IN THE SUPREME COURT OF FLORIDA

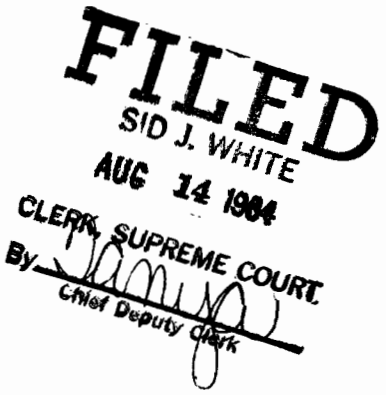
HAROLD W. HOOPER,

Appellant,

v. CASE NO. 64,299

STATE OF FLORIDA,

Appellee.



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

REPLY BRIEF OF APPELLANT

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	:	

REPLY BRIEF OF APPELLANT

I STATEMENT OF THE CASE AND FACTS

HAROLD HOOPER relies upon his initial statement of the case and facts presented in his initial brief.

II 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.

The state claims that Hooper could not waive his presence at voir dire, that despite his knowing and voluntary desire to waive his presence, he must sit in chambers because it was his right. In pursuing this argument, it relies upon four cases which merit discussion. Proffitt v. Wainwright, 685 F.2d 1227, 1258 (CA 11 1982) modified on rehearing, 706 F.2d 311 (CA 11 1983), appeal pending __U.S.__, Hall v. Wainwright, 733 F.2d 766 (CA 11 1984), Holton v. State, 2 Fla. 476, 500 (1849) and Morey v. State, 72 Fla. 45, 72 So. 490 (1916).

In Proffitt, on rehearing, what the court said about Proffitt's waiver of his presence was dicta because he had not, in any event, freely and voluntarily made such a waiver. Proffitt at 706 F.2d 312. Similarly what this Court said in Morey regarding Morey's right to waive his presence at trial was also dicta and not binding on this Court in this case.

Nevertheless, in Hall, supra, the 11th circuit read Proffitt to hold that an accused cannot waive his presence at any critical stage of his trial. Despite this clear ruling, however, the court remanded the case to the district court for further development to determine "whether Hall knowingly and intelligently waived his right to be present." Hall at 775. If such a right was non-waiverable, why remand for such a determination? Moreover, Judge Hill, in his concurring opinion, argued that the court and placed undue reliance on the dicta of the old cases of Diaz v. United States, 223 U.S. 442, 56 L.Ed. 500, 32 S.Ct. 250 (1912), Lewis v. United States, 146 U.S. 370, 36

L.Ed. 1011, 13 S.Ct. 136 (1892), Hopt v. Utah, 110 U.S. 574, 28 L.Ed. 262, 4 S.Ct. 202 (1884).

On the other hand, the more recent cases of Illinois v. Allen, 397 U.S. 337, 25 L.Ed.2d 353, 90 S.Ct. 1057 (1970), Snyder v. Massachusetts, 291 U.S. 97, 78 L.Ed. 674, 54 S.Ct. 330 (1934), Frank v. Mangum, 237 U.S. 309, 59 L.Ed. 969, 35 S.Ct. 582 (1915) and Howard v. Kentucky, 200 U.S. 164, 50 L.Ed. 421, 26 S.Ct. 189 (1906) support the position that a defendant can waive his right to be present at any hearing.

Moreover in Drope v. Missouri, 420 U.S. 166, 182, 43 L.Ed. 2d 103, 95 S.Ct. 896 (1975) the court left open the question of whether a trial can continue when a defendant is not present. Consequently, the law the state cites is not as well settled as it claims.

From the state's brief one must wonder who is conducting Hooper's defense: His counsel or the trial court. The message that Knight v. State, 394 So.2d 997 (Fla. 1984) and Washington v. Strickland, __U.S.__, 35 Cr.L. 3051 (1984) proclaim is that trial counsel conducts the defense and courts will not second guess his decisions. Similarly, here, why should the trial court determine trial strategy?

On a different level, however, the state's argument is bazarre. What it is saying is that when Hooper, using proper procedures, asked to waive his presence at voir dire, he could not. On the other hand, if he had sang the Star Spangled Banner during voir dire despite court orders to stop, he could have been excluded. If this Court affirms the trial court on this issue, the message to trial counsel will be clear. If a defendant does not want to be present at part of his trial, he need only cause a disruption. Surely that is not the message this Court wants to send.

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.

The state here relies upon the well worn argument that the trial court's discretion is broad enough to cover the problem raised by the court's excusal of venireman Musgrove because of his limited education. In his initial brief, Hooper acknowledged that a particular venireman's competence to sit as a juror was a mixed question of law and fact, lying within the trial court's discretion (see initial brief at 17, fn.13). Because the state seems to think that merely saying the court acted within its discretion answers Hooper's argument, further clarification of the appropriate appellate standard of review is necessary.

In Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1981), this Court said:

> In order to properly review orders of the trial judge, appellate courts must recognize the distinction between an incorrect application of an existing rule of law and an abuse of discretion. Where a trial judge fails to apply the correct legal rule, as when he refuses to terminate periodic alimony upon remarriage of the receiving spouse, the action is erroneous as a matter of law. This is not an abuse of discretion. The appellate court in reviewing such a situation is correcting an erroneous application of a known rule of law. * * * Our trial judges are granted this discretionary power because it is impossible to establish strict rules of law for every conceivable situation which could arise in the course of a domestic relation proceeding. The trial judge can ordinarily best determine what is appropriate and just because only he can personally observe the participants and events of the trial.
>
> Id. at 1202.

Consequently, when issues are purely factual, appellate courts must sustain the exercise of such judicial discretion unless the trial court has manifestly abused that discretion. See Singer v. State, 109 So.2d (Fla. 1959).

In those cases involving questions of mixed law and fact, however,

the analysis is more complicated:

> Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.
>
> Brown v. Allen, 344 U.S. 443, 97 L.Ed. 469, 73 S.Ct. 397 (1952).

Thus, if the facts are uncontroverted, the trial court's ruling loses its discretionary color, and upon review this Court must decide if the trial court made an incorrect application of an existing law. A manifest abuse of discretion, in short, is the incorrect standard of review in mixed questions of law and fact when the facts are uncontroverted or when such conflicts as exist are resolved against the complaining party.

Accordingly, the trial court's determination that Musgrove was incompetent to serve as a juror, involved an incorrect application of a known law and was consequently not a discretionary act. That is, the facts used by the trial court in excusing Musgrove were that Musgrove had a limited education which might make his ability to grasp complex legal problems difficult (T-593).[1] Admitting his functional illiteracy, however, does not end the analysis. The court should have then asked whether such illiteracy was a was a legitimate reason to excuse Musgrove from jury duty, and as presented in his initial brief, Hooper argues that it was not.

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[1] While Musgrove said he had itching skin (T-599), the court did not excuse him for that reason, and we must presume in light of the trial court's personal observations of Musgrove, Canakaris at 1202, that the court did not consider Musgrove's discomfort a sufficient infirmity to disqualify him from jury service. Moreover, even if the trial court had found as a matter of fact, that Musgrove had itching skin, this Court, as a matter of law, must determine if such a problem was a physical infirmity sufficient to disqualify him from jury duty.

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.

On page 32 of its brief, the state admits that sufficient evidence of Hooper's intoxication existed to justify giving a voluntary intoxication instruction:

> Appellee also agrees with appellant's assertion that the evidence adduced at trial was sufficient to warrant a jury instruction on voluntary intoxication.

In justifying the court's refusal to give such an instruction, however, the state claims:

> 1. Hooper never claimed voluntary intoxication as a defense. (appellee's brief at pages 32,33)
>
> 2. In any event, such an instruction would have been necessarily inconsistent with his defense that someone else committed the murders. (appellee's brief at page 34).

The record, contrary to the state's claims, clearly indicates that Hooper intended on raising his intoxication as a defense to premeditated first degree murder. The amount of evidence presented at trial of Hooper's intoxication, much of it by Hooper, clearly had relevance only to prove his level of intoxication:

> 1. An employee saw Hooper drink three beers on the 19th of August, an unusual occurrence as she had never seen Hooper drink (T-1880).
>
> 2. Hooper said that over several hours he drank 10 to 12 beers, at least a half a bottle of wine, and a considerable amount of whiskey (T-2102,2140-2141,2155).

3. On cross-examination, Hooper said he was "feeling no pain." (T-2141)

4. After 1:00 a.m. on August 20, he drank some more liquor (T-2103).

5. He had blackouts before and after the murders (T-2103, 2112).

6. The state produced evidence that Hooper drank three more beers after he had returned to the apartment (T-2237,2263).

7. When questioned by the police, Hooper said he had drunk a lot of beer and wine on the 19th and had experienced blackouts (T-2300). Moreover, when he drank, something breaks, it did so every time (T-2317).

8. Most significantly, Hooper told the police, "I wouldn't doubt [committing the murders] if I got drunk." (T-2312) "Oh, God, no. No. I may have done it if I got drunk." (T-2319).

Clearly, such evidence indicated that Hooper intended on raising a partial defense of intoxication. Moreover, what counsel did during the trial supports this conclusion. Specifically, before the charge conference, counsel had filed written instructions with the trial court requesting voluntary intoxication instructions (R-2427). Moreover, at the charge conference and at the end of the state's initial closing argument, defense counsel repeatedly requested a voluntary intoxication instruction (R-2515-2517). To say that Hooper "at no time during the trial [explained or relied] upon the defense of intoxication" (appellee's brief at 34) is to totally ignore significant portions of the trial.

Nevertheless, the state, in perverted twist of logic, argues that because counsel did not argue intoxication in his closing argument, he did not intend to raise that issue (appellee's brief at 35). That claim, however, conveniently ignores the fact that the court denied his requested instruction. Because of that, Hooper could not tell the jury that he lacked a premeditated intent to commit the murders because of his level of intoxication. Consequently, what else could defense counsel have argued once that partial defense was precluded?

He certainly could not argue intoxication. The only argument, weak though it may have been, was that if he was as drunk as he said he was, Jimmy Hooper would have smelled it. Defense counsel here did what any counsel would have done in such similar situation: Try to make bad facts look good. Counsel did not intentionally avoid arguing the voluntary intoxication issue, he was precluded from arguing it.

The state's second argument focused upon the perceived inconsistencies between Hooper's claims that he did not commit the crimes, but that if he did he was too drunk to know it.

As explained in Hooper's initial brief, such defenses are not necessarily inconsistent.[2] See initial brief at pages 27-28. That is, raising the possibility that someone other than Hooper committed the murders does not necessarily disprove the fact that Hooper was drunk on the night of the murders to the extent that he did not know what he did.

Nevertheless, after a torturous analysis of Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981),[3] the state's argument on this point is this:

> What distinguishes the instant case from Mellins is that the defense of voluntary intoxication is necessarily inconsistent with the theory of defense advanced by appellant in which he denied committing the murders and asserts someone else did it. The proof of one necessarily disproves the other. (appellee's brief at 39)

Other than stating this conclusion, however, the state has provided no reason why Hooper's defenses are mutually exclusive. Hooper, on the other hand, has shown why his defenses are not necessarily inconsistent.

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[2] Other than possible jury confusion, Hooper can think of no reason why inconsistent defenses should not be allowed. If counsel wants to follow such a trecherous course and risk confusing the jury with his inconsistent defenses, that should be his responsibility, not the court's. See People v. Hansma, 269 N.W.2d 504 (Mich.Ct.App. 1978).

[3] The state, in several places, refers to the trial testimony of Cassandra Mellins. That testimony, however, is not part of the record on appeal in this case as

Moreover, while other cases factually similar to this case have not been found, two cases by analogy suggest that Hooper's defenses are not necessarily inconsistent. In Sassnett v. State, 23 So.2d 618 (Fla. 1945) this Court reversed Sassnett's larceny conviction because Sassnett did not intend to steal the bull he had been convicted of stealing. In other words, Sassnett was not guilty of larceny because he lacked the specific intent to steal. The court, however, strongly intimated that had such an intent been present, and under the facts of that case, he could have also claimed a defense of entrapment. Lack of intent and entrapment were not necessarily inconsistent defenses.

In State v. Lora, 305 S.W. 452 (Mo. 1957) the court said:

> Insanity and alibi are not inconsistent defenses. Proof of one does not disprove the other. A defendant in a criminal case may rely on both and show that he was not at the place where the crime was committed and also introduce evidence to prove that he has not sufficient mental capacity to be responsible for the offense charged.
>
> Id. at 455 (cites omitted).

Finally, Hooper cannot believe the state seriously considers the court's error in refusing to instruct on voluntary intoxication to be harmless beyond a reasonable doubt (appellee's brief at 41). Assuming the evidence was overwhelming that Hooper committed the murders, it is far from overwhelming that he committed them with a premeditated intent. The evidence of his drinking and his statements upon being told what he had done strongly suggests that if he had committed these crimes, he did them with a depraved mind regardless of human life.[4] Section 782.04(2), Florida Statutes (1983) (R-2128).

3(cont'd)
this Court denied the state's request to take judicial notice of portions of the trial testimony of her. See the order of this Court entered on August 1, 1984, in this case.

[4]Similarly, the state misplaces its reliance on Steinhorst v. State, 412 So.2d 332 (Fla. 1982) to short-circuit Hooper's argument. In Steinhorst, appellate

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.

On page 45 of its brief, the state's argument mirrors the problem it had in its closing argument at trial:

> Appellant, or any defendant, who commits so horrible a crime can hardly expect, under the circumstances, for James Hooper, or any witness, to be a model of calmness, a sponge capable of soaking up all of the goings on around him while viewing his wife's lifeless form before him and then have the wherewithall and presence of mind to later regurgitate every single detail exactly as taken in.

The point is, that, of course, we do not expect James Hooper to be a "model of calmness." We do expect, however, the state to avoid asking the jurors to place themselves in the place of James Hooper, to feel as he felt, to suffer as he must have suffered. Moreover, despite what the state on appeal may argue about Hooper's inviting this comment, the trial court was not concerned about that problem, and when the court questioned him, the prosecutor uttered the classic definition of the golden rule argument:

> 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.
>
> (T-2498)

See Bullock v. Branch, 130 So.2d 74 (Fla. 1st DCA 1961).

In a less inflamed situation maybe such comment would have been merely harmless error. This case, however, involved the murders of a woman and her child

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4(cont'd)
counsel sought to argue a different point than it argued at trial. This Court rejected such tactic, probably for similar reasons as the "sandbagging" tactic in Clark v. State, 363 So.2d 331 (Fla. 1978). Nevertheless, in this case, everyone knew upon what grounds Hooper objected to the court's ruling, and just as certainly they knew such grounds implicated the state and federal constitutions. Hooper, on appeal, only develops this argument to assist this Court, he is not arguing an entirely different issue.

and the brutal beating of the mother's son. The pictures of the victims shown to the jury were the worst the trial court had ever seen and were highly inflammatory (T-1341,1353). Emotions, even at the appellate level, where all we have is the "cold record" naturally act to this tragedy. If counsel and judges, who are daily exposed to the brutal death in all of its horrible forms, dispair at such carnage, should we not expect a jury less desensitized than us to similarly be swayed? Nevertheless, despite the enormous difficulty the jury must have had in maintaining their detached impartiality (see T-1341, 1364,1353) the prosecutor's comment could only have exacerbated a case already on the brink of being impermissibly inflammatory. Consequently, allowing such a comment certainly was error, and this Court cannot say beyond a reasonable doubt that it was harmless.

ISSUE VI

THE COURT ERRED IN SUSTAINING THE STATE'S OBJECTION 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.

The state raises two arguments in this issue. First, it argues that defense counsel failed to object (a) to the court's sustaining of a state objection to his efforts to establish Jimmy Hooper's reputation (appellee's brief at 47,50), and (b) to the court's order denying his request to proffer Pruitt's reputation outside of the presence of the jury.

Hooper, however, did everything that the law required him to do. Before he asked Pruitt about Jimmy Hooper's reputation, he repeatedly asked the court if he could proffer her reputation testimony (T-2034,2036). In response, the court said:

> THE COURT: That's just not the way a trial goes, Mr. Baker. A man pays his money and takes his chances.
>
> (T-2036)

Second, the state argues that in examining Pruitt, Hooper tried several times to attack Jimmy Hooper's reputation for truth and veracity but voluntarily abandoned the effort. According to the state, to preserve this issue for appeal, Hooper should have asked for a proffer of what Pruitt would have said had he been allowed to proceed further. (appellee's brief at 49). Such a request would obviously have been a useless act in light of the court's earlier denial of just such a request. Bailey v. State, 224 So.2d 296 (Fla. 1969), Brown v. State, 206 So.2d 377 (Fla. 1968). Defense counsel brought the matter to the court's attention, that is all that he is required to do, and he "moved along" when it became obvious to him that the court was not going to let him impeach Jimmy Hooper's reputation. Moreover, in accordance with Boykin v. State, 40 Fla. 484, 20 So. 141 (1898) the questions asked by Hooper clearly indicated that whatever the answer would have been, those answers would have been material or pertinent. Section 90.609, Florida Statutes (1983).

Also, there is absolutely no authority for the state's argument that once a court has ruled, the defense must object to that ruling. In Lucas v. State, 376 So.2d 1149 (Fla. 1979) Lucas failed to object to the state's failure to make adequate discovery. Defense counsel was not faulted for not objecting to the court's ruling. The place to make that objection is on appeal.

Finally, the state claims this error was harmless because it was cumulative. In order to be cumulative there must have been some other evidence of Jimmy Hooper's reputation. There was not. Delmar's testimony, while damaging, was not testimony of his reputation. In addition, despite the state's argument that Hooper had a "full and fair cross-examination of Jimmy Hooper" Jimmy was hardly going to say he had a bad reputation. Further, accepting the state's argument (appellee's brief at page 51) repeals Section 90.609, Florida Statutes (1983) because once a witness has been examined, there is no need to have any reputation testimony because such examination allowed "the jury to hear and observe [the witnesses] testimony and therefore his credibility..." (appellee's

brief at 50). Such is not the case, and clearly such error was not harmless.

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.

The state argues that the evidence the court prevented Hooper from presenting at trial was either irrelevant or developed on cross-examination.

The evidence of James Hooper's motive to commit the murder was hardly irrelevant as it tended to prove that he had a premeditated intent to murder his wife. Section 90.401, Florida Statutes (1982). Of course James Hooper may not have personally committed these murders (T-2464). He may have hired someone to murder his wife, and during the course of this murder, this man may have also killed Rhonda. Moreover, only by the fortuity of Hooper's stumbling into the apartment in a drunken haze, was Jimmy Hooper's life spared. Such a scenario certainly is plausible, and the court erred by excluding evidence of James Hooper's motive yet allowing the state to present evidence of his lack of opportunity to commit the murder (T-1653-1654,1660).[5]

Further, saying that Hooper "had a fair and full cross-examination relative to the events he witnessed" (appellee's brief at 52), is analogous to saying that a particular runner ran as fast as he could. While that may be true, what the statement ignores is the fact that the runner is carrying a 50 pound rucksack no one else is carrying. In this case, given the limits imposed by the court, Hooper probably fully and fairly cross-examined the witnesses. The problem is that the limits imposed by the court were narrower than those permitted by the law

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[5] Subsequently, in light of the state's extensive evidence showing James Hooper's lack of opportunity to commit the murder, the court questioned, but never reversed, its earlier ruling concerning the relevancy of the defense evidence of James Hooper's motive to have his wife murdered (T-1711-1712).

and basic notions of fairness.

ISSUE VIII

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

Relying solely upon the newness of this Court's decision in Johnson v. State, 438 So.2d 774 (Fla. 1983), the state asks this Court to ignore the significant distinctions between this case and Johnson. Specifically, in this case: (1) the court gave no special cautionary instruction to minimally alert the jury of the dangers lurking in Jimmy Hooper's testimony. To the contrary, the court rejected all of Hooper's requested instructions, and gave instead the standard instructions on evaluating a witness' testimony (T-2365-2366), (2) cross-examination of Jimmy Hooper, no matter how brilliantly conducted, could not have developed several of the fallacies commonly believed about eyewitnesses. Brigham's testimony would have assisted the jury in this regard.

Significantly, some courts are re-examining their earlier decisions excluding experts on eyewitness identification. Hooper cited State v. Chapple, 660 P.2d 1208 (Ariz. 1980) as one court that has done this. The Sixth Circuit Court of Appeals in United States v. Smith, __F.2d__ (CA 6, opinion filed June 7, 1984), 35 Cr.L.Rptr. 2224, likewise has allowed eyewitness experts to testify. Such testimony, the court in Smith said was admissible because it assisted the jury, the same standard used in Section 90.702, Florida Statutes (1983). In this case, Brigham's testimony would have assisted the jury to evaluate Jimmy's testimony and was relevant, and it should have been admitted. Jent v. State, 408 So.2d 1024 (Fla. 1981).

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.

The state says that Hooper's statement that he was not going back to jail was admissible because it showed his consciousness of guilt. In reply, Hooper

asks, of what? Of what crime does it show his consciousness of guilt? Hooper, by his spontaneous statements to someone at the Salvation Army house thought the police wanted to arrest him because he had taken money and a gun from the Sea Hut Restaurant (T-1236,2116). Nothing he did after ever refuted this belief or supported the notion that he knew he had committed the murder of Rhonda and Kathleen and had beaten Jimmy. On the contrary, Hooper had a plausible reason for leaving Jacksonville which was independently supported by Rivenbark's testimony (T-2227,1893-1905). Moreover, when arrested, Hooper was visibly shaken when he learned that the police had charged him with beating Jimmy (T-2279,2283). Consequently, before admitting evidence showing a defendant's consciousness of guilt, the state must prove such evidence shows that the consciousness of guilt is for the crime charged. Here the state presented no such evidence, and to the contrary, Hooper presented evidence that if he fled it was because he did not want to meet George Rivenbark.[6]

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 trial court cited Riley v. State, 366 So.2d 19, 22 (Fla. 1978) to support its conclusion that this murder was committed to avoid lawful arrest. Riley is factually distinguishable in that the surviving witness in that case was left for dead whereas Hooper left Jimmy Hooper's bedroom knowing that he was alive. Consequently, the court could not conclude beyond a reasonable doubt that Rhonda was killed to avoid lawful arrest.

Moreover, the state is arguing that conceding that the court improperly

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[6] On page 58 of its brief, the state says counsel acquiesced to the court's ruling on this point. This is not so. Counsel understood the ruling but took exception to it (T-1942).

considered this aggravating factor, it was nevertheless harmless error. In light of the presence of mitigating factors such cannot be the case.

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.

The state cites language from Alvord v. State, 322 So.2d 533 (Fla. 1975) and Thompson v. State, 328 So.2d 1 (Fla. 1976) to support its position that the murder of Rhonda Hooper was committed in a cold, calculated, and premeditated manner. Those cases were decided before that factor was added to the list of aggravating factors. Consequently, what the court said there applied to the aggravating factor of especially heinous, atrocious, or cruel. This distinction is significant because the premeditation required to justify finding this factor is significantly greater than that required to justify a finding of premeditated murder. Combs v. State, 403 So.2d 418 (Fla. 1981).[7]

[7] The state noted that Rhonda's neck was also slashed. Appellee's brief at 66. That fact, however, was not mentioned by the trial court in its findings in support of this aggravating factor, and was in any event, not a cause of death (T-1389).

III 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 Reply Brief of Appellant has been furnished by hand to Mr. Thomas H. Bateman, III, Assistant 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 14 day of August, 1984.

DAVID A. DAVIS