Although the court permitted Hooper to partially develop his theme, it refused to let him present all of the evidence available that would have bolstered his defense. Such a failure denied Hooper his constitutional right to a fair trial and requires this Court to reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE VIII

THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF DEFENSE WITNESS, DR. BRIGHAM, AN EXPERT IN EYE-WITNESS IDENTIFICATION.

Jimmy Hooper's identity of Harold Hooper as his assailant was the most damning evidence of Hooper's guilt. Consequently, defense counsel tried in several ways to inform the jury of the weaknesses of his testimony. The court effectively excluded Jan Pruitt's testimony concerning Jimmy Hooper's reputation for truthfulness (see Issue VI), and it also precluded him from adequately developing the inherent weaknesses of Jimmy Hooper's identification of Hooper. Specifically, Hooper proffered the testimony of Dr. Jack Brigham, an expert in the area of eyewitness identification. The court, however, excluded this testimony, concluding that some if not all of the standards set forth in jury instruction 2.04 were contained in the doctor's testimony (T-1611).

This Court in Marvin Johnson v. State, 393 So.2d 1069 (Fla. 1980) rejected the defense argument that an expert on eyewitness identification could assist the jury in evaluating the testimony of an eyewitness. In Paul Beasley Johnson v. State, 438 So.2d 774 (Fla. 1983), this Court specifically rejected Dr. Brigham's testimony because:

> Expert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions. Johnson. We hold that a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony. We find no abuse of discretion in the trial court's refusal to allow this witness to testify about the reliability of eyewitness identification.
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> Id. 777 (footnote omitted).

In this case, defense counsel proffered the testimony of Dr. Brigham as to (1) the weaknesses inherent in identification; (2) the common myths and

false assumptions the average person believes; and (3) what specific problems Jimmy Hooper's identification may have had which the jury should have been aware of. Brigham's testimony was especially crucial because there was absolutely no way that defense counsel could have exposed the hidden problems of Jimmy's identification through even the most rigorous cross-examination. Moreover, unlike the court in Paul Beasley Johnson, supra, the court here gave no special cautionary instruction to minimally alert the jury of the dangers lurking in Jimmy's testimony. To the contrary, the court rejected all of Hooper's requested instructions, and gave, instead, the standard instruction on evaluating a witness' testimony (T-2365-2366). But, these instructions, as Brigham testified, provided marginal help at best, and at worst were inaccurate, incomplete, or misleading (T-1599-1600). Consequently, Hooper asks this Court to reexamine both Johnson cases in light of Sections 90.702, Florida Statutes (1981) which permits expert testimony if it will assist the jury. Brigham's clear and unrebutted explanation of human problems in eyewitness identification should have been admitted.

Cross-examination is the traditional technique used to probe a witness' memory and perception of an event, Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv.L.Rev. 177, 186, 188 (1948), but its utility is considerably weakened when a truthful witness is simply unaware of the limits of his ability to perceive and remember an event. For example, Jimmy Hooper may honestly believe that his uncle was the one who attacked him. At trial defense counsel on cross-examination brought out the fact that he was asleep when the beating started and that the room was essentially dark (T-1436,2033). No cross-examination could, however, have developed several of the fallacies commonly believed about eyewitnesses. Brigham's testimony would explain the problems involved and would have assisted

the jury in properly evaluating Jimmy's testimony. For example, a common fallacy of eyewitness identification is that when people are under stress they remember better. That is, an image is "burned" into their memories. This is false: stress causes inaccuracies in perception and subsequent distortion of recall (T-1596). State v. Chapple, 660 P.2d 1208, 1221 (Ariz. 1980). Similarly, Brigham's testimony debunked the notion that the witness' confidence in the accuracy of his identification was related to the accuracy of that identification (T-1595).[29] To the contrary, Brigham and others have shown that confidence and accuracy are not related (T-1596). Chapple at 1221. This fact is particularly important in this case because Jimmy, in effect, said he was sure Hooper attacked him (T-1443).[30] Compounding this problem is the common tendency of jurors to believe an eyewitness' veracity, a faith Brigham says was not particularly well placed. Brigham, The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identification, 7 Law and Human Behavior 19 (1983).

Also, Jimmy's age (12) was a factor the jury was certainly aware of but was unable to evaluate as it related to his ability to perceive and recall the events of August 20th. That is, children apparently do not perceive and recall events in the same manner as adults (T-1606), and apparently they are about half as accurate as college students (T-1610). Certainly no

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[29] During closing argument, the prosecutor repeatedly referred to Jimmy's consistency in identifying Hooper (T-2506). Without Brigham's testimony, Hooper had no way to effectively counter the prosecutor's allegation that because Jimmy has been consistent in his identification he is therefore accurate.

[30] In that respect Brigham said that several of the factors used by the U.S. Supreme Court in establishing the reliability of an eyewitness identification, Neil v. Biggers, 409 U.S. 188, 33 L.Ed.2d 401, 93 S.Ct. 375 (1972) were common sense notions which subsequent research has partially refuted.

cross-examination could have developed this fact, and just as certainly Brigham's testimony could have assisted the jury in evaluating Jimmy's testimony.[31]

Jimmy's age also indicates that his perception of what happened on August 20th may have been affected by "post event" information (T-1592). That is, Jimmy may have convinced himself that his early identification of his uncle as the assailant was accurate despite the possibility of some internal uneasiness. Consequently, having publicly announced that Hooper beat him, he may well have been unwilling in light of the extent of adult attention focused upon him to express those doubts or uncertainties (T-1605).[32] Moreover, Jimmy may also have incorporated into his identification information gained subsequent to the beating (T-1592).

By analogy, one of the dangers of hypnotism as an aid in eyewitness identification is confabulation. Brown v. State, 426 So.2d 80 (Fla. 1st DCA 1983).

> Confabulation is the innate tendency of a hypnotized subject to manifest a decrease in critical judgment. This decrease in critical judgment seems to manifest itself in occasional memory distortions, sheer fantasy, and even willful lies in recalling specific events. Although most people are unaware of this fact, the currently accepted view in the scientific community is that no one's conscious or subconscious memory recalls all details in minute detail. No one has a perfect memory. An individual's recall of a specific event may have gaps in it. The mind simply is not a videotape recorder. Id.

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[31] The court also denied a defense motion to conduct a psychological examination of Jimmy (T-229) and refused to let Hooper ask Jimmy at trial about going to a mental health clinic (T-1485).

[32] This conclusion has some support in this case. At trial with the attention of several adults focused exclusively upon him, Jimmy said he was sure Hooper was his assailant. Yet, when asked by one of his peers, George Delmar, he was unsure of his identification (T-2044).

In this instance, where 12 year old Jimmy is beaten while asleep, then asked who did it, he may very well have honestly thought Hooper was the assailant but have also unwittingly filled in the gaps of his memory with a familiar figure who roughly fit the description of his assailant. Certainly, Brigham's testimony would have assisted the jury in realizing the limits of a young boy's memory and perception and placed the "mystical aura" jurors tend to hold of eyewitness identification in proper perspective. Cf. Farmer v. City of Fort Lauderdale, 427 So.2d 187, 191 (Fla. 1983).

This Court and other courts of this state and nation have readily accepted the boons that science has brought to the law. Hair analysis, Peek v. State, 395 So.2d 492 (Fla. 1980), Jent v. State, 408 So.2d 1024 (Fla. 1981), "voice print" analysis, Alea v. State, 265 So.2d 96 (Fla. 3d DCA 1972); Worley v. State, 263 So.2d 613 (Fla. 4th DCA 1972) and other sophisticated analytical techniques regularly find admissibility into the courts. Even the testimony of psychologists and other experts in the subject of the mind are admitted. Brown v. State, supra. Consequently, it is an unexplained anomally that experts who also testify about the mind, but as it pertains to eyewitness identification, should be excluded from testifying in court. The irrationality of this fact is heightened by the recognition of courts that eyewitness identification is particularly vulnerable:

> The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification. United States v. Wade, 388 U.S. 218, 228, 18 L.E.2d 1149, 87 S.Ct. 1926 (1967).

Consequently, Hooper can think of no reason, either in logic or experience, to preclude admissibility of expert testimony on eyewitness identification. In this case, in particular, it would have assisted the jury and it was relevant to prove or disprove a material fact: The identification of Jimmy's assailant. Failure to permit such a defense

denied Hooper his right to present his defense.

ISSUE IX

THE COURT ERRED IN ADMITTING THE STATEMENT OF HAROLD HOOPER THAT HE WAS NOT GOING TO GO BACK TO THE PENITENTIARY, (1) AS AN EXCITED UTTERANCE, AND (2) AS A REFLECTION UPON HOOPER'S CHARACTER.

During the proffer of Williams, the Ohio policeman who talked Hooper into surrendering, Williams said:

> He [Hooper] said he did not want to go back to jail. I [Williams] said, I don't know that for sure. I said, I don't know what it is. But he said, I'm not going back. And then he used the word "penitentiary."
>
> (T-1936)

Initially, the court sustained the defense objection to admitting these statements because they were evidence of prior bad acts and only showed what occurred at the time of Hooper's arrest (T-1940). The court, however, reversed its ruling upon further argument by the state:

> THE COURT: Well, based upon the State's representation, and I assume this is going to be supported in argument, based upon the representation that the testimony is offered to show the state of mind of the defendant with regard to his departure from the State of Florida and to show guilt of mind, I will overrule the objection to permit it as it was testified to on the proffer as an excited utterance not made in custody. It's made under circumstances brought about by the defendant, and the statements indicate that he knows why the officers are there. And whether it's a suicide attempt or whatever, it shows his state of mind with regard to the departure from the State of Florida, so I will permit it.
>
> (T-1941-1942)

Hooper's statements, made six days after the murders (T-1908) hardly qualified as excited utterances.

Traditionally, excited utterances have been accepted as an exception to the hearsay rule because such statements were made when the declarant was under such severe stress or shock that his reflective capacity was suspended

and therefore whatever utterance he made was a sincere response to his actual perceptions. He had, in short, little time or ability to fabricate a self serving story. 6 Wigmore on Evidence (Chadbourn revision, 1976) Section 1747. On the other hand, statements which are themselves statements or opinions of the declarant are excluded. Jacobs v. State, 380 So.2d 1093 (Fla. 4th DCA 1980), Mitchum v. State, 56 Fla. 71, 47 So. 815 (Fla. 1908).

Consequently, in Florida, a hearsay statement is admissible as an excited utterance if:

> 1. The nature of the occasion was "startling enough to produce nervous excitement and render the normal reflective processes inoperative."
>
> 2. The statement must have been a spontaneous reaction to the event and not the result of reflective thought.

Section 90.803(2), Florida Statutes (1982).

Spontaneity is the essential element of excited utterances, Custer v. State, 159 Fla. 574, 34 So.2d 100 (1948), and while the court has discretion in admitting or excluding such statements at trial, Washington v. State, 118 So.2d 650 (Fla. 2d DCA 1960), it can admit statements as excited utterances only when the totality of the circumstances supports their admission. 89 ALR 3d 102. From this totality, however, certain important factors emerge in determining whether a statement was the product of the circumstances or the declarant's reflection:

> 1. There must be an event startling enough to cause nervous excitement.
> 2. The statement must have been made before there had been time to contrive or misrepresent.
> 3. The statement must be made while the person is under the stress of excitement caused by the event.

Harmon v. Anderson, 495 F.Supp. 341 (E.D. Mich. 1980), as quoted in Jackson v. State, 419 So.2d 394, 396 (Fla. 4th DCA 1982).

In this case, Hooper is unsure what startling event occurred that supposedly caused him to make the "excited utterance." If it was the events of the 19th and 20th of August, the impact of that night had clearly faded by the 26th (T-1908). See Lambright v. State, 34 Fla. 564, 16 So. 582 (1894). On the other hand, if the event was the police closing in on him, Hooper hardly was startled by this activity so as to cause him to babble. Hooper, after all, is familiar with the criminal justice system (T-2638-2639). This is evident by the fact that when arrested and informed of his Miranda rights, he asked for a lawyer (T-2273). Surely, this particular confrontation did not cause his normal reflective powers to be suspended. Second, the state laid an inadequate predicate that Hooper did not have sufficient time to contrive or fabricate his statement. Lyles v. State, 412 So.2d 458 (Fla. 2d DCA 1982). To the contrary, from what we know, Hooper was not overly excited by the police action (T-1949), and he had the presence of mind to ask them what they wanted (T-1914), to move to the edge of the roof several times apparently judging the height (T-1914,1951), and to break a window and slash his wrist (T-1914). Moreover, immediately before Hooper said he did not want to go back to the penitentiary, he and Williams were carrying on a conversation with Hooper rather depressed and contemplating suicide (T-1948-1951).

Third, while Hooper may have been depressed and despairing, the state presented absolutely no evidence that due to some heightened excitement under which Hooper was held, he blurted out that he did not want to go back to the penitentiary. In Lyles, supra, police questioned a four year old girl about a sexual battery committed upon her by her stepfather almost four hours earlier. Ruling that her answers were not excited utterances or spontaneous statements, the court noted that the girl's statements were only

responses put to her by the police and not the results of the sexual battery. Id. at 460.

Similarly here, Hooper was merely responding to his situation and his statements, or rather his opinions as to his fate, were clearly the result of a man who saw the future and did not like what he saw. They were not the statements of a man laboring under some current excitement.

Nevertheless, if Hooper's statement is admissible as an excited utterance, it was inadmissible as a reflection upon his character. That is, Hooper was ignorant of the real reason why the police had come to arrest him. Hooper apparently thought that the police came for him because he had taken money and a gun from the Sea Hut Restaurant (T-1236,2116). In addition, when told why he was arrested, Hooper was shocked and incredulous and kept insisting on knowing whether this was true (T-2279,2283). Thus, the evidence that he did not want to go back to prison was irrelevant to show his guilty mind as it pertains to the murder charges, and the only relevance of Hooper's comment was to show his bad character. Williams v. State, 110 So.2d 654 (Fla. 1959); Harris v. State, 427 So.2d 234 (Fla. 3d DCA 1983).[33]

ISSUE X

THE TRIAL COURT ERRED IN DENYING A REQUESTED DEFENSE INSTRUCTION THAT INTOXICATION COULD BE USED AS A MITIGATING FACTOR WHEN IT DETERMINED WHAT SENTENCE TO RECOMMEND TO THE TRIAL COURT.

During the penalty phase charge conference, Hooper asked for a special instruction to the effect that the jury could consider intoxication as a mitigating factor (R-3340, T-2669). The court denied the instruction saying

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[33] The court gave no cautionary instruction limiting the use of this evidence.

that Hooper could argue intoxication under the statutory mitigating factors (T-2669). Nevertheless, in the court's sentencing order, it rejected Hooper's intoxication as sufficient to prove that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (R-3417-3421). Further, the court did not find Hooper's intoxication, no matter how slight it may have been, as a non-statutory mitigating factor. Accordingly, the court erred in the sentencing phase of the trial as it did during the guilt phase, by refusing to instruct the jury on a legitimate defense. Specifically, the jury had a right to know that Hooper's intoxication was a legitimate factor they could use in determining what sentence they should recommend to the trial court.

In Lockett v. Ohio, 438 U.S. 586, 604-605 (1978), a plurality of the Supreme Court held that:[34]

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death....
>
> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

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[34] Eddings v. Oklahoma, 455 U.S. 104 (1982) adopts the reasoning of the Lockett plurality as the holding of the Court.

[Footnotes omitted]. Accord, Bell v. Ohio, 438 U.S. 637 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

To insure that the sentencer considers fully each mitigating factor, clear jury instructions on each such mitigating factor are required. Gregg v. Georgia, 428 U.S. 153, 192-193 (1976), emphasizes the constitutional necessity for clear jury instructions in capital cases so that "the jury is given guidance regarding the factors about the crime and the defendant that the state, ..., deems particularly relevant to the sentencing decision," noting that "it is ... a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." A fundamental corollary, therefore, to Lockett's prohibition against jury instructions which preclude consideration of mitigating circumstances, is the requirement that the judge clearly instruct the jury about mitigating circumstances. Chenault v. Stynchcombe, 481 F.2d 444 (5th Cir. 1978); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), rehearing en banc denied, 662 F.2d 1116 (5th Cir. 1981), cert.denied, __U.S.__ (1982) [31 Cr.L. 4030]; Spivey v. Zant, 661 F.2d 464 (5th Cir. 1982).

Although the jury here was instructed on the "catch-all" reference to nonstatutory mitigating circumstances, appellant contends such reference is totally inadequate to suitably guide and focus the jury's consideration on the independent mitigating weight to be given appellant's intoxication at the time of the offense. The necessity for specific instructions on a proffered nonstatutory mitigating circumstance has been cogently explained in State v. Johnson,[35] 298 N.C. 47, 257 S.E.2d 597 (N.C. 1979). There the

[35] North Carolina's statute specifically lists eight mitigating circumstances which might arise, but provides that consideration shall not be limited to these eight. G.S. 15A-2000(f)(9) permits the jury to consider "any other circumstance arising from the evidence which the jury deems to have mitigating value."

court reasoned:

> The legislature did not intend to give those mitigating circumstances expressly mentioned in the statute primacy over others which might be included in the "any other circumstance" provision. Such an intent, if it existed, might run afoul of Lockett v. Ohio, supra.
>
> Under Lockett a legislature would be free to provide that the existence of certain mitigating factors would preclude the imposition of the death penalty, while the existence of others should simply be considered, but not as controlling, on the question. A death penalty sentencing statute, however, which by its terms or the manner in which it is applied, puts some mitigating circumstances in writing and leaves others to the jury's recollection might be constitutionally impermissible under the reasoning of Lockett. For if the sentencing authority cannot be precluded from considering any relevant mitigating circumstance supported by the evidence neither should such circumstances be submitted to it in a manner which makes some seemingly less worthy of consideration than others.
>
> [Emphasis supplied]. Id. 616-617.

Thus, in order to avoid detracting from the weight to be given nonstatutory mitigating factors, jury instructions must include specific reference to the specific nonstatutory circumstances proffered by the defendant as well as the statutory mitigating circumstances.

Although the court told Hooper that he could argue intoxication under the statutory mitigating factors (T-2669) it is clear that those instructions inadequately consider intoxication as a legitimate mitigating factor. Specifically, this Court has rejected claims that intoxication can justify a finding of either of the two mental mitigating factors. Section 921.141(6)(b), (f), Florida Statutes (1981). Hitchcock v. State, 413 So.2d 741 (Fla. 1982); Stevens v. State, 419 So.2d 1058 (Fla. 1982); Hall v. State, 403 So.2d 1321 (Fla. 1981); Simmons v. State, 419 So.2d 316 (Fla. 1982).

Consequently, Hooper was entitled to a jury instruction that adequately reflected his intoxication argument, and the court erred by not giving him one.

ISSUE XI

THE COURT ERRED IN FINDING THAT HOOPER COMMITTED THE MURDER OF RHONDA HOOPER FOR THE PURPOSE OF PREVENTING OR AVOIDING LAWFUL ARREST.

The court, in sentencing Hooper to death, said that he committed the murder for the purpose of avoiding or preventing a lawful arrest:

> CONCLUSION: It is a reasonable inference that a struggle between Kathaleen Hooper and the defendant took place which was witnessed by the child who had been in bed with her mother. Each had on night clothes. After the struggle and the murder of Kathaleen, the defendant, knowing that Rhonda Kay was a witness, pursued her into the bedroom and killed her so as to eliminate her witness as to his identity as the murderer of her mother. Such inference is bolstered by the savage attack upon James Scott Hooper from fear that young Hooper would have known of his presence after the murders were committed. Additional support is found in defendant's failure to gather his belongings before leaving the state for Ohio. The Court is convinced that Rhonda Kay was murdered with the intent to avoid arrest and detection.

In this case, the crucial inference made by the court was that Rhonda Hooper saw her mother struggle with Hooper (R-3427). The state admitted Hooper had no motive to kill (T-2354) and the court also admitted that Hooper had no motive to murder Kathaleen or Rhonda Hooper (R-3430). Ignoring this latter finding it had made, the court nevertheless was able to say that Hooper's motive in killing Rhonda came from its belief that Rhonda saw the struggle and could therefore identify Hooper as her mother's murderer. Such a conclusion however, is not justified by the circumstantial evidence presented at trial, and in any event, it was not proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1972).

Specifically, the medical examiner did not say whether Kathaleen Hooper died before or after Rhonda. Consequently, the possibility that Rhonda died before Kathaleen is as reasonable a hypothesis as the one the court put forward.

Moreover, Kathaleen's body was found by the front door (T-1279), and Jan

Pruitt, a neighbor of the Hoopers who was awake until 2:00 a.m. on the night of the murder, said she heard no screams coming from the Hooper apartment (T-2033). Perhaps if Pruit was aware of a struggle, so was Rhonda. Consequently, a reasonable doubt existed about the validity of the court's finding that Rhonda saw the struggle.

Similarly, the court's conclusion that Hooper's beating of Jimmy supports the finding that Hooper murdered Rhonda to avoid lawful arrest does not. That is, if Hooper murdered Rhonda to avoid being identified why did he beat Jimmy and then leave him crying and hollering (T-1442). Obviously, the boy was alive; if Hooper wanted to avoid lawful arrest by killing all witnesses then surely he should have killed Jimmy. That he did not when he could have easily done so is strong evidence that his motive was not to avoid lawful arrest. In Rembert v. State, Case No. 62,715, Fla. opinion filed February 2, 1984, this Court said:

> The [trial] court reasoned that, because Rembert and the victim had known one another for a number of years, Rembert eliminated the only witness who could testify against him, thereby establishing the avoidance or prevention of arrest. . . .
>
> The victim was alive when Rembert left the premises and could conceivably have survived to accuse his attacker. If Rembert had been concerned with this possibility, his more reasonable course of action would have been to make sure that the victim was dead before fleeing. We do not find that the state demonstrated beyond a reasonable doubt the requiste intent needed to establish this aggravating factor.

In addition, the fact that the bodies were left at the apartment supports the theory that these killings were impulsive. Waterhouse v. State, 429 So.2d 301 (Fla. 1983). In Adams v. State, 412 So.2d 850 (Fla. 1982) the body was hidden in a remote area and encased in a plastic bag. Likewise in Griffin v. State, 414 So.2d 1025 (Fla. 1982) Griffin killed his victim three miles from the store he had abducted him from. Accord Martin v. State, 420

So.2d 583 (Fla. 1982). Hiding the body in a remote area, far from where the victim was last seen, is strong evidence of an intent to avoid lawful arrest.

Also, the court found that Rhonda's body was "found at a location most distant from the entrance to the master bedroom. Her body was almost trapped between the wall and a chest standing near." (R-3427). What such a fact means is uncertain, and it hardly supports the court's reconstruction that Hooper pursued Rhonda into the bedroom and killed her (R-3427). Armstrong v. State, 399 So.2d 953 (Fla. 1981); Enmund v. State, 399 So.2d 1362 (Fla. 1981). In those cases the equivocal nature of the pathologist's conclusions that the victims were laid out prone to "finish [them] off" was insufficient to find that they were killed to prevent or avoid lawful arrest. Similarly here, the evidence of where Rhonda's body was found is equivocal.

Here, as in Menendez v. State, 368 So.2d 1278 (Fla. 1979) where the victim was killed using a silencedgun and his body was found with his hands outstretched in a supplicating manner,the state has not presented that strong evidence that Hooper's dominant motive in killing Rhonda was to avoid lawful arrest. This Court should not assume it.

ISSUE XII

THE COURT ERRED IN FINDING THE MURDER OF RHONDA HOOPER TO HAVE BEEN COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT THE PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In sentencing Hooper to death, the court found that as to Rhonda Hooper, Hooper had committed the murder in a cold, calculated, and premeditated manner:[36]

[36]The court did not find this aggravating factor for the murder of Kathaleen Hooper (R-3430).

FACT: Rhonda Kay Hooper was murdered by the deliberate act of the defendant in a cold, calculated manner. His choice of the weapon of her destruction, a ligature, exceeds the premeditations required to prove capital murder. Blood stains proved to have been only those of the defendant's were found on the ligature. It had to be formed, placed, and tied upon the child's throat before the pressure required to take her life was applied. This murder was an execution.

FACT: The defendant denied her murder and, consequently, no legal nor moral pretense nor justification was shown.

FACT: No motive for the murder of Rhonda Kay Hooper was shown by the evidence.

FACT: The child had loved him and they had gotten along exceptionally well, according to the defendant's testimony, which was corroborated by James Scott Hooper and others.

CONCLUSION: There is no aggravating circumstance under this paragraph as to Kathaleen Ruth Hooper.

There is an aggravating circumstance under this paragraph as to Rhonda Kay Hooper. Those facts constitute one of those cases which is the exception to the contract type murder referred to in McCray v. State, 416 So.2d 804, 807 (Fla. 1982) and Cannady v. State, 427 So.2d 723, 730 (Fla. 1983). The murder was an execution.

(T-3430-3431)

The problem here is that the state did not prove this factor existed beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1972). In fact, the state, several times referred to Hooper's drunkenness as a way of explaining why these murders occurred (T-2418,2421-2422,2424). Moreover, the state and the court admitted Hooper had no motive to commit the murder (R-3430). To the contrary, Hooper "had gotten along exceptionally well" with Rhonda (R-2429). From the record, there is absolutely no reason for Hooper to have committed the murders. Herzog v. State, 439 So.2d 1372 (Fla. 1983). Consequently, there is no evidence Hooper had planned or plotted the murder in a cold and calculated manner. Hill v. State, 422 So.2d 816 (Fla. 1983). To the contrary, the ligature appears to have been fabricated from a towel found in the apartment. Harris v. State, 438 So.2d

787 (Fla. 1983), and the killing, like that in Mann v. State, 420 So.2d 578 (Fla. 1982) was spontaneous.

The trial court's justification for finding this factor derives solely from the fact that a ligature was used to commit the murder (R-3430). The instrument of death, however, cannot be the sole justification for finding this factor. See Menendez v. State, 368 So.2d 1278 (Fla. 1979). In Menendez, this Court rejected finding the murder to have been committed for the purpose of avoiding or preventing lawful arrest:

> The state urges (with some logic) that any murder committed by means of a pistol fitted with a silencer indicates a motivation to avoid arrest and detection. The presumption accorded the instrument of murder by this reasoning, however, carries us too far. Were this argument accepted, then the perpetration of murder with a knife would similarly add an aggravating circumstance to the life-or-death equation, since it is less detectable than a firearm. This mechanical application of the statute would divert the life-and-death choice away from the nature of the defendant and the deed, as the statute seems to require.
>
> Id. at 1282 (footnote omitted).

Likewise, in this case, we do not know how or who formed the ligature; all we know is that one was used. We do not know what events preceded the killing, and the state presented no other evidence to show Hooper had the clarity of mind, the calculated motive, or the coldness of intent for the trial court to conclude that beyond a reasonable doubt he committed the murder in a cold, calculated, and premeditated manner.

## V CONCLUSION

Based upon the arguments presented here, Harold Hooper asks this Honorable Court to (1) reverse the trial court's judgment and sentence and remand for a new trial, or (2) reverse the trial court's sentence and order a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand to Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida, Attorney for Appellee; and, a copy has been mailed to appellant, Mr. Harold W. Hooper, #091077, Post Office Box 747, Starke, Florida, 32091, this 11 day of May, 1984.

for P. Douglas Brinkmeyer
DAVID A. DAVIS