IN THE SUPREME COURT OF FLORIDA

JAMES ROGER HUFF,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 65,695

ANSWER BRIEF OF APPELLEE

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TOPICAL INDEX

TOPICAL INDEX (cont'd)

AUTHORITIES CITED

(AUTHORITIES CONTINUED)

CASES PAGE

(AUTHORITIES CONTINUED)

(AUTHORITIES CONTINUED)

(AUTHORITIES CONTINUED)

(AUTHORITIES CONTINUED)

(AUTHORITIES CONTINUED)

(AUTHORITIES CONTINUED)

OTHER AUTHORITES CITED

STATEMENT OF THE CASE AND FACTS

Appellee generally accepts the Statement of the Case and Facts presented by appellant, with those additions and corrections pertinent to each argument as noted therein. Appellee would call attention to the additional facts presented under Point VIII, relating to the sufficiency of the evidence, at pp 20-21.

SUMMARY OF ARGUMENT

POINT I: Appellant's proffered expert on police procedure was too unfamiliar with the facts of the case to be competent.

POINT II: Prosecutor comment was harmless. A curative instruction was given and each juror individually polled.

POINT III: There was no error in the court's comment; the point was not preserved for review.

POINT IV: The trial judge made factual findings contrary to appellant's position regarding the Miranda warnings and voluntary nature of the confession.

POINT V: The witness' comment was harmless. This point was not properly preserved for review.

POINT VI: The evidence that appellant felt safe in the crime location is relevant.

POINT VII: No reversible error occurred in Terry Overly's cross-examination.

POINT VIII: The evidence of guilt was overwhelming.

POINT IX: No error occurred in the cross-examination of appellant.

POINT X: Terry Overly testified his memory was refreshed by his prior statement. The prior statement was also admissible as past recollection recorded.

POINT XI: Appellant shows no prejudice by "jocular" comments, which for the most part were made in the jury's absence. He did not preserve this point for review.

POINT XII: The evidence was properly preserved. Appellant's objections were not.

POINT XIII: The proffered evidence was irrelevant.

POINT XIV: The photographs and clothing were highly relevant.

POINT XV: There is no double jeopardy problem in appellant's retrial. The prosecutor did not intend to cause a mistrial.

POINT XVI: Appellant was present during all critical stages of this trial. Any objections were not preserved.

POINT XVII: Any errors in the trial were harmless; proof of guilt was overwhelming.

POINT XVIII: The death sentences were properly imposed.

POINT XIX: The death penalty statute is constitutional.

POINT I

WHETHER THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF A DEFENSE WITNESS REGARDING PROPER CRIME SCENE PROCEDURE

ARGUMENT

Several weeks into the trial of this cause, appellant announced he wished to present a new witness.[1] The witness was a retired St. Petersburg police officer, Alfred White, who lives in Pinellas County (to which the trial had been transferred on appellant's change of venue motion)(R 2427). On Friday, May 25, White offered the opinion that the crime scene had not been properly investigated (R 2455). This opinion was based solely on what defense attorneys told him, and observing photos of the scene; White had never been to the scene himself (R 2436-2438). White offered his view that no matter how numerous the footprints and tire cases, he personally would take casts of every one.[2] (R 2450). White further opined that if local Sumter County law enforcement processed the scene to the best of their ability, but did not do everything he thought they should, then they should have gotten assistance "from some place."[3] At the point his opinion was offered, White had read none of the testimony or reports regarding what was done at

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[1] The name of the witness, Alfred White, was given to the state Monday, May 21 (R 2427), three weeks after the trial had begun.

[2] "Q: Would there be a reason for not taking footprints if they were too numerous?
A: It wouldn't be for me, no.
Q: How about with tire tracks, sir, if they were too numerous to case?
A: Whatever length of time it takes, it should be done." (R 2450).

[3] "Well, I'm not familiar with the area and I don't know what is available in that area, but certainly they could get assistance from some place." (R 2454).

the crime scene, had never been to Sumter County (let alone the scene), and knew nothing of the conditions under which the officers operated. The trial judge ruled the "expert" evidence incompetent, irrelevant and immaterial:

> THE COURT: All right. Let's do it this way. The Court is not interested in hearing any more legal argument. I think without casting any aspersions at all upon the personal competence of the witness on crime scene investigations, the Court, of course, initially has not made a decision whether he is an expert witness or not, but even if the Court were to determine that he is an expert, and, quite likely, he is, I think it's ludicrous to expect the Court to allow this testimony to be presented to the jury based upon a handful of photographs and a totally insufficient hypothetical in which the facts are assumed that are not in evidence.
>
> MR. HILL: Judge, for the record, --
>
> THE COURT: I'm not through yet.
>
> There was no access given of this witness to reports, no knowledge of procedures actually used, the time frame of the photographs are not available to anyone. There's no testimony or no inclusion in the hypothetical as to the possibility that much of the crime scene portrayed in the photographs may have already been processed before some of the photographs had been made. I think it's just totally inadequate amalgamation of data to allow any expert, regardless of how knowledgeable he is, to give an opinion. So at least as of this point in time, I feel that his testimony would not only be incompetent, it would be irrelevant and immaterial.

(R 2478-2479).

Appellant re-proffered White on Tuesday, May 29, after Memorial Day weekend (R 2482). White had read reports of officers Williams, Elliott, and Thompson at home, and spent approximately 1 1/2 hours reading their transcripts that morning (R 2525). However, he had only finished a part of Williams, a part of Elliott's, and none of Thompson's testimony (R 2483; 2506-7; 2522). He still didn't know who the people in the crime scene photos were, or their function in processing the scene (R 2564-65). White stated he didn't know if any evidence was disturbed "because he wasn't there." (R 2568). The trial judge reaffirmed his prior ruling, and excluded the "expert" testimony (R 2607).

On appeal, appellant claims error in excluding the proffered opinion that proper procedures were not followed in processing the scene.

Contrary to appellant's belief, appellee does contest that preservation of the crime scene was a "crucial issue." The issue relevant to the cause is the claim of possible lost evidence which, according to the defense, could corroborate appellant's story. This issue is not affected one way or the other by any "expert" opinion about crime scene techniques. Had the state offered ten experts all testifying that the procedures followed represent the highest and best standards of recognized police procedure, the defense argument (and the issue) would be the same: that the procedure followed (whether good, bad or indifferent) could have resulted in possibly exculpatory evidence being lost. Thus, the relevant inquiry is into the actual procedures used, not a collateral critique of police procedures in general. A trial should not be turned into a collateral, irrelevant debate with one expert witness criticizing the opinions or methods of another. Carver v. Orange County, 444 So.2d 452 (Fla. 5th DCA 1983); Ecker v. National Roofing of Miami, 201 So.2d 586 (Fla. 3d DCA 1967).

Further, as recognized by the trial judge, this "expert" had no basis whatever for criticizing the police procedure in the instant case, because he had no knowledge of the scene or the procedure actually followed. While appellant cites the general rule, he fails to note that his cited cases require a trial judge to exclude proffered expert testimony where the expert has insufficient knowledge of the facts of the case at hand. See, e.g., Nat Harrison Associates, Inc. v. Byrd, 256 So.2d 50 (Fla. 4th DCA 1971). Experts with insufficient personal knowledge of the facts of the case should not be permitted to testify. Spradley v. State, 442 So.2d 1039 (Fla. 2d DCA 1983); Martin v. Story, 97 So.2d 343 (Fla. 2d DCA 1957).

Lastly, the witness's testimony that he did not know

of any lost, contaminated, or disturbed evidence, likewise negates any evidentiary value of his opinions, since there is no inference his methods would have made any difference. Accord, Husky Industries, Inc. v. Black, 434 So.2d 988 (Fla. 4th DCA 1983).

POINT II

WHETHER THE PROSECUTOR'S REMARK REFERRING TO APPELLANT AS A MURDERER REQUIRED THE TRIAL JUDGE TO GRANT APPELLANT'S MOTION FOR MISTRIAL.

In response to defense allegations that the Sumter County Sheriff's Office "contaminated" the crime scene, the prosecutor, in the course of a heated exchange with defense counsel, stated, "And I hope Mr. Hill is not suggesting that we should let a murderer walk free just because we didn't have the Federal Bureau of Investigation...conducting the investigation of the killing of his parents." (R 734-735). Argument continued, then defense counsel continued his cross-examination, asking Chief Lynum two more questions. Counsel then approached the bench and requested a mistrial (R 736). Appellant claims denial of this motion was error.

A mistrial should not be granted unless the comment was so prejudicial as to vitiate the entire trial. Cobb v. State, 376 So.2d 230 (Fla. 1979). It is respectfully urged that this comment could hardly be said to have influenced the jury at all. The jury was obviously aware that appellant was on trial for murder; "it is not reversible error for the prosecutor to refer to the defendant as a murderer where the indictment is for murder and evidence supports the charge." Washington v. State, 86 Fla. 533, 98 So. 605 (1924). This comment was made during the first day of testimony in the trial, on May 7, 1984. The jury retired to deliberate on June 1, some three weeks later (R 3080-3081). After three weeks and some

two dozen witnesses, any impact the exchange may have had was clearly dissipated. As in Blair v. State, 406 So.2d 1103 (Fla. 1981), the comment complained of was not

> "of such a nature so as to poison the minds of the jurors or to prejudice them so that a fair and impartial verdict could not be rendered." ...They did not "materially contribute to this conviction",...were not "so harmful or fundamentally tainted so as to require a new trial"..., and were not so inflammatory that they "might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise"...***"[I]t will not be presumed that...jurors are less astray, to wrongful verdicts, by the impassioned eloquence and illogical pathos of counsel."

406 So.2d at 1107 (cites omitted). See also, Mason v. State, 438 So.2d 374 (Fla. 1983).

Appellee would furtherpoint out that there was not contemporaneous objection and motion for mistrial at the time the comment was made, Clark v. State, 363 So.2d 331 (Fla. 1978), and that a curative instruction was given (R 754-755). In fact, each juror was specifically polled on his ability to disregard comments by counsel, and agreed he would do so (R 755-756). No error has been shown in the trial court's determination that a mistrial was unnecessary.

POINT III

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN THE COURT RULED THAT APPELLANT'S ANSWER TO A QUESTION WAS "VAGUE".

As noted by appellant, during his cross-examination by the state, the trial court stated, "the answer by the witness was vague." (R 2761). This ruling was in response to defense counsel's non-specific opposition to the state's persistent questioning. Appellee respectfully disagrees that this comment reflects one way or the other upon appellant's credibility.

Rather, it is a neutral ruling allowing a question to be re-asked, as not redundant. This should be compared to the situation where a court statement could be construed as a comment on the truthfulness of a witness, such as in Gordon v. State, 449 So.2d 1302 (Fla. 4th DCA 1984).[4] Further, if the ruling could be construed as an implication that the court feels appellant was "evasive" (as argued below), this "error" is exactly the type of situation which should be addressed by a curative instruction, not a mistrial. It is the possible influence on the jury of their possible interpretation of the trial judge's opinion which is complained of here. This speculative prejudice could readily have been dispelled by an announcement by the trial judge himself. Accord, Henderson v. State, 463 So.2d 196 (Fla. 1985); Provence v. State, 337 So.2d 783 (Fla. 1976). "Even if the comment is objectionable on some obvious ground, the proper procedure is to request an instruction from the court that the jury disregard the remarks." Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982). By failing to request an instruction by the judge which could easily have cured any misinterpretation, appellant waived any claim to prejudice on appeal. Appellee would also reiterate that the comment is innocuous and non-prejudicial in any case.

The other comment by the judge was insufficient to warrant even an objection by defense counsel (See R 2253 et. seq.). By failing to object, request a curative instruction, or move for a mistrial, any objection to comment by a trial judge is not preserved for review. Herzog v. State, 439 So.2d 1372 (Fla. 1983); Foreman v. State, 47 So.2d 308 (Fla. 1950); Scott v.

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[4] Q: In fact, you have been consistent with what your statement is except for the demonstration?
A: Right.
MRS. HOAGUE: Objection, Your Honor, that's not true.
THE COURT: Not only that, its very leading. The objection is overruled and it isn't true.

Gordon at 1303.

State, 396 So.2d 271 (Fla. 3d DCA 1981); Pegues v. State, 361 So.2d 433 (Fla. 1st DCA 1978).

POINT IV

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT TO SHERIFF JOHNSON THAT, "I SHOT THEM IN THE FACE."

When Sheriff Johnson arrived at the scene of the murders, appellant was seated in a patrol car. Johnson stuck his head in the car and asked what happened; appellant responded, "I shot them in the face." (R 1005-1006). Prior to this second trial, appellant moved to suppress this confession (R 3309). The same motion was re-filed after the jury was chosen, (R 3559), and a hearing held on the matter (R 518-530). A hearing had already once been had, determining that the confession was admissible, prior to the first trial of this cause. (See "Huff I", Case No. 59,989, R 1810-1845). At the motion to suppress in this re-trial, appellant represented to the court that Judge Booth's prior ruling would be "law of the case" unless different testimony was presented. (See Defendant's Memorandum of Law, R 3555-3557). The taking of testimony was postponed until the trial proper.

In this appeal, appellant claims that (1) "law of the case" should not have governed the admissibility of the confession, and (2) the motion to suppress should have been granted.

(1) "Law of the Case"

In ruling the statement admissible, the trial judge gave two bases:

> THE COURT: The state has shown by a preponderance of the evidence that the Miranda warning was adequately given. I feel it is law of the case and res judicata and will not disturb the original ruling.

(R 877-878). In now attacking the court's reference to "law of the case",

appellant is attempting to deny his own argument below. In fact, the trial judge accepted appellant's position as to "law of the case" (R 519). Appellant's own case citations and memorandum of law instructed the court that the prior ruling was binding on the judge unless new facts were presented; a trial judge should not revisit pre-trial motions to suppress or relitigate suppressison issues already decided. U.S. v. Montos, 421 F.2d 215 (5th Cir. 1970); Rouse v. U.S., 359 F.2d 1014, 1018, N.1 (D.C. Cir. 1966)[Cases cited as authority by appellant below]. While appellant may deny the applicability of federal authority now, there can be no question that any "error" by the trial court in this instance was invited. Further, the rule is not inconsistent with Florida law, and deference to a prior ruling is not error. See, Brown v. State, 397 So.2d 320 (Fla. 2d DCA 1981); Songer v. State, 365 So.2d 696 (Fla. 1978). See also, Gregg v. U.S. Industries, Inc., 715 F.2d 1522 (11th Cir. 1983). In any case, the court below did in fact have a new suppression hearing (R 790-858), and also took judicial notice of the prior testimony (R 849), before coming to its own independent ruling (in addition to finding 'law of the case').

(2) Denial of the Motion to Suppress

Appellant offers two reasons why his statement should have been suppressed. First, that a statement by Overly in the October, 1980, testimony ("Huff I" suppression hearing R 1810-1845), indicates appellant invoked his right to remain silent, and second, that there was insufficient predicate for the confession.

With respect to appellant's allegation that, at (Huff I, R 1834-5), Overly indicated that appellant invoked his right to remain silent, all that needs be said is that appellant's interpretation of the testimony is incorrect. Overly was referring to the fact that appellant acknowledged his right: "He said 'yes' to me and when he said 'yes' I just felt in my mind

that he acknowledged them." (Huff I, R 1834). As appellant recognizes, the testimony is ambiguous, but the trial court made a factual finding in the state's favor on this question (R 880).

With respect to the Miranda predicate, appellee would point out:

(1) Overly read the warnings from a Wildwood Police Department form. (R 900). Only one form has ever been used by the Wildwood department (See R 967-975). A copy of the Wildwood form was entered into evidence as exhibit 1 (R 975).

(2) Overly recalled giving all the warnings except the fact that counsel would be appointed at state expense if appellant could not afford private counsel (Huff I, R 1821-22; 1827-28). Failure to inform a suspect of the availability of appointed counsel does not warrant suppressing an otherwise voluntary statement. Alvord v. State, 322 So.2d 533 (Fla. 1975); see also, Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984). It might also be noted that appellant has always been represented by private counsel.

(3) Appellant asks this court to reverse the independent determinations of not one but two trial judges that the statement is admissible. Although Overly's testimony is susceptible of more than one interpretation, it was sufficient to support the rulings of these judges. "Any contrary inferences which might be drawn from the evidence have been resolved by the trial court in favor of the state," and this court should not substitute its judgment for that of the trial court. Ross v. State, 386 So.2d 1191, 1195 (Fla. 1980).

POINT V

WHETHER THE TRIAL COURT ERRED BY ALLOWING LAY WITNESSES TO GIVE OPINION TESTIMONY

A. FRANCIS FOSTER

Francis Foster, the first person to witness appellant after the

murders, stated without objection that after he had viewed the murder scene, he told his son "this thing don't look right. How is it that three people in the car, two people on the road and he's out over here." (R 659). When the prosecutor subsequently asked Foster to clarify why things did not look right, defense counsel objected that this called for an opinion, and pointed out that the question had already been answered (R 660).

If appellant's complaint in this appeal is with Foster's testimony that the situation "did not look right," appellee would point out that this opinion testimony was already before the jury without objection (R 659). The subsequent testimony merely explained the factual predicate for this opinion. Obviously, the jury was informed that two people were killed and appellant was not, so these facts do not prejudice him. Other witnesses also asked how appellant avoided injury; during Chief Lynum's testimony, for example, Lynum was asked:

> Q: Chief, in the course of your conversation with the defendant, did he indicate to you how he had escaped injury from this alleged or supposed assailant?
>
> A: He said he jumped out of the car and ran across the field is what he said.

(R 684). Thus, Foster stated nothing that was not already before the jury, and no harmful error occurred. Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Lopez v. State, 264 So.2d 69 (Fla. 3d DCA 1972).

Further, the circumstances of this testimony made it encumbant upon appellant to object again and move to strike the testimony. Foster had already stated without objection that "things don't look right." Since he was the first person to observe appellant, the prosecutor's question asking what didn't look right could have led to admissible "opinion" testimony relating appellant's appearance or actions. Sealey v. State, 89 Fla. 439, 105 So. 137 (1925); see generally, § 90.701, Fla. Stat. (1984). The

question was therefore proper, and appellant's objection properly overruled. Once Foster's answer revealed no further facts than the jury already knew, a motion to strike would be appellant's recourse. See, Herzog, supra. However, there was no such motion, or objection, or motion for mistrial, or request for curative instruction. In sum, it cannot be even remotely suggested that but for this comment of Foster, it is likely the result would have been different. Teffeteller, at 843, quoting Palmes v. State, 397 So.2d 648, 653-4 (Fla. 1981); Donaldson v. State, 369 So.2d 691 (Fla. 1st DCA 1979).

B. THE TESTIMONY OF MABRY WILLIAMS

In discussing his objections to the cited testimony of Williams (R 1354-5), appellant neglects to discuss the basis for overruling the objection below. As stated by the prosecutor, the testimony was elicited in response to "a question which was asked by Ms. Pepperman [defense counsel]." (R 1354). The basic thrust of the defense cross-examination of Mabry Williams (as well as other witnesses) was that evidence was not properly preserved at the scene. It was pointed out in cross-examination that appellant was arrested in the early stages of the investigation, and Williams was asked: "Isn't it true that that entire investigation was conducted in such a way as to justify the arrest of Mr. Jim Huff?"[5] (R 1301). The questions must be viewed in their proper context, i.e., as a response to the defense suggestion that only evidence of appellant's guilt was preserved. In this light, it was proper for the state to rebut the implication that evidence of appellant's innocence was found, either at the scene or in subsequent investigaiton, up to the day of trial. One of the objectives of re-direct examination is to explain, correct, or modify the testimony gathered from cross-examination,

[5] To which Williams inexplicably answered, "yes"; (R 1301); appellee would suggest he must have misunderstood the question.

and the testimony was properly offered for this purpose. Jones v. State, 440 So.2d 570 (Fla. 1983); Hinton v. State, 347 So.2d 1079 (Fla. 3d DCA 1977). Appellant "opened the door" in his examination of the witness, and shows no reversible error in the prosecutor's follow-up. Blair v. State, 406 So.2d 1103 (Fla. 1981). Appellee would also point out no limiting instruction was requested by appellant (nor was motion for mistrial made).

POINT VI

WHETHER THE TRIAL COURT ERRED IN ALLOWING EVIDENCE OF A CRIME NOT CHARGED

The state introduced evidence that appellant was familiar with the location of the murders, and thought it to be a quiet, secluded area with very, very little traffic (R 702). Appellant was seen two or three times parked at the location with a black female in the car (R 704-705).

Appellant clearly overstates his case in suggesting evidence of a "crime" was introduced, since none of the aforesaid conduct is criminal. Appellee concedes, however, that the evidence was offered with the idea that appellant's presence in the car with a black female is something he would wish to hide. This implication, the basis for appellant's objection, is also his downfall.

If the jury did not draw any negative inferences from the evidence, appellant shows no prejudice.

If the jury concluded appellant did have something to hide, the evidence allows exactly the inference for which it was offered: that appellant felt safe in the area, and felt he would not be discovered there. The prosecutor asked about six questions establishing appellant's presence at the scene with the woman, and mentioned once in closing argument that this could show he felt safe there. The evidence in both instances was presented

in the context that appellant was familiar with the area and thought it secluded; reference to the evidence was "brief and incidental". Oats v. State, 446 So.2d 90, 94 (Fla. 1984). Evidence of collateral crimes is admissible if relevant for any purpose, Sireci v. State, 399 So.2d 964 (Fla. 1981); "bad acts" are admissible to show state of mind. Alford v. State, 307 So.2d 433 (Fla. 1975). Appellant shows no error here.

POINT VII

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED UPON THE PROSECUTOR INDICATING TO CO-COUNSEL DURING STATE CROSS-EXAMINATION TO MAKE NOTE OF A POINT IN THE WITNESS'S TESTIMONY, ALONG WITH OTHER COMMENTS.

Appellant called Terry Overly during his case on defense (R 2220-2229). Overly was the officer who gave appellant his Miranda warnings, and who was first on the scene. Overly had been fired from both the Miami and Wildwood police forces, and held a rather vehement disregard for law enforcement, judges, and attorneys.[6] (R 2272; 2275; 2364). The defense elicited testimony from Overly that Chief Lynum searched the victim's vehicle at the scene, (disturbing possible evidence)(R 2221-2), and that Sheriff Johnson drove over a crime scene rope Overly had put up (R 2223). Overly also testified that he saw Sheriff Johnson get in Overly's patrol car where appellant was seated, and remain for about 15 minutes; Overly stated Harris Rabon was nowhere near the vehicle.[7] (R 2225-2227).

In this point on appeal, appellant urges reversible error in the prosecutor's cross-examination of Overly. The question of possible error in

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[6] Additionally, this prosecutor had him arrested and charged with contempt (R 800).

[7] The significance of this testimony is to impeach Rabon, who testified he heard appellant confess to Johnson in the car (R 1119).

prosecutor conduct should be viewed in the context of similar conduct by the defense. U.S. v. Young, 105 S.Ct. 1038 (1985). Appellee would argue that improper comments from witness Overly,[8] and his patently hostile manner, (See Overly's testimony, R 790-940; 2220-2229; 2245-2276; 2260-2264), should also be weighed when judging the overall effect of prosecutorial conduct.

Appellant first suggests that the prosecutor's technique of cross-examining witnesses by referring to other testimony contradicting theirs is improper. In this matter, appellant's appellate counsel disagrees with his trial counsel, who saw nothing wrong with the technique, did not object, and did the same thing himself. During the prosecutor's cross-examination of appellant using this technique, particularly clear examples of acquiesence took place:

> THE COURT: Why don't we take [a break]. How long do you say it's going to take?
>
> MR. BROWN: Well, let's see. I'm going through the statements. I'm down to Mabry Williams. That doesn't leave very much.
>
> MR. HILL [Defense Counsel]: Elliott.
>
> MR. BROWN: Elliott.
>
> MR. HILL: But he admitted he said no, so there's no impeachment.
>
> MR. BROWN: Yeah, he gave an explanation.

(R 2813).

* * * * *

> Q. [MR. BROWN]: Okay. So if he said that you never mentioned any vehicle whatsoever, that's a lie by him?
>
> A: I believe his testimony is false.
>
> MR. HILL: Judge, no objection, Mr. Brown. We would apreciate a page and line number, that's all.

(R 2815-2816).

[8] Such as, "Sheriff Johnson did something which I deem very unprofessional..." (R 2223).

Defense counsel at trial used the same method of cross-examination for, e.g., Sheriff Johnson, (R 1031), and Harris Rabon:

> Q: Well, Sheriff Johnson said it this morning. Now, was Sheriff Johnson incorrect?
>
> A: I cannot say what Sheriff Johnson said, sir, I didn't hear him.
>
> Q: Well, if Sheriff Johnson said that it took place in a Wildwood police patrol unit, would he be incorrect?
>
> A: No, sir.
>
> * * * *
>
> Q: Would Officer Overly be incorrect when he said that his car was a blue Wildwood Police patrol unit, blue, grayish-blue? The entire car grayish-blue?
>
> . . . .
>
> Q: Let me ask you this question one more time. Would Sheriff Johnson be incorrect when he testified that it took place in a Wildwood Police patrol unit?

(R 1145-1147). This method of cross-examination, used by both state and defense, tests the certainty of the witness' testimony when faced with a contradictory statement by another eyewitness. It also allows the witness to offer a possible explanation for apparent contradictions. (See, e.g., R 2702-5, where appellant explained how he could have been seated in the front seat between his parents, yet the arm rest be down when his parents were killed).

Appellant next urges error in the prosecutor's statement in arguing to the court about an objection, "It goes to his credibility and how much of what he can say or does say, if any, can be believed." (See R 2262-2263). Appellee would note that this comment is proper argument to the court, and does not express personal belief of the prosecutor; no law is cited to

show why this statement is improper; appellee is at a loss to further respond since no basis for impropriety is suggested.

Appellant's remaining argument preserved for review contends that the prosecutor's gesturing to co-counsel and mouthing to him "that's got it,"[9] along with the other comments, required that the court grant his motion for mistrial (R 2276). The prosecutor stated that he was indicating to co-counsel to make note of the state for late rebuttal, (R 2281-2282), and denied the jurors could have heard anything. The state also pointed out:

> MR. PFISTER: Your Honor, even if the jurors saw anything, during the course of the trial when the defense, they think that they have something there, they all four confer together. This is a small courtroom. They are not more than twenty feet away from the jury. They huddle together and write their notes. We're in the courtroom also, your Honor, and when we think we've scored something we huddle together and we write our notes and confer. They obviously know when we think something is going good and the defense thinks something is going good, your Honor. That's the way it is in every trial, your Honor. Nothing differently happened there.

(R 2285).

Even if the prosecutor's action could be deemed error, no reversible error is shown. Contrary to appellant's suggestions, the evidence in this second trial in considerable, including a confession (which could not be introduced in the first trial because Overly did not appear to testify regarding Miranda warnings). A curative instruction was given, (R 2360), which should be more than sufficient. Appellant offers no case where improper impeachment of a witness supports reversible error. In fact, in no case cited was the conviction even reversed, except appellant's extraordinary reliance on Murray v. State, 425 So.2d 157 (Fla. 4th DCA 1983), a case reversed

[9] There is dispute regarding what actual words the prosecutor mouthed. Statements of spectators in the courtroom are contained in the record from (R 2295) through (R 2351). Most did not hear any statement. The prosecutor stated to court and counsel that he said "that got it". (R 2278; R 2279; 2281).

on the point by this court. State v. Murray, 443 So.2d 955 (Fla. 1984).

No reversible error is shown. Mason v. State, 438 So.2d 374 (Fla. 1983); Blair v. State, 406 So.2d 1103 (Fla. 1981).

POINT VIII

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT A JURY VERDICT OF GUILT.

Evidence was presented in this trial allowing the jury to make factual findings identical to those already deemed sufficient in Huff v. State, 437 So.2d 1087 (Fla. 1983). Appellant was seen in the back, center of the car, with his mother driving and his father in the front passenger seat at 3:30 p.m., less than 1 1/2 hours before the murders (R 615-616; 634-638; 653-655). The bloodstains in the car indicate Mrs. Huff's blood on the driver's seat, and Norman Huff's on the front passenger seat (R 2015-2035). The shots were fired from the back seat (R 1201-1204). Tire tracks from the death vehicle reveal that the car entered the pit and stopped, then spun off running over Norman Huff's right foot, then turned around and left the pit; the car returned again to stop just below Norman Huff's body (R 1371-75; 1488-94; 1522). Appellant was seen driving the death vehicle near the crime scene, alone, at about 4:20 p.m. on the day of the murders (R 1557-1562) [he appeared at a neighbor's door to report the murders at 4:50 p.m., (R 654)].

In addition to the above (which was found sufficient in Huff, at 1088-1089), there was evidence that:

(1) Appellant told Sheriff Johnson, "I shot them in the face." (R 1006). Norman Huff was shot in his left eye and left side of the head (R 1604-1612). Genevieve Huff was shot in the scalp, temple, and neck (R 1586-87). Deputy Harris Rabon corroborated that appellant told Johnson

something to the effect of "I did it." (R 1119).

(2) The victim's injuries are consistent with a .32 caliber automatic pistol, (R 1615); and casings, bullets, and unfired .32 automatic rounds were found in the car (R 1819-1821; 2091-2117). Appellant told a witness that he possessed a .32 caliber army automatic pistol (R 2082).

(3) Appellant had a large spot of his mother's blood on his pants, soaked through onto his underwear, consistent with having sat in the driver's seat (R 1778; 2040-2042).

(4) Appellant initially refused to take a gunshot residue test (R 1934). After hearing a message come over the radio of the patrol car in which he was riding, indicating a test would be administered over his objection, appellant began rubbing his hands on his pants (R 1126-1127).

(5) Appellant gave various statements at the scene inconsistent with each other and inconsistent with his trial testimony.

(a) Appellant told Francis Foster, Chief Lynum, and Officer Boyett that his car had been forced off the road (R 665; 681; 980).

(b) He told Sheriff Johnson there were two or four persons, and "they" shot his parents (R 1006). Appellant told Boyett only one assailant was involved (R 983).

(c) Appellant stated to Chief Lynum that he escaped injury by jumping out of the car and running across the field (R 684).

The aforesaid evidence is clearly sufficient to support premeditated murder. Huff v. State, 437 So.2d 1087 (Fla. 1983). Appellant argues that this trial should be distinguished from the first trial, since appellant here testified, offering a reasonable hypothesis of innocence. Appellant's story here, however, is no different from the basic statements he offered

at the last trial: that an unknown assailant got in the car, robbed him and his parents, then knocked him out; when he awoke, his parents were lying on the ground, dead.

A jury need not believe appellant's testimony if it offers an unreasonable explanation in light of other facts. Williams v. State, 437 So.2d 133 (Fla. 1983). Conflicts in the evidence are resolved in favor of the jury verdict. Id. Here, appellant's story is unreasonable in light of the testimony establishing that the vehicle left the scene after the murders, and appellant was observed driving the vehicle near the scene at approximately 4:20 p.m.; his mother was driving prior to the murders, which were reported by him at 4:50 p.m. Further, medical testimony indicated appellant showed no sign of being struck on the head (R 2858-92; 2893-2900). Officer Williams felt appellant's head at the scene, but found no bump or injury. Appellant did not appear injured at the scene (R 684-685).

Appellant testified at trial that when the car left Bergman Realty, he was driving, with his mother and father beside him in the front seat. He argues that this testimony must be believed, since no witness saw the car leave, and thereby establishes an irrefutable hypothesis inconsistent with guilt (since the shots were fired from the back seat). This would explain how he was seen driving near the scene (although it doesn't explain how he was seen alone). Appellee respectfully disagrees that the jury could not reject this testimony, and, in fact, undoubtedly did. This explanation is inconsistent with other evidence in several respects:

(1) Appellant told Officer Williams that his mother drove to the crime scene (R 1181).

(2) The armrest between the driver and passenger seat was down when Norman Huff was shot (R 1810, 1258).

(3) A considerable amount of blood was spread around the front seat, especially from Norman Huff, whose blood ran over both sides of the armrest, soaking a map, and leaking onto the back floorboard. A bullet went through his upraised hand into his eye, and he slumped forward. Mrs. Huff's blood is on the driver's side. As appellant notes, he had no blood on him except from sitting in the driver's seat after his mother's blood was already there. If appellant were in the driver's seat prior to the murders, the assailant would have had to remove his unconscious body from the car to it's alleged location in front of the vehicle (and in its path),[10] then returned to the back seat to shoot the victims. Otherwise, the victims' blood would have at least spattered on appellant, since spatters were on the dashboard, and a bullet hit the steering wheel.

(4) The assailant would have had to accomplished the aforesaid, plus rob the victims, plus strike Mrs. Huff's head several times, then turn the car around, leave the scene, and for some reason return to the scene, all between 4:20 when appellant was seen driving the car and 4:50 when he appeared at Foster's house.

Whether a hypothesis of innocence is reasonable is a jury question. Williams v. State, supra, Rose v. State, 425 So.2d 521 (Fla. 1982). Obviously, the jury did not believe appellant's version.

The evidence of premeditation was also sufficient. Appellant had to bring his gun along with him into his parents' car. See, Eutzy v. State, 458 So.2d 755 (Fla. 1984); Williams v. State; accord, Davis v. State, 461 So.2d 67 (Fla. 1984). After murdering one of his parents, he then had to proceed to kill the other; after shooting his father in the face, then the head, appellant proceeded to shoot his mother three times and deliver

[10] Where appellant testified he awoke after the murders (R 2747-48).

multiple forceful blows, cracking her skull. This behavior is such that a premeditated design to kill may be inferred. Heiney v. State, 447 So.2d 210 (Fla. 1984). The jury resolved any conflicts against appellant. Oats v. State, 446 So.2d 90 (Fla. 1984).

POINT IX

WHETHER THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED UPON THE PROSECUTOR'S ASKING APPELLANT TO CLARIFY WHAT HE MEANT BY "PROFFER".

Contrary to appellant's representation, there was no motion for mistrial made regarding the cross-examination recited in his brief, nor was there any objection or request for limiting instruction. See, (R 2687-2688). The reason for this is that it was appellant's counsel's own desire to assert attorney-client privilege, so obviously no objection was made; it was then entirely proper for the prosecutor to ask appellant if he personally desired to assert the privilege, since the privilege was his, not the attorney's. § 90.502, Fla. Stat. (1984); see, Delap v. State, 440 So.2d 1242 (Fla. 1983). Defense counsel noted this by saying, "It's up to you Mr. Huff, but --." (R 2687). No objection was preserved below, Clark v. State, 363 So.2d 331 (Fla. 1978); there was no objection to be made.

There was objection and motion for mistrial after the following exchange in the state's cross-examination of appellant:

> Q: And could you tell us, please, why was it that you [appellant and his parents] were going to Stan Cushman's office in Wildwood?
>
> A: I think, Mr. Brown, you should proffer this testimony.
>
> Q: You would prefer -- If I understand correctly, you would prefer to answer without the jury present?
>
> A: I would be most happy to answer with the jury present, but I think you should proffer the testimony.

> MR. HILL: Judge, that's clearly attorney-client priviledge why he went there, that's why. And for the record, I have instructed him if it's attorney-client priviledge, just like priest-penitent priviledge that Mr. Brown respects and that also ought to be respected. It's clearly outside the scope of direct examination. May we approach the bench, Judge?
>
> (WHEREUPON, the following bench discussion ensued outside the hearing of the jury panel and the Defendant.)
>
> MR. HILL: Judge, we would object at this time. It's clearly outside the scope of direct examination. Further, it's certainly attorney-client priviledge. Secondly, we would object to Mr. Brown's comments concerning what the jury -- in his testimony preferred the jury being out. It's prejudicial, and we would move for a mistrial for the purposes of those statements to the jury, which were clearly unnecessary. And Mr. Brown knows that it could be interpreted and I've informed my client that it's certainly attorney-client priviledge why he went to see the attorney. It's no one's business why he did.

(R 2683-2684).

The motion for mistrial, and this point on appeal alleging prejudicial misconduct by the prosecutor, are clearly meritless. The prosecutor, faced with appellant's answer that the testimony should be "proffered", was entitled to try to clarify what it was that appellant wanted. Appellant had no basis in law to simply request that his own testimony be proffered, without any particular reason given. In fact, his assertion of attorney-client privilege based on why his parents were going to an attorney is highly questionable. (See, R 2686: THE COURT: Did Mr. Cushman represent this defendant or his parents? MR HILL: I don't know, Judge."). In any case, the resolution adopted by both sides was to have defense counsel have appellant assert attorney-client privilege.[11] Any objection was abandoned or waived; no error in fact occurred. (See, R 2683-2688).

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[11] MR. BROWN: Why don't you, Mr. Hill, when I ask the next question stand up and say, "We assert the attorney-client privilege."
MR HILL: Fine.
THE COURT: Motion for mistrial denied. (R 2686).

POINT X

WHETHER THE TRIAL COURT ALLOWED IMPROPER USE OF OVERLY'S PRIOR TESTIMONY TO ASSIST HIS MEMORY AT TRIAL

Witness Terry Overly testified regarding Miranda warnings during a suppression hearing prior to the first trial of this cause. (Huff I, R 1810-1845; See Point IV, supra). During a suppression proffer in the instant trial, Overly showed difficulty in recalling either the warnings themselves, or his prior testimony (See, R 790-858). The trial judge took judicial notice of the earlier transcript, (Huff I, R 1810-1845), without objection by appellant (R 849-850).

During trial, the prosecutor offered two bases for his use of the transcript: to refresh Overly's recollection (R 901-902), and as past recollection recorded (R 9050907). The document was used properly for either purpose.

According to his testimony, Overly's recollection was in fact refreshed by use of the earlier testimony[12] see, (R 911-917). Appellant's argument here is untrue, as a matter of fact.

Even if the record was used as past recollection recorded, its use was not improper as a matter of law. Section 90.803(5), Florida Statutes (1984) provides:

> The provision of section 90.802 to the contrary notwith-

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[12] E.g., Q: ...Do you recall that?
A: Yeah, Now I do.
Q: Okay. Does that refresh your recollection?
A: Yes.
(R 913)

* * * * *

Q: ...Does that refresh your recollection as to whether you asked him if he understood?
A: Yes.
Q: Okay. And did you, in fact, ask him if he understood?
A: Yes.
(R 915).

standing, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(5) RECORDED RECOLLECTION. - A memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. A party may read into evidence a memorandum or record when it is admitted, but no such memorandum or record is admissible as an exhibit unless offered by an adverse party.

Thus, if Overly's memory "was not refreshed at trial" as appellant (erroneously) suggests, the record of his prior knowledge, the transcript, was still admissible evidence if it was shown (1) to have been made when his knowledge was fresh, and (2) his prior testimony accurately reflected that knowledge.

Overly testified that his memory was fresh at the time of prior hearing:

> Q: In a prior proceeding, did you recall what it was that you read to the defendant? And specifically, thinking back to the hearing, October 23, 1980. At that point when I was asking you questions, did you recall what it was that you advised the defendant?
>
> A: Yes, I did. It was the Miranda Rights.
>
> Q: Okay. And at that time did you recall specifically what it was that you said?
>
> A: Yes, at that time I knew my Miranda Rights a lot better than I do now, I had to use them all the time.

(R 900-901). Overly also testified that the testimony he gave in the transcript was accurate:

> Q: ...You've had occasion to look at that transcript of of the suppression hearing from October 23, 1980, is everything that you said in the course of that suppression hearing and your testimony, was that true?
>
> A: Yes, it was. Like I never lie in court, I do my best to remember the facts the best that I can and I always tell the truth....

(R 802).

Consequently, a proper predicate was before the court to allow the prior record into evidence.

Without belaboring the issue, appellee would also point out several areas of disagreement with appellant's stated facts and conclusions.

First, it was not Overly who was confused in referring to a prior deposition at (R 803), see (AB p. 56), it is appellant. A review of the testimony reveals Overly was in fact being questioned about a deposition at that point.

Second, appellant's horror at "the prosecutor actually reading certain questions and answers from this transcript" rather than introduce the transcript itself (AB p. 55), is also unwarranted. Section 90.803(5) specifically requires that the past record be "read into evidence," and not introduced as an exhibit.

Third, appellee respectfully disagrees that having a court reporter read the transcript into evidence would have been the proper procedure. (AB p. 56). This procedure is used to introduce an admission of a party, where the court reporter is the witness who heard the statement and needs his memory assisted. An admission of a party is admissible by testimony of a witness (the court reporter). However, for another witness (the court reporter) to testify Overly said he gave Miranda warnings is inadmissible hearsay, irrespective of whether his memory is present, refreshed, or recorded. Overly was the proper witness to verify this past recorded memory of his own testimony.

Lastly, appellant was not denied any confrontation rights. The testimony was made in a contested suppression hearing. Appellant had not one, but two opportunities to cross-examine. Appellant in fact used the prior testimony to raise new objections to admission of his statement. See, (R 877 at seq). Appellant never discussed this point in terms of

confrontation below, and there is no grounds to do so now.

In sum, appellant's argument in this point inaccurately represents the record, and, additionally, shows no error as a matter of law.

POINT XI

WHETHER THE CONDUCT BY THE TRIAL JUDGE DEMONSTRATES THE JURY DID NOT TAKE THE PROCEEDINGS SERIOUSLY AND THEREFORE DENIED APPELLANT A FAIR TRIAL.

Appellee objects to appellant's attempt to argue "these and all similar instances" of misconduct by the judge and/or prosecutor, requiring appellee and this court to review a twenty volume record trying to guess what exactly it is that appellant would like this court to review. While there are some "jocular" remarks by the trial judge, most are in the jury's absence, and thus could not be the subject of this point on appeal. Since there was no objection of any sort made below, the trial record offers no clue to any prejudice occurring, and appellant takes the unacceptable position that it is not necessary for him to point out specific objectionable occurrences on appeal, either.

There are numerous reasons why the type of "problem" alleged here requires objection below before error can be claimed on appeal. The impact, if any, of "jocularity" is not discernible in a cold transcript. Appellee suggests that most of the judge's remarks to the jury would be considered completely normal and unworthy of comment had we been present in the courtroom. It must be recognized that these jurors were kept from their regular daily lives for over a month, and many days were shuttled back and forth to the jury room or hotel hearing only an hour or two of testimony. While the attorneys are intent on their argument and procedure, the trial judge must also be aware of the jury's needs. It is only to the defendant's benefit

that the trial judge sees to the jury's comfort and convenience, maintains their attention, and avoids their irritation at all the hours of argument of counsel outside their presence (which is, from their perspective, wasted time). It seems only normal to appellee that the jurors would adopt a stray dog in their "off" hours over a month's time, and appellee respectfully submits that no prejudice whatever is even remotely inferrable from the trial judge's reference to it. The judge noted to counsel (outside the jury's presence):

> THE COURT: ...The jury has obtained a diversion for any type of boredom they might experience. They have adopted a dog. Apparently a very loving little dog.
>
> MR. HILL: [Defense Counsel]: I wonder who's going to take it home.

(R 2135).

When it was necessary to once again send the jury back to their hotel for the entire day, the court tells them they will have an opportunity to spend some time with their dog (R 2137). This comment is in the nature of apologizing to the jury for the delay, which is only normal politeness, and occurs in every jury trial.

The point is, in the course of a one month trial, occasional "jocular" remarks are to be expected, and certainly do not prejudice the defendant; they may even work in his favor. Defense counsel at trial perceived no irregularity or reason for objection, and did not mention any "jocularity" problem in his motion for new trial (R 3781-82). This situation goes beyond even the policies expressed in Clark v. State, 363 So.2d 331 (Fla. 1978), since without objection below there is no reason to assume prejudicial error even occurred, let alone be preserved for review.

Likewise, appellee also relies on the obvious procedural default in appellant's failure to object, ask for instructions, or move for mistrial with respect to any of the allegedly prejudicial comment or actions.

Ferguson v. State, 417 So.2d 639 (Fla. 1982); Castor v. State, 365 So.2d 701 (Fla. 1978). Any "error" below could easily have been corrected, and future "jocularity" avoided, by the simple expedient of registering an objection. Appellant "will not be allowed to await the outcome of the trial with the expectation that, if he is found guilty, his conviction will be automatically reversed." Clark v. State, at 335. Further, it cannot be presumed that the jury acted improperly, or were "led astray to wrongful verdicts" by anything that was said or done. Blair v. State, 406 So.2d 1103 (Fla. 1981). The appropriate solution to non-prejudicial prosecutor misconduct is referral to the Florida Bar. State v. Murray, 443 So.2d 955 (Fla. 1984). Likewise, if judicial misconduct did occur here, this is a matter for the judicial qualifications commission, not an appellate reversal.

POINT XII

WHETHER APPELLANT WAS DENIED DUE PROCESS BY THE FAILURE OF THE STATE TO PRESERVE EVIDENCE.

Appellant argues error involving five items of evidence:

(1) The victims' blood samples
(2) The defendant's clothing
(3) The victims' vehicle
(4) The rear view mirror from the vehicle
(5) The gun shot residue test

"Due process" arguments were raised below only as to the blood samples and the gunshot residue test, thus a due process argument is cognizable only as to those items in this appeal. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

With respect to the victims' blood samples, appellant moved to exclude the tesitmony of the state's serologist (who identified various bloodstains as being those of either Norman or Genevieve Huff)(R 3431). The basis for this motion was that the blood samples taken from the victims,

to type Norman and Genevieve, were no longer available. Id. In fact, the vials of blood were available and actually introduced into evidence, (R 1209-1215; 1231). However, one of the vials had cracked between the first and second trials (R 1215). The vials of blood were introduced into evidence in appellant's first trial, in their original condition (Huff I, R 558-560). With respect to the gunshot residue test, appellant claimed below that his cross-examination was hampered by the failure of the state to preserve any instructions that may have been with the residue kit when it was used (R 546-548).

In order to impose a due process duty upon the state to preserve evidence for defense inspection, the "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 104 S.Ct. 2528, 2534 (1984). Further, any duty imposed "must be limited to evidence that might be expected to play a significant role in the suspect's defense." Id.

Suppression of the serologist's testimony was clearly an unnecessary measure. Appellant cannot seriously argue that the blood types of the victims was incorrect, and does not even suggest that the evidence would have been exculpatory. He did not argue below that the blood in the car was any other than his parents'. The samples could have been tested prior to the first trial, thus appellant cannot suggest he had no opportunity to do so. Further, he could easily have challenged his parents' blood types with proof from other sources, such as medical records, if there were any dispute as to their correctness. No prejudice is shown by the "loss" of the blood. State v. Sobel, 363 So.2d 324 (Fla. 1978).

Neither was it error to allow testimony regarding the gunshot residue test. Appellant examined the test two weeks before trial, and found the instruction sheet missing. The absence of the instruction sheet, he alleged, made proper cross-examination impossible (R 546-7). However, appellant did, in fact, cross-examine Detective Elliott from a copy of the instructions (R 1882; 1886-1889). Thus, no prejudice occurred. Further, the detective had a memo sheet indicating the procedure he actually followed, along with the actual materials used (R 1882). This information provides the subject matter for cross-examination, not the instruction sheet; appellant suggest no error in the procedure followed. There is no due process error in discarding the test materials, so there could hardly be error in discarding the packaging. California v. Trombetta; see also, Breedlove v. State, 413 So.2d 1 (Fla. 1982); Perry v. State, 395 So.2d 170 (Fla. 1981).

Appellant's objection to introduction of his clothing was that the items of clothing were packaged together, perhaps allowing blood from one to get on the other. There was a large spot of blood on his pants, and a smaller spot on his underpants apparently where it had soaked through. Presumably, appellant's objection is that the clothing was not shown to be in the same condition as when it was removed from him. However, Detective Elliott testified the blood was too dry to have transferred (R 1771-2; 1779; 1783). Witnesses saw the spot on appellant's underpants while he still had them on, so it could not have come from contact in packaging (R 1728; 1129). The clothing was preserved, and introduced into evidence, so it is unclear how appellant's citations of authority are pertinent. Relevant evidence is admissible unless there are signs of probable tampering. Peek v. State, 395 So.2d 492 (Fla. 1981).

Appellant's objection regarding the victim's vehicle is unclear from the record (R 1743). He apparently decided he wanted to object to the

introduction of some items removed from the vehicle (sometime after others had already been introduced) on the ground that the vehicle had not been preserved for his inspection. It was available for inspection prior to the first trial (R 1743-4). Appellant never sought to inspect the vehicle, thus is precluded from objecting. Peek v. State, supra. Further, there was no possibility that additional evidence would have been found, since the vehicle was thoroughly processed, with photographs available (R 1785, et. seq), thus, appellant failed to show any prejudice. California v. Trombetta, Perry v. State, State v. James, 404 So.2d 1181 (Fla. 2d DCA 1981); see also, United States v. Herndon, 536 F.2d 1027 (5th Cir. 1976).

Appellant's argument concerning the rear-view mirror is also meritless. His objection in the record (R 2847-8), is insufficient, in that it is impossible to determine his legal grounds, if any. Castor v. State, 365 So.2d 701 (Fla. 1978); Clark v. State, 363 So.2d 331 (Fla. 1978). The mirror was preserved and admitted into evidence, (R 1807), as well as inspected by the defense prior to trial. On April 25, 1984, (approximately one month prior to trial), appellant moved to have the mirror re-dusted for prints (R 3307). The motion was granted, but dusting could not be accomplished in time for trial. The trial court denied appellant's motion at trial (whatever it was) by stating:

> Neither side saw fit to expedite the matter, but mainly based on the argument and the depositions demonstrating that the mirror had been thoroughly dusted before the last proceeding, I will rule in favor of the state that it is unnecessary for the mirror now to be produced and reevaluated.

(R 2848). The state is not responsible for the defendant's failure to seek fingerprint evidence in time for trial; "we have broad discovery rules and defendants must diligently use them." Perry v. State, at 174. Further, once again, the mere possibility of exculpatory evidence does not demonstrate

prejudice; Perry; here, the mirror had already been dusted, and no favorable evidence found.

POINT XIII

WHETHER THE TRIAL COURT ERRED IN LIMITING APPELLANT'S CROSS-EXAMINATION OF SHERIFF JOHNSON

At the outset, appellee disagrees that Sheriff Johnson was a "lynchpin" witness. Appellant was already convicted once for this crime without Sheriff Johnson's testimony. Further, Sheriff Johnson was not "the only witness who testified that appellant made an incriminating statement." Harris Rabon corroborated appellant's confession. Sheriff Johnson's testimony was not even necessary.

During cross-examination, defense counsel asked Sheriff Johnson,

> Q: The next question that I ask, Sheriff, isn't it true that you were under investigation by the Florida Department of Law Enforcement for sexual misconduct in 1979 and '80?

(R 1046). The prosecutor objected; defense counsel responded that he had witnesses who would testify that sexual misconduct occurred, and stated,

> "I think it goes not to bias or prejudice, but certainly his credibility before this jury whether it was or it wasn't. We can certainly put on the people who say it was true in our case and we are prepared to fly Jackie King down from Nebraska to say it was true. We can bring down others who will testify to that, too.

(R 1047-1048)(emphasis added). In this appeal, appellant takes the position that the proffered testimony[14] was offered on the issue of bias or motive. This situation is exactly identical to that discussed in Steinhorst v. State,

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[14] The proffered cross-examination (R 1065-1068) revealed that in October or November, 1979, the sheriff was investigated for sexual misconduct; there was publicity surrounding this; 1980 was an election campaign; the sheriff denied the misconduct occurred.

412 So.2d 332 (Fla. 1982). Below, the stated purpose of the inquiry was credibility. Appellant cannot now offer different grounds.[15] Id., at 337-338. As a means of impeaching the Sheriff's credibility, the cross-examination (and anticipated rebuttal witnesses) was clearly improper. Id. Basically, appellant attempted to set up a collateral "straw man" issue just for the purpose presenting prejudicial rebuttal witnesses to show the witness "lied" about this collateral matter.[16]

Even if appellant's argument on appeal is considered, there are no grounds for his claim of error. While it is true that a witness may be cross-examined regarding his motive for testifying, the trial court may limit such cross-examination where the facts relied upon are too remote to show such a motive. Morrell v. State, 297 So.2d 579 (Fla. 1st DCA 1974); accord, Hitchcock v. State, 413 So.2d 741 (Fla. 1982). The issue of whether sexual misconduct actually occurred has no conceivable relevance to any motive for testifying. See generally, Justus v. State, 438 So.2d 358 (Fla. 1983); Sireci v. State, 399 So.2d 964 (Fla. 1981). It is also highly prejudicial and embarassing to the witness. Tinker v. U.S., 417 F.2d 542 (D.C. Cir. 1969).

POINT XIV

WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE BLOODY CLOTHING OF THE VICTIMS AND VARIOUS PHOTOGRAPHS

As appellant notes, the test for this type of evidence is rele-

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[15] Appellant, in his brief, gives a record citation to argument raising Sheriff Johnson's motive in testifying. (AB p. 63; R 2238-39). This argument was offered during Terry Overly's testimony, however, long after Sheriff Johnson left the witness stand.

[16] Since the sexual misconduct charges were dropped as unfounded, appellant, essentially, was attempting to re-try Sheriff Johnson as a sidelight in this trial.

vance. Henderson v. State, 463 So.2d 196 (Fla. 1985). The location of the blood stains, as well as the amounts of blood in the various locations, was not only relevant, it was crucial evidence to both the state and defense theories. See, e.g., Point VIII, p. 23, supra. Defense counsel made extensive use of the photos and the clothing itself in his closing argument to demonstrate his theory (R 3015; 3026; 3056). Appellee respectfully suggests this point is frivolous. Henderson; Straight v. State, 397 So.2d 903 (Fla. 1981).

POINT XV

WHETHER REVERSAL OF APPELLANT'S FIRST CONVICTION BECAUSE OF IMPROPER PROSECUTOR COMMENT BARS HIS RE-TRIAL ON DOUBLE JEOPARDY GROUNDS

Although a defendant's own request for a mistrial will normally waive any double jeopardy claim to his retrial, a claim of double jeopardy can be successful if the defendant shows his motion for mistrial was intentionally provoked by the state. U.S. v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). The "intent of the prosecutor" is the determinative factor; "only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of Double Jeopardy to a second trial after having succeeded in aborting the first on his own motion." Oregon v. Kennedy, 456 U.S. 667, ___; 102 S.Ct. 2083, 2089; 72 L.Ed.2d ___(1982). Negligence, even gross negligence, by the prosecutor is insufficient; only an actual intent to cause a mistrial will suffice. State v. Howe, 432 So.2d 795 (Fla. 4th DCA 1983).

Assuming, arguendo, that double jeopardy concerns have the same application here as would apply had a mistrial been granted in the

first instance,[17] there are no grounds for reversal here. To justify dismissal on double jeopardy grounds, a factual finding by the trial court is required. Oregon v. Kennedy, 102 S.Ct. at 2089. "Conduct that would be sufficient to justify a mistrial would not bar retrial unless the court does find such intent on the part of the prosecutor." U.S. v. Dante, 739 F.2d 547, 549 (11th Cir. 1984); Bell v. State, 413 So.2d 1292 (Fla. 5th DCA 1982). The trial court made no such finding here, nor was there any evidence presented from which such a conclusion could be drawn.

Appellant suggests a remand is necessary for the trial court to enter a specific finding that the prosecutor's conduct was not intended to create a mistrial. Appellee disagrees; in the absence of such a finding, the motion was properly denied. Further, a factual finding against appellant is implicit in the trial court's denial of the motion; there was no evidence whatever of such prosecutorial intent presented; the record speaks for itself. Accord, Peterson v. State, 382 So.2d 701 (Fla. 1978); Wilson v. State, 304

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[17] As appellant notes, this is not a necessary conclusion; see, e.g., U.S. v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980):

> "...if the first trial has ended in a conviction, the double jeopardy guarantee imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside"(emphasis in original). North Carolina v. Pearce, 395 U.S., at 720, 89 S.Ct., at 2078. "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." United States v. Tateo, 377 U.S., at 466, 84 S.Ct., at 1589. "[T]o require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." United States v. Scott, 437 U.S., at 91, 98 S.Ct., at 2193.

449 U.S. at 131; 101 S.Ct. at 434, 66 L.Ed.2d at ___.

So.2d 119 (Fla. 1974).

POINT XVI

WHETHER THE CRITICAL STAGES OF APPELLANT'S TRIAL WERE CONDUCTED IN HIS INVOLUNTARY ABSENCE.

Appellant urges error based on his Sixth Amendment confrontation right to be present during all critical stages of his trial. Snyder v. Massechusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed.2d 674 (1934); Francis v. State, 413 So.2d 1175 (Fla. 1982). He points to four occasions where he was allegedly absent:

(1) during the medical examiner's testimony for the penalty phase of his first trial;

(2) during a conference in chambers referred to at (R 2064-5);

(3) when the jury viewed the scene of the crimes; and

(4) during a brief discussion between the court and counsel regarding the admissibility of certain items (R 1616-8).

With respect to appellant's absence during his first trial, appellant cites no authority demonstrating grounds for error in this second trial. His argument is really that the court should not have taken judicial notice of the first trial; that would be the only "error" which took place here (if such is error). Appellant's general objection to taking judicial notice (R 3097) was insufficient to apprise the trial court of the "error" now claimed on appeal; thus, this point was not preserved for review. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Castor v. State, 365 So.2d 701 (Fla. 1978); Clark v. State, 363 So.2d 331 (Fla. 1978); see also, Point XVIII, infra, at 46. Secondly, the taking of judicial notice of the facts and testimony of the prior trial does not re-raise all procedural matters which occurred in the prior proceeding. Appellant should have

raised this purported error when he appealed the trial in which it occurred. See, Riley v. State, 413 So.2d 1173 (Fla. 1982). Lastly, even if this court should choose to reach the merits, appellant clearly waived any objection to his presence at the medical examiner's testimony.[18] He was actually present in court when his attorney announce appellant's own personal desire to absent himself, (Huff I, R 1285; 1286). Cf., Francis v. State, 413 So.2d 1175 (Fla. 1982). "There is no indication, nor is it asserted, that the defendant's absence was not voluntary." Herzog v. State, 439 So.2d 1372, 1375 (Fla. 1983); see generally, State v. Melendez, 244 So.2d 137 (Fla. 1971). Appellant indicated that if he were forced to remain in court against his will for this testimony, he would break down, cry, and sob. (Huff I, R 1286-7). The trial court can remove a defendant even against his will if he is disrupting the proceedings. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, ___L.Ed.2d___ (1970).

With respect to the jury view, appellee would point out that appellant was present at the scene, in a separate vehicle (R 597). He observed the scence contemporaneously with the jury. Appellant cites no authority

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[18] MR. JOHNSON: Mr. Huff indicates that he wishes to be excused from these proceedings and he will waive all error that might be predicated upon his non-attendance during this portion of the testimony, specifically the testimony of Dr. Shutze regarding the autopsy performed on his parents.
(Huff I, R 1285).

* * * * *

MR. JOHNSON: ...The rules do not require the defendant to be present at all times, there are situations when the court can instruct that the defendant be taken from the court room. The defendant had indicated that he does not wish to be in the court room during the testimony of Dr. Shutze regarding the autopsy, that he waives any and all errors that might arise later down the road with regard to his being excused from this testimony and it would not be prejudicial in this case and we stand on our motion. Also waives any other assistance that he might otherwise gives us with regard to the testimony.
(Huff I, R 1286).

for the proposition that the defendant must be present in the same vehicle as the jurors, a circumstance with obvious logistic and security obstacles.

At a jury view in Florida no testimony is taken; counsel do not point out features they wish to emphasize; in this case nothing was even said to the jury by anyone except statements identifying locations, specifically pre-approved by counsel for both sides (R 3686-3688; 597-599). See, § 918.05, Fla. Stat. (1984). This jury view is therefore not a "critical stage" requiring the defendant presence to protect confrontation rights. Snyder v. Massechusetts, 291 U.S. at 108, 54 S.Ct. at 333; Washington v. State, 86 Fla. 533, 98 So. 605 (1923). The requirement for the defendant's presence is accorded under Florida Rules of Criminal Procedure and Statute. See, Fla. R. Crim. P. 3.180(a) (1984); § 918.05, Fla. Stat. (1984). Since no fundamental right is at stake, appellant was obligated to object to the procedure and inform the court of how he wished the view to be taken in order to allege the procedure was error in this appeal. Castor, Clark. There was no objection below, defense counsel participated in arranging the jury view, (R 554-5), (R 3686-3688; 597), thus waiving any objection had one been raised. Lastly, this "error", if one occurred, is harmless. Cf., Francis, 413 So.2d at 1178.

With respect to the in-chambers and bench conferences regarding legal matters, these are clearly not critical stages requiring the defendant's presence, and the court may properly exclude the defendant. In re. Shriner, 735 F.2d 1236 (11th Cir. 1984); U.S. v. Vasquez, 732 F.2d 846 (11th Cir. 1984); Shriner v. State, 452 So.2d 929 (Fla. 1984); Blanco v. State, 452 So.2d 520 (Fla. 1984); Herzog v. State, 439 So.2d 1372 (Fla. 1983). Consequently, appellant's failure to object below forestalls any appeal of the issue, even if there were error. Further, the error would be harmless. Cf., Francis, at 1178.

POINT XVII

MISCELLANEOUS POINTS

Appellant consolidates six new issues in this "catch-all" point:

(1) Improper state voir dire;

(2) Limitation on defense voir dire;

(3) Excusal of a juror for cause;

(4) Jury view of the defendant in shackles;

(5) Reference to the defendant's refusal to take gunshot residue test;

(6) Absence of the judge from the courtroom when spectator statements were being taken.

(1) "Improper" state voir dire.

Appellant belatedly objected to the state's asking questions of jurors based on the prosecutor's explanation of reasonable doubt and circumstantial evidence (R 329-336). A review of the questions reveals nothing prejudicial to appellant, however. It is clear that both the state and the defense may question jurors regarding their understanding and ability to apply such principles as the presumption of innocence and circumstantial evidence. Pope v. State, 84 Fla. 590, 94 So. 865 (1922); Jones v. State, 378 So.2d 797 (Fla. 1st DCA 1979); cf., Coney v. State, 348 So.2d 672 (Fla. 3d DCA 1977). The defense also presented its position on these principles to the jurors (R 291-294). The trial judge properly ruled:

> THE COURT: All right. It's the Court's opinion, and was yesterday as the questions unfolded, that both the State and the defense were going rather far afield for a voir dire examination of the jurors. However, there was no objection yesterday to it, and

> it's the Court's opinion today that if suddenly there was a 180 in the method of questioning that it may confuse the jurors that are presently sitting and may be the trial jurors.
>
> I'll deny your objection because it is untimely made. However, I would caution counsel for both sides that they should minimize the questioning that has been now complained about.

(R 336).

Appellant made two attempts to create on interpersonal relationships between each juror and the defendant, neither of which was permitted by the court. The trial judge sustained an objection to the defense asking each juror to "look at Jim Huff and describe him to me." (R 369). Appellant offered no reason to the trial court why such a "question" is pertinent. He also wanted to personally ask each juror to give him a fair trial after voir doir had been concluded (R 497-499). This question had already been asked of each juror by both the state and the defense. "The extent to which parties may examine prospective jurors on voir dire lies within the trial judge's discretion," Purdy v. Gulf Breeze Enterprises, 403 So.2d 1325, 1331 (Fla. 1981); King v. State, 390 So.2d 315 (Fla. 1980); Kalinosky v. State, 414 So.2d 234 (Fla. 4th DCA 1982); the judge will not be reversed absent a showing "clear abuse." Essix v. State, 347 So.2d 664 (Fla. 3d DCA 1977). The purpose of voir dire is to obtain a jury impartial to both the state and defense, Moody v. State, 418 So.2d 989 (Fla. 1982), not to provide opportunity for the defendant to ingratiate himself with personal pleas to the jurors. No abuse of discretion is shown in any of appellant's voir dire issues.

Appellant also disputes the trial judge's exusing for cause juror

Merriam, who apparently started to cry while being questioned about personal problems on voir dire (R 259-60, 324). The judge had the bailiff further inquire, discovering that "she was physically exhausted that resulted in mental exhaustion. She was working three jobs at one time, and her husband didn't like it, she got in a fight with her mother-in-law and her mother-in-law attacked her with a buther knife." (R 325). As appellant notes he had no objection below to ascertaining this information through use of the baliff. Further, perhaps more importantly, the state wished to strike this juror immediately, prior to further inquiry, when her inability to cope with the stress of mere questioning was apparent (R 260). The state had numerous preemptory challenges left, thus the strike for cause had no impact upon appellant. Juror competency is a mixed question of law and fact to be determined by the trial judge in his discretion; "manifest error" must be shown before the court's decision will be disturbed. Christopher v. State, 407 So.2d 198 (Fla. 1981); Williams v. State, 386 So.2d 538 (Fla. 1980), Singer v. State, 109 So.2d 7 (Fla. 1959); accord, Wainwright v. Witt, 105 S.Ct. 844 (1985).

Appellant's speculation that the jury may have inadvertantly observed him in handcuffs,[19] even if true, does not constitute reversible error. Heiney v. State, 447 So.2d 218 (Fla. 1984); Neary v. State, 384 So.2d 881 (Fla. 1980).

With respect to appellant's refusal to submit to a gunshot residue test, it is clear such conduct is relevant to his consciousness of guilt, and is, as such, admissible evidence. Proffitt v. State, 315 So.2d 461 (Fla. 1975). All such conduct, such as refusal to be fingerprinted,[20]

[19] Although appellant discusses "shackles," only handcuffs are involved (R 1633-1638).

[20] Whitefield v. State, 433 So.2d 1285 (Fla. 1st DCA 1983).

refusal to give a hand writing sample,[21] or, as here, refusal to submit to a gunshot residue test[22] has been held admissible as against Fifth Amendment challenge. See: also, South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983)(refusal to submit to blood alcohol test). While appellant argues that his refusal was perhaps an assertion of his right to remain silent,[23] the reasonableness of this "explanation" is for the jury, as is its inferential impact on the initial refusal; further, since appellant's testimony was contradicted on this point, the jury could reject it altogether.

Appellant's last point regarding the presence of the judge during the taking of certain statements is frivolous. Appellant wished to take affidavits from courtroom observers (R 2292). The trial judge merely allowed the use of the courtroom and court reporter to facilitate the taking of the statements. This was not part of the trial (R 2294). The trial judge accepted the statements as attached to appellant's motion for mistrial, (R 2358); they just happened to appear in a volume of the trial transcript (presumably because the court reporter simply typed the volume in the order things occurred on her tape).

POINT XVIII

WHETHER THE TWO DEATH SENTENCES WERE PROPERLY IMPOSED

Appellant waived a sentencing jury[24] and personally requested that death sentences be imposed. He now claims error in imposing these

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21 Lowery v. State, 402 So.2d 1287 (Fla. 5th DCA 1981).

22 State v. Esperti, 220 So.2d 416 (Fla. 2d DCA 1969).

23 Detective Elliott testified he asked appellant to submit, and appellant said "No." (R 1754, 1954). Appellant testified Elliott asked, appellant said "No," but as Elliott "turned around and left," he added, "not until I speak to an attorney." (R 2652)

24 Palmes v. State, 379 So.2d 648 (Fla. 1981)

sentences, and initially states several "general objections" to the procedure employed by the judge. Primarily, appellant objects to the court taking judicial notice of the earlier trial over appellant's stated preference to have no evidence taken whatsoever, and merely have the death sentence imposed. Appellee first points out the obvious waiver of any complaint by appellant to this procedure, since appellant asked for the death sentence without the taking of any evidence. Second, although appellant may waive his right to present evidence, the state was still entitled to do so. Judicial notice is a valid method for receiving evidence, and, additionally, hearsay is admissible in the sentencing proceeding as long as appellant has opportunity to present rebuttal. No evidence or argument held improper in Huff I was considered, (See, R 3790-3804); Huff I did not even discuss the sentencing findings. Appellee would lastly point out the important fact that the judicial notice issue is relevant only to (1) the aggravating circumstance of pecuniary gain, and (2) the lone mitigating circumstance of "no significan history of prior criminal activity." (R 3802). If this court strikes all reference to the prior proceeding, two aggravating factors, and no mitigating factor, will remain. (Id.).

In sentencing appellant for the deaths of Norman Huff and Geneieve Huff, the trial court relied on the same three factors for each:

(a) That the murders were committed for pecuniary gain;

(b) That the murders were especially heinous, atrocious or cruel;

(c) That the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(a) Pecuniary gain.

The factor of pecuniary gain [§921.141(5)(f), Fla. Stat. 1984] relied primarily upon testimony recorded during the 1980 trial. There was considerable evidence that appellant was having financial difficulties, and was sued one week prior to the crime. (See: Findings of Fact, R 3790-3792). Appellant was to inherit $15,000. in cash from his parent's estate, along with some other items, upon their demise (R 3792). The prospect of inheritance can allow the conclusion that a murder was committed for pecuniary gain. Michael v. State, 437 So.2d 138 (Fla. 1983). Appellant also indicated to chief Lynum that "he thought he had some money that would be coming in soon from something" (R 703) and wanted to buy the property where the murders took place. The fact that Judge Huffstetler recited the findings of Judge Booth on this issue does not compel the conclusion he did not weigh the evidence himself. Accord, Palmes v. State, 397 So.2d 648 (Fla. 1981). Judge Huffstetler filed a supplement to the finding of fact explaining that he did, in fact, carefully review the entire case file from Huff I (R 3800), and relied upon the testimony therein for this factor (R 3802).

(b) Heinous, Atrocious or cruel.

With respect to genevieve Huff, there can be no serious argument that the murder was especially heinous, atrocious or cruel. It appears that her husband was gruesomely murdered in her immediate presence, whereupon her son then turned on her; she certainly knew she was about to die. The first two shots in the scalp and face caused excruiciating pain, though not unconsciousness; she was bludgeoned numerous times, then shot again. There was clearly sufficient evidence for this factor. Compare, Wilson v. State, 436 So.2d 908 (Fla. 1983). There is a paragraph included

under this factor in the court's findings for Geneieve which includes a reference to remorse,[25] (R 3798), although it appears this paragraph was intended to be under the third factor[26] (cold, calculated and premeditated). However, even if considered under this circumstance, with respect to Genevieve it must be concluded the consideration of appellants' attitude was merely used "to support a factor which is already amply supported by the record." Stano v. State, 460 So.2d 890, 893 (Fla. 1984).

With respect to Norman Huff, it is clear that he, too, was aware of his impending death, as evidenced by his "futile attempt at defense" when the first bullet passed through his upraised hand into his eye (R 3793). As with Genevieve, he is coldly murdered by his own child, a crime historically and philosophically among the most reprehensible. The trial judge included the fact that appellant is the natural son of the victims as one factor in deciding this crime was especially heinous and atrocious, which is consistent with our societal foundations and Judeo-Christian heritage.

(c) Cold, Calculated, Premeditated

For both Norman and Genevieve Huff, the trial judge found the murders to be committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. § 921.141(5)(i), Fla. Stat. (1984). This circumstance is patently established by appellant's preparation

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[25] The disputed statement reads: "...the defendant did demonstrate a callous disregard for his crimes and did show no evidence of mercy, remorse, or concern for his victims although they were his natural parents" (R 3798).

[26] This same paragraph is recited under the third aggravating circumstance (cold, calculated, premeditated) in that portion of the order dealing with Norman Huff (R 3792-3794). The supplemental order clarifies that any consideration of "lack of remorse" was in the context of finding that the crimes were committed in a cold, calculated and premeditated manner. (R 3801).

in bringing his gun with him into his parents' car, Eutzy v. State, 458 So.2d 755 (Fla. 1984); Davis v. State, 461 So.2d 67 (Fla. 1984), cf., Harris v. State, 438 So.2d 787 (Fla. 1983); by his execution-style elimination of his father, Eutzy; Lightbourne v. State, 438 So.2d 380 (Fla. 1983); and by his persistent, methodical infliction of blows and gunshots to his mother, culminating in her obviously intended death. Heiney v. State, 447 So.2d 210 (Fla. 1984). Appellee would also urge that the trial court's reference to appellant's lack of remorse is a proper consideration under this aggravating circumstance.

The trial judge referred to appellant's lack of remorse in the context that witnesses at the scene, immediately after the murders, found appellant's attitude to be unusually dispassionate for one confronted with the death of his parents:

> The testimony of the Defendant himself upon taking the stand in Phase I of this trial as confirmed by the testimony of those witnesses called by the State with whom the Defendant had first had contact upon the discovery of the crime for which the defendant is to be sentenced including inter alia, Francis Foster, Chief Ed Lynum, Sheriff Ernie Johnson, Investigator Mabry Williams, and Sgt. Frank Boyette, demonstrates to the required standard and to the satisfaction of this Court that the Defendant did demonstrate a callous disregard for his crimes and did show no evidence of mercy, remorse or concern for his victims although they were his natural parents. (R 3793-4).

This evidence of appellant's composure immediately after committing the murder is extremely relevant to his cold, calculated mindset. In Pope v. State, 441 So.2d 1073 (Fla. 1983), this court held that lack of remorse could no longer be considered as a factor under section 921.141(5)(h), (heinous, atrocious, and cruel), precisely because the mindset of the murder is now taken into account under section 921.141(5)(i) (cold, calculated, premeditated). Pope, at 1078. Previously, remorselessness was properly considered in the definition of "cruel", akin to "conscienceless

or pitiless." Pope, at 1077; Sireci v. State, 399 So.2d 964 (Fla. 1981); See State v. Dixon, 283 So.2d 1 (Fla. 1973). Now that this mindset factor is considered under circumstance (5)(h), appellant's demeanor at the scene, i.e., "no evidence of mercy, remorse or concern for his victims although they were his natural parents" is proper evidence of his cold attitude. Pope itself deals with lack of remorse as applicable to the circumstance of heinous, atrocious and cruel. In Agan v. State, 445 So.2d 326 (Fla. 1983) and Gorham v. State, 454 So.2d 556 (Fla. 1984), the several aggravating circumstances are not distinguished. However, the reference to, and consideration of, lack of remorse in the case sub judice should be distinguished for several reasons.

1) Use of remorselessness as an attitude at the time the crime is committed is relevant to the perpetrator's mindset in committing the crime, and is distinguishable from lack of remorse at time of trial for having committed the crime. The latter presents due process problems, Pope, at 1077; the former does not.

2) Appellant's lack of remorse for the death of his parents (whoever killed them) is valid evidence, even if determined at time of trial. Consideration of lack of normal human sadness at the death of one's parents carries no due process stigma. It has nothing to do with equating a "not guilty plea with lack of remorse." Pope, at 1077.

3) The reference to lack of remorse in this case is used only in passing, and not emphasized.

Appellee would also urge that Agan and Gorham are overbroad in their dicta implying remorselessness may not be used to evaluate the perpetrator's mindset under aggravating circumstance (5)(i). Cf., Pope, at 1078, N.2.

In any event, this aggravating circumstance is established beyond doubt without reference to this piece of evidence.

POINT XIX

WHETHER THE FLORIDA DEATH PENALTY STATUTE IS CONSTITUTIONAL

This boilerplate challenge to section 921.141 has been included word-for-word in other death case briefs and found to be meritless. See, e.g., Stano v. State, 460 So.2d 890 (Fla. 1984).

CONCLUSION

Two juries, 24 people, have unanimously convicted appellant of these murders. The evidence at this second trial was found to be overwhelming by the trial judge. Appellant has twice been sentenced to death for the murder of each of his parents. He presents no cause here why his convictions should not stand, and his sentence carried out; may God have mercy on his soul.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by mail, to Christopher S. Quarles, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 30th day of April, 1985.

Ellen D. Phillips

Of Counsel
Ellen D. Phillips