IN THE SUPREME COURT OF FLORIDA

JAMES ROGER HUFF,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 65,695

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SUMTER COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENT

POINT I The trial court refused to allow Appellant to introduce the testimony of Alfred White, who was offered as an expert in the investigation of crime scenes and the collection, identification and preservation of evidence. The trial court concluded that the witness did not have sufficient facts at his disposal to offer an expert opinion.

POINT II During the cross-examination of a state witness, the prosecutor interrupted with an objection based upon relevance. Cross debate between opposing counsel developed during which the prosecutor called the appellant a murderer.

POINT III During cross-examination of the appellant, cross debate ensued between opposing counsel after defense counsel's objection that the question had been asked and answered. In ruling on the objection, the court said that the answer was vague. Appellant argues that this was a comment on his credibility which carried much weight with the jury.

POINT IV Shortly after his arrest at the scene, police officer Terry Overly advised the appellant of his rights pursuant to Miranda. The rights were indadequate, appellant failed to understand them and he invoked his right to silence. Sheriff Johnson then interrogated Appellant without readvisement. Appellant contends that the incriminating statement should have been excluded based upon three grounds: (1) the inadequate Miranda warnings; (2) the failure of Appellant to fully understand his rights thus rendering the statement involuntary; and (3) the fact that the statement was obtained following further interrogation without readvisement of rights after the appellant had invoked his right to remain silent.

POINT V The first citizen to which the appellant reported the crimes, testified over objection that the circumstances of Appellant's account of the killings did not "look right" to him. A police officer was also allowed to

testify over objection that he believed the appellant to be guilty of the murders. Appellant argues that this testimony should have been excluded as impermissible opinion testimony from lay witnesses.

POINT VI Evidence was admitted that implied that the appellant was engaged in extra-marital, interracial fornication. The state offered the evidence to show that the appellant felt safe at that location. The evidence was totally irrelevant and highly prejudicial.

POINT VII The prosecutor once again engaged in improper cross-examination and comment during the testimony of Terry Overly. This included two separate comments on Overly's credibility as well as improper impeachment.

POINT VIII The motion for judgment of acquittal should have been granted where the evidence was insufficient and also failed to disprove the appellant's testimony which revealed a reasonable hypothesis of innocence. At the very least, the evidence was totally insufficient to prove the requisite premeditation beyond a reasonable doubt. The state's case was almost entirely circumstantial.

POINT IX During the cross-examination of the appellant, the prosecutor engaged in misconduct by improperly commenting on Appellant's credibility, and by implying that the state had other evidence of guilt which they were not permitted to present to the jury based upon procedural maneuvering by the defense. The prosecutor also inferentially commented upon the appellant's failure to fully and completely testify.

POINT X The trial court erred in overruling Appellant's objections and allowing the state to improperly introduce prior testimony of a witness where the prior testimony did not refresh the witness' memory to the point that he had an independent recollection of the facts. At that point, the state should have proceeded under the method of prior recollection recorded which was done improperly in this case.

POINT XI Appellant contends that fundamental error occurred as a result of numerous instances of misconduct by the trial judge and the prosecutor which gave the jury the distinct impression that the trial was not a serious matter.

POINT XII Appellant was denied due process of law by the failure of the state to maintain certain physical evidence prior to trial. These included blood samples of the victims, the clothing that appellant wore at the time of his arrest, the dismantling of the automobile where the murders occurred and the complete gun shot residue test including instructions.

POINT XIII Appellant attempted to introduce evidence that Sheriff Ernie Johnson was under investigation for alleged sexual improprieties shortly after the murders. Since it was an election year, this issue was an important one in the campaign. Appellant contended that this evidence should be admissible since it provided a motive for Sheriff Johnson to go to any lengths (including perjury) in order to solve this big case and focus on that as a campaign issue instead.

POINT XIV The photographs and bloody clothing of the victims which were introduced over objection should have been excluded where the shocking and prejudicial nature of the evidence outweighed any probative value.

POINT XV The indictment should have been dismissed based upon double jeopardy grounds. Appellant's first trial resulted in reversal and remand for a new trial due to prosecutorial misconduct. This misconduct should preclude reprosecution. At the very least, an evidentiary hearing should be held where the trial judge addresses the issue of whether the prosecutor's misconduct at the first trial was intended to provoke the motion for mistrial which resulted in the subsequent reversal.

POINT XVI The appellant was not present at the jury view, during a discussion in chambers concerning the introduction of certain evidence on two occasions

and during the testimony of the medical examiner at the penalty phase of the first trial.

POINT XVII Appellant urges reversal based upon cumulative error resulting from several incidents at trial.

POINT XVIII Appellant argues that the trial court improperly imposed the two death sentences. Appellant objects to the trial court's heavy reliance upon his lack of remorse where this is derived from his exercise of constitutional rights. The court also erred in repeating verbatim the findings of fact by the first trial judge regarding the aggravating factor that the murders were committed for pecuniary gain. This is an abdication of the trial court's responsibility and is an indication of a failure to individually consider certain factors in consideration of the death penalty. The murders were not heinous, atrocious or cruel since the victims did not suffer. The evidence that the murders were committed in a cold, calculated and premeditated manner is totally circumstantial.

POINT XIX Appellant urges that the Florida capital sentencing statute is unconstitutional.

IN THE SUPREME COURT OF FLORIDA

JAMES ROGER HUFF,	)	
	)	
Appellant,	)	
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vs.	)	CASE NO. 65,695
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The following symbols will be used:

"R" - Refers to the Record on Appeal consisting of the transcript and pleadings from the most recent trial in 1984.

"T" - Refers to the Record on Appeal consisting of the transcript and pleadings from the first trial in 1980.

STATEMENT OF THE CASE

Appellant was originally convicted in 1980 for two charges of first-degree murder and was sentenced to death as to each. Subsequently, this Court reversed and remanded this cause for a new trial. Huff v. State, 437 So.2d 1087 (Fla. 1983). (R 3120-8) Appellant was retried commencing in May of 1984 on a two-count indictment charging him with the first-degree murders of Norman and Genevieve Huff. (R 3119)

Prior to trial, Appellant filed a motion to protect evidence found at the crime scene. (R 3154) Appellant also filed a motion to dismiss based upon double jeopardy. This was denied. (R 3-4, 3157-9, 3168-3209, 3217-44)

Pursuant to Appellant's motion for change of venue, the trial was held in Pinellas County. (R 3164, 3300-3306, 3393)

Appellant also filed a motion for production of favorable evidence. (R 3408-10) Appellant also filed a motion in limine regarding argument by the state that the grand jury of Sumter County had indicted the appellant, thus implying guilt. (R 3216)

Appellant filed a motion to suppress a pretrial statement which was denied. (R 518-30, 3309-10)

Appellant's motion for statement of aggravating circumstances on which the state intended to rely was denied. (R 4-7, 3637)

Numerous other pretrial motions were made which, if pertinent to this appeal, will be addressed in the body of the argument. This statement also applies to adverse rulings suffered by the appellant during the trial.

Following deliberation, the jury returned with verdicts of guilty as charged as to each count. (R 3089-92) Appellant elected to waive the penalty phase and accept two sentences of death. The state objected to the waiver but the court overruled it. At the state's request and over Appellant's objection, the trial court took judicial notice of the first trial in this cause. (R 3093-3106)

The trial court imposed two consecutive sentences of death and filed written findings of fact. The court found three aggravating circumstances: (1) that the murders were committed for pecuniary gain; (2) that the murders were especially heinous, atrocious or cruel; and (3) that each murder was committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification. The trial court found in mitigation that the appellant had no significant history of prior criminal activity. (R 3106-12, 3788-3804) A timely notice of appeal was filed and this appeal follows.

STATEMENT OF THE FACTS

On April 21, 1980, James Roger Huff, the appellant, arrived at the nearby home of his parents, Norman and Genevieve Huff (the decedents), between

9:30 and 10:00 that morning. After doing some chores around his parents' house as well as a neighbor's, the appellant walked back to his own home which was only about 100 yards away. There he did some chores until his parents arrived about mid-afternoon to pick him up before driving to his mother's office at Bergman Realty. (R 2613-23)

The trio arrived at Bergman Realty and Mrs. Huff went into the office to take care of some business. They were observed by Sue Hollingsworth and Jackie Pruitt, both employed at Bergman Realty in Leesburg where Mrs. Huff was also employed. Hollingsworth saw Genevieve and Norman arrive at the realty office riding in the front seat of their late model Buick; the defendant was observed seated in the back seat. Pruitt observed the same thing. Pruitt further explained that Mrs. Huff was on her way to Sandalwood, a nearby condominium complex, to take care of a rental problem. Neither Hollingsworth nor Pruitt saw the Huff vehicle leave the realty office. (R 613-51)

While waiting for his wife in the car with the appellant, Mr. Huff suggested that the appellant take over the driving chores since he had little confidence in his wife's driving ability. (R 2622-3) When she returned to the car, Mr. Huff suggested that she slide over in the front seat to sit by him while the appellant occupied the driver's seat. The trio resumed their journey toward their final destination of an attorney's office in Wildwood. (R 2623, 2683) After turning onto Highway 44, the appellant observed a car on the side of the road with a man standing next to it signaling with his hand. Assuming some sort of problem, the appellant pulled in behind the car in order to offer aid to the motorist. The car was a green 1972 or 1973 LTD Ford with one passenger who remained in the car while the other man stood outside on the road. The stranger approached the Huffs' car and stuck a rusty-looking, semi-automatic pistol in the appellant's face. The unknown assailant got into the backseat of the Huffs' automobile and, holding them at gun point, told

them to stay calm, quiet and to do as they were told. As instructed, the appellant continued driving west on Highway 44 while the Ford LTD followed approximately 75 to 100 yards back. The intruder forced the Huffs to drive down winding back roads until they eventually arrived at a dump area located off of Lee Road. While the Ford LTD followed the Huffs the entire way, the appellant did not see the car pull up to this final destination. Once the car was stopped, the assailant remained in the back seat and asked for money. The appellant took the money out of his wallet and handed it back to the man. Mrs. Huff handed her purse back and Mr. Huff did likewise with his cash. The appellant then felt a blow to his head and was knocked unconscious for an indeterminate period of time. Upon regaining consciousness, the appellant discovered his parents' bodies at the crime site. In an attempt to summon aid, the appellant got into the car only to realize that the keys were missing. He then ran to a nearby house belonging to Wildwood Police Chief Ed Lynum that Appellant knew was vacant but contained a phone. He beat on the front door but found it locked. The appellant next ran to the nearby home of Francis Foster and pounded on the screen door which was latched. He then rang the doorbell until Mr. Foster saw him at the door. The police were summoned. (R 2623-40)

The crime scene is a sandy landfill off Highway 44 west of Highway 301 and Wildwood going toward Interstate 75. At approximately 4:50 p.m., Francis Foster, a person living in the vicinity of the crime scene where the Huffs' bodies were found, saw the appellant. Foster testified that although he did not have his hearing aid in place, he heard his doorbell and found the appellant outside talking about someone being "killed." Foster stated that Huff said he had been run off the road by two men, that he cried for help, and that he asked Foster to call the police. (R 652-74)

Foster further stated that the appellant had sand on his forearms and that he had nothing on his hands. The appellant had no blood on his clothes, hands or forearms. Foster testified at trial that the appellant acted "pretty calm" and that his head appeared to be uninjured. On cross-examination, however, he was impeached from his deposition where he had stated the the appellant was upset and that the appellant had been hit on the head. By the time of the second trial, Mr. Foster's general memory had badly deteriorated partly due to a recent accident. (R 665-74)

Wildwood Police Chief Ed Lynum was one of the first people to see Huff at the crime scene. He testified that Huff was hysterical, crying and upset, and that Huff had related how he had been forced from the road by an armed man. Huff told Lynum that this man had killed his mother and father. (R 676-85, 712-14)

Lynum further testified that Huff had spoken with him several months earlier about possibly purchasing some of Lynum's property in the area. Lynum had seen the appellant in the area on two or three occasions within the two months preceding the murders. Each time, the appellant was in the company of a black female and was drinking a beverage. On the occasions when the appellant remained in the vehicle with the black female, Lynum could not tell what was happening inside the car. (R 701-7) During this same time period, the appellant asked Lynum about obtaining a gun permit. Lynum told him that there should be no problem with this request, since the appellant's business required him to carry money. (R 707-8)

Throughout all of the investigation and both trials, Appellant maintained his statements that he and his parents had been abducted and robbed at the dump site before he found himself knocked unconscious. When he awoke, he found the bodies of his parents and sought help. The only statement by the appellant to the contrary was Sheriff Johnson's testimony that the appellant,

while in a highly emotional state, said to Johnson, "I shot them in the face". (R 105-6) When Johnson asked the appellant who he had shot in the face, the appellant replied, "They shot them in the face". The appellant then told Johnson how he and his parents had been abducted at gun point and he had been knocked unconscious. (R 106-7) Harris Rabon also testified that he had heard the gist of Appellant's incriminating statement to Johnson, but other evidence tended to show that Rabon was nowhere near the pair during their conversation. (R 1116-9, 2179-87) Sheriff Johnson made no written report of this statement. (R 1033-4) All of the other testimony revealed that the appellant had made consistent statements to numerous people at the scene which were consistent with his testimony at trial. (R 660, 681-4, 980-3, 1181-3)

Deputy Harris Rabon of the Sumter County Sheriff's Department transported the appellant to the Sumter County Jail in Bushnell. During the trip, Deputy Rabon heard a radio transmission to Detective Ron Elliott concerning Appellant's lack of consent to a gun shot residue test. Deputy Rabon was of the opinion that the appellant could have heard this radio transmission. Shortly thereafter, the appellant began rubbing his hands together in a washing manner and also rubbed his hands on his pants. (R 1114-28, 1140-1) At the time, Rabon attached no particular significance to Appellant's actions. (R 1163-4)

Deputy Elliott administered a gun shot residue test upon the appellant at the Sumter County Jail after he was booked. The results of this test did not indicate that Huff had recently fired a gun. (R 1766-8, 1953-71) Williams also secured and processed the Huffs' vehicle. (R 1784-5) Much physical evidence was seized and processed. (R 1784-1852, 1868-78) Several fingerprints were obtained from the interior of the car which did not match the prints of either the appellant or Mr. and Mrs. Huff. (R 1893-4, 1899-1903)

The appellant's clothing was seized when he was booked into the Sumter County Jail. Bud Stokes, the booking officer, noted a spot of what appeared to be blood on the right hip area of his underwear. He also stated that he looked at Huff's head in response to Huff's statement about being hit in the head but saw no injuries. Huff had less than one dollar in change at the time of the booking. (R 1725-35) Stokes did not actually touch his head.

A Sumter County resident, Buddy Joyner, testified that on April 21, 1980, he was returning from Inverness, traveling east toward Wildwood on Highway 44. Joyner stated he had known the appellant for several months. He stated that he observed the appellant for a matter of seconds in a vehicle on Highway 44 west of Highway 301 at approximately 4:20 p.m. The vehicle was traveling west on Highway 44 at approximately 35 m.p.h. He further stated that the defendant was driving the vehicle and that he saw no other people in the car. Joyner admitted that a dozen other people could have been in the car with the appellant but they would have to have been the size of "eraser heads". (R 1553-69)

A Sumter County physician testified that he had examined the defendant on April 24, 1980. Dr. Rojas examined Huff for brain and head injuries. The doctor found no sign of edema, bruising, lacerations or abrasions on the defendant's head, and also found no external signs that Huff had been rendered unconscious by a blow to the head. Dr. Rojas stated that a person could be struck hard enough on the head to lose consciousness, yet still appear normal in gross examination as well as x-ray. The doctor admitted that he did not employ all available procedures in order to detect any possible brain damage. (R 2858-92)

Radiologist L. D. Chatham testified that he had examined head x-rays taken of the defendant by Dr. Rojas. He stated that he found no fractures, no soft tissue abnormalities, and nothing consistent with a person who has

received a severe skull blow. The witness conceded that he would expect to see evidence of injury in the x-rays given the facts of which he had knowledge. (R 2893-900)

Examination of the victims revealed that they had been killed by multiple gun shot wounds. Mrs. Huff received three bullet wounds: a creasing wound across the top of her scalp; a head wound to the right temple area; and a wound in the neck. In addition, she sustained a blunt trauma injury to the back of the head. This injury was consistent with one that could be made from the butt of a gun by a person using heavy, repeated blows. The blunt trauma injury resulted in multiple skull fractures. Mrs. Huff died from a combination of the blunt trauma injury and the gun shot wound to the neck. She would have remained conscious through several of the blows to the back of the head until enough force was inflicted to produce unconsciousness. Dr. Schutze also stated that the assailant may have gotten some blood on his hands. (R 1574-1602, 1614-15) The first bullet would have resulted in immediate unconsciousness with the second bullet resulting in death when it transected the brain stem. (R 1604-15) All of the bullet wounds were consistent with infliction by a .32 caliber automatic pistol. (R 1615) The medical examiner concluded that the trajectory of Mrs. Huff's neck wound is inconsistent with the hypothesis of the first two shots. The doctor concluded that the third shot could have been inflicted outside of the car. (R 1674-1700)

Norman Huff sustained bullet wounds to the left eye and left side of the head. In addition, he received a bullet wound in the palm of the right hand. The wound in the hand was probably caused by the bullet that entered the victim's left eye. According to the pathologist, Norman Huff died from the gun shot wound to the left side of the his head. (R 1604-12)

An extremely important issue at trial was the contamination or preservation of the crime scene. Police Chief Lynum testified about people

walking around the car and about Sheriff Johnson actually entering the car and retrieving a check from the passenger's side. Chief Lynum's car was parked behind the Huff vehicle and later was moved. (R 716-33, 763-82) Terry Overly testified that Chief Lynum was crawling around inside the Huff vehicle when he and the appellant were the only other ones present. Overly roped the crime scene off only to see Sheriff Johnson drive over the rope and park right behind Chief Lynum's car. (R 2220-4, 2361-4) Johnson denied driving over the crime scene rope. (R 1010) Johnson admitted that a reporter was on the scene and stood within ten feet of one of the bodies. (R 1011) In fact, there were several unknown personnel in the crime scene area. (R 1015-18, 1031-3) Johnson admitted to moving some of the evidence in the car before the evidence technician arrived. (R 1030-1, 1035-7) Ronald Elliott, the sheriff department's crime scene investigator, admitted that evidence and bodies had been moved prior to his arrival. (R 1913) At one point, Elliott felt compelled to straddle a footprint in order to preserve the evidence, since failing to do so would have resulted in damage. (R 1914)

Investigator Jerry Thompson of the Sumter County Sheriff's Department also visited the crime scene and assisted in the processing of evidence. He traced the tire tracks of the Huff vehicle in the sandy pit. He determined that the tracks entered the pit, drove close to where the body of Mrs. Huff was found, and traveled further to where Mr. Huff's body was found. From there the tracks went further into the pit, did a turnabout, and headed back out of the pit. (R 1365-98)

Deputy Elliott was the Sumter County Sheriff's Deputy who processed much of the evidence at the crime scene. He found no latent prints on the car doors. He found blood stains on the front seats and the right back floorboard, but found no blood stains on the backseat or left back floorboard. Elliott recovered two shell casings in the car, two unfired shells (both in

the backseat), and also recovered two spent projectiles. Elliott also located Mrs. Huff's purse in the car; her wallet was missing and was never found. He lifted prints from some of the papers in the purse. They did not match the defendant's prints. (R 1745-1920)

The ballistics expert testified that the three projectiles recovered in the Huff vehicle were all .32 automatic caliber bullets. The three shell casings located in the vehicle were also .32 automatic caliber, Remington brand. In the opinion of the ballistics expert, the bullets had been fired from a .32 caliber automatic pistol. The ballistics expert never identified the particular weapon from which the bullets were fired. He admitted that there were six different makes of gun from which the bullets could have been fired. The murder weapon could have been a foreign or American made semi-automatic pistol. (R 2091-2117)

Paul Moore testified that he had been acquainted with Huff prior to the murders. He stated that in November of 1979, Huff had offered to sell to Moore a .32 caliber automatic weapon. Huff told Moore that he had an old army .32 automatic, and that he did not even know if it would fire. Moore never saw any such weapon in Huff's possession. When Moore again asked Huff about the gun at a later date, Huff replied that he had taken it apart for the safety of the children and was now unable to locate all of the parts. The murder weapon was never located; no firearm was introduced at trial. (R 2069-89)

The defendant's brother and sister, Jeff Huff and Judy Maddox, both testified about the close relationship the defendant shared with his parents. Judy Maddox testified that the defendant lived close to his parents' house. Jeff Huff stated that Huff often drove for his parents, especially for his father who was practically blind. (R 2384-2411, 2588-90)

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN IMPROPERLY RESTRICTING APPELLANT'S PRESENTATION OF EVIDENCE WHERE SUCH EVIDENCE WAS CRUCIAL TO HIS DEFENSE THEREBY RESULTING IN A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT.

Appellant does not believe that Appellee will contest that a crucial issue at trial was the preservation or contamination of the crime scene. This was a primary point of contention by the defense throughout the state's case-in-chief as demonstrated by the numerous questions on cross-examination of state witnesses. In fact, the primary thrust of Appellant's defense was that the contamination of the crime scene resulted in the appellant being unable to corroborate his statements throughout the investigation and proceedings that two unknown assailants were responsible for the murders.

In an attempt to present evidence on this issue, the defense offered the testimony of Alfred L. White, Jr. during its case-in-chief. Mr. White had over twenty (20) years experience in law enforcement during which he spent most of his time involved in the investigation of crime scenes and the collection, identification and preservation of evidence. (R 2427-2434) White examined photographs and a diagram of the crime scene. (R 2435-2437, 2443) Initially, White testified as to how he would have gone about investigating the crime scene, also pointing out the numerous things that were done wrong in this investigation resulting in apparent contamination of the scene. (R 2444-2455) The state contended that there was an insufficient predicate upon which the witness could base an opinion. (R 2455-2457, 2472-2473) The trial court made an initial ruling that, while it was quite likely that the witness was an expert in the field, he would not be allowed to testify based upon his limited knowledge of the facts contained in the insufficient hypothetical

question. (R 2478-2479) Defense counsel asked the trial judge what further data would be necessary for the witness to examine before he could competently testify. The court refused to answer this question. (R 2479-2480)

The next day, the defense again proffered the testimony of witness White who, during the intervening weekend, had viewed all police reports made in the case, reviewed the file, and reviewed the testimony of Investigator Williams, Investigator Elliott and a portion of the testimony of Investigator Thompson. White also examined numerous photos of the crime scene, a state's exhibit which contained a diagram of the scene with distances indicated, as well as lab sheets and other material of that nature. White concluded that he had sufficient facts upon which he could render an expert opinion concerning the processing of the crime scene. (R 2483-2486) A lengthy cross-examination by the state during the proffer of White then occurred. (R 2486-2587, 2603) The state again objected on the grounds that they did not receive the witness' name until the 21st day of trial, that he was not an expert and that he had an insufficient factual basis upon which to predicate an opinion. (R 2605-2606) Defense counsel stated without contradiction that the witness had been made available to the state last week at which appointment the state did not appear. The state later thoroughly deposed Mr. White prior to his appearance as a witness. (R 2607) Defense counsel also relied upon its written memorandum of law which was filed with the court. (R 2606, 3699-3704) The trial court reaffirmed its prior ruling and incorporated the state's objections into the ruling. (R 2607)

The right of an accused to present witnesses to establish a defense is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14 (1967). Indeed, this right is a cornerstone of our advisory system of criminal justice. Both the accused and the prosecution present a version of

facts to the judge so that he may be the final arbiter of truth. Id.; United States v. Nixon, 418 U.S. 683, 709 (1974). Subject only to the rules of discovery, an accused has an absolute right to present evidence relevant to his defense. Roberts v. State, 370 So.2d 800 (Fla. 2d DCA 1979); Campos v. State, 366 So.2d 782 (Fla. 3d DCA 1979).

The state cannot now legitimately claim that the witness should have been excluded based upon discovery violations. The prosecutor did not dispute the fact that the witness had been made available on two (2) occasions to the state prior to his testimony and had been thoroughly deposed on one (1) of those occasions. No Richardson [Richardson v. State, 246 So.2d 771 (Fla. 1971)] inquiry was conducted by the trial judge regarding this allegation of discovery violation. Nor can the state now contend that White was not an expert in the field. A sufficient predicate was established in this regard, and the trial judge stated that the witness was quite likely an expert in the field. (R 2478-2479) This was not the stated basis for exclusion of the evidence by the trial judge. (R 2478-2479)

The only possible legitimate grounds for excluding the witness are that of relevance and the state's contention that the witness had an insufficient basis upon which to render an opinion. The Florida Evidence Code provides generally that all relevant evidence is admissible with relevant evidence being defined as evidence tending to prove or disprove a material fact. §§90.401, 90.402, Fla.Stat. (1983). As stated earlier in this argument, the preservation or contamination of the crime scene was a critical point at trial. Appellant does not believe that the state can contest this statement. Hence, the proffered testimony was certainly relevant.

A trial judge does not have discretion to exclude relevant testimony unless it is inadmissible by virtue of some recognized rule of evidence, such as hearsay. Spencer v. Spencer, 242 So.2d 786 (Fla. 4th DCA 1970). The

proffered testimony of Mr. White shed considerable doubt on the method of crime scene investigation used in this case. One state witness even went so far as to testify that the entire investigation was conducted in such a way as to justify the arrest of James Roger Huff. (R 1301) Case law in Florida is clear that it is error for the trial court to exclude evidence which tends in any way, even indirectly, to prove a criminal defendant's innocence, and that all doubt of admissibility of this type of evidence should be resolved in favor of admissibility. Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982). Florida Evidence Code, Section 90.702 specifically authorizes expert testimony to "assist the trier of fact in understanding the evidence...if it can be applied to evidence at trial." This section clearly permits expert crime scene testimony, since none of the members of the jury panel have any training or experience in law enforcement. Additionally, there is no question that the expert opinion can be applied to evidence at trial; this is properly done by way of a hypothetical question. Section 90.804 allows the expert to base his opinion on facts "made known to him at or before the trial." In the case at bar, the appellant's expert witness was apprised of all relevant facts upon which his opinion would be based prior to testifying.

The hypothetical question mentioned above is the subject of many Florida court opinions. The general rule is that:

> There must be competent, substantial evidence in the record tending to prove each of the basic facts set forth in the hypothetical question. Such basic facts do not need to be proven conclusively before a hypothetical question can be based thereon. (emphasis added)

Autrey v. Carroll, 240 So.2d 474, 476 (Fla. 1970).

The party propounding the hypothetical question may present a hypothetical question in accordance with any reasonable theory of the effect of the evidence. Steiger v. Massachusetts Casualty Insurance Company, 273

So.2d 4 (Fla. 3d DCA 1973). This holding clearly permits the party offering expert testimony to formulate a hypothetical question which does not merely restate facts which are in evidence, as long as the question has its basis in a reasonable interpretation of those facts. Likewise, the facts upon which the hypothetical question is based need not be undisputed. Chiles v. Beaudoin, 384 So.2d 175 (Fla. 2d DCA 1980). This holding is especially appropriate in the case at bar, since the court witness testified dissimilarly from several state witnesses regarding preservation of the crime scene. Steiger allows the drafter of the hypothetical question to include facts in evidence as testified to by the court witness, even though they are not undisputed. The cross-examiner is then called upon to present the other facts in evidence, also disputed, to the expert. It is then the function of the jury to weigh the testimony of the expert, in light of the various facts.

The Florida Supreme Court, in Buchman v. Seaboard Coastline Railroad Company, 381 So.2d 229 (Fla. 1980), has enumerated the only two elements to be considered by the trial judge in evaluating the admissibility of expert testimony: 1) the subject must be beyond the common understanding of average laypersons, and 2) the witness must have such knowledge as will probably aid the trier of fact in its search for truth. Both of those elements are unquestionably met by the crime scene expert offered by the appellant.

Perhaps the most important, and most overlooked, aspect of the sufficiency of facts on which an expert opinion is based, is that the expert himself, and not the trial court, is the person who makes the determination. As was held in H. K. Corporation v. Estate of Miller, 405 So.2d 218, 219 (Fla. 3d DCA 1981), "the sufficiency of the facts required to form an opinion must normally be decided by the expert himself and any deficiency relates to the weight rather than the admissibility of the expert's opinion." Case law

recognizes the fact that it is the expert himself who is in the best position to determine whether he has enough facts to render an expert opinion. Nat Harrison Associates, Inc. v. Byrd, 256 So.2d 50 (Fla. 4th DCA 1971).

A similar opinion was issued in Quinn v. Millard, 358 So.2d 1378, 1382 (Fla. 3d DCA 1978), which held that:

> ...the sufficiency of the facts required to form an opinion must normally be decided by the expert himself because neither trial judges nor appellate judges are usually in a position to determine precisely which facts are dispensable and which are essential to the validity of the opinion reached. Therefore, it is usually up to the opposing side to refute these conclusions, and, unless the omissions are glaring, such deficiencies relate to the weight rather than the admissibility of the expert's testimony.

As previously mentioned, and as the Quinn case illustrates, the weight to be accorded expert testimony is the province of the jury, and the trial court should not preclude the admissibility of expert testimony unless the expert himself testifies that he has knowledge insufficient on which to base an expert opinion. This is especially true if the cross-examiner is given the opportunity to present other facts to the expert.

Most of the objections set forth by the state in their argument on this issue at trial went to the weight rather than the admissibility of evidence. The objections were properly the subject of cross-examination. Seibels, Bruce & Company v. Giddings, 264 So.2d 103 (Fla. 3d DCA 1972), stated that:

> In propounding a hypothetical question, a party is entitled to use evidence, even if it be conflicting viewed in a light most favorable to him.

The court further held that evidence which conflicted with that offered in hypothetical questions to expert witnesses could be used to impeach or impair the credibility of opinions given by the experts. On the authority of this

case, clearly the prosecutor's role is not to object to the expert testimony on this basis, but rather to attempt to diminish the credibility of the expert witness through effective cross-examination.

Especially in the case such as the one at bar, a rule allowing wide latitude in the presentation of evidence by a defendant in a capital trial should be applied. As this Court stated in its previous opinion, the state's case is totally circumstantial and the evidence against the defendant is not the strongest. Huff v. State, 437 So.2d 1087 (Fla. 1983). A trial judge may not frustrate a defendant's legitimate right to present his defense by strict adherence to state evidentiary rules. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). No such rule prevails over the fundamental demand of due process of law in the fair administration of criminal justice. United States v. Nixon, supra at 713. In the weighing process, the fundamental constitutional right to present witnesses should prevail. The Sixth Amendment right to present evidence is supreme, and any doubts must be resolved in favor of that fundamental right. The exclusion of the proffered testimony deprived Appellant of a fair trial.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHERE THE PROSECUTOR ENGAGED IN IMPROPER COMMENT RESULTING IN THE DEPRIVATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During cross-examination of Wildwood Police Chief Ed Lynum, defense counsel questioned the witness about possible contamination of the crime scene by Sheriff Johnson who was also present. (R 733-4) The prosecutor interrupted with a speaking objection:

> MR. BROWN: Your Honor, if the Court please, I've given great latitude to Mr. Hill. Sheriff Johnson is the chief law enforcement officer of Sumter County. He is present at the scene,

> obviously he is going to take part in the investigation. I object to it as irrelevant and immaterial. I think it's a waste of our time and a waste of the jury's time.
>
> MR. HILL: Mr. Brown thinks it's a waste of time when the head law enforcement officer of Sumter County is there contaminating the crime scene and who will later testify, Judge, that he had no control over the crime scene at all and it was the duty of Jerry Thompson and Mabry Williams to control the crime scene. Therefore, he had no business being there, Mr. Brown, especially inside the victims' car if the car was preserved for proper evidentiary purposes and you know that.
>
> MR. BROWN: If the Court please, my point is if he thinks that this is material, the proper witness to ask is Sheriff Johnson, not Chief Lynum. He's going to have to go through the same questioning that he is now with the chief with Sheriff Johnson when he takes the stand. And I hope that Mr. Hill is not suggesting that we should let a murderer walk free just because we didn't have the Federal Bureau of Investigation --
>
> MR. HILL: Judge, that's improper.
>
> MR. BROWN: -- conducting the investigation of the killing of his parents. (R 734-5)

After hearing further argument, the trial court overruled the objection and, following two more questions, defense counsel approached the bench and moved for mistrial based upon the prosecutor's improper comment which stated his opinion that Mr. Huff was guilty of murder. Defense counsel also stated that this was the reason that the motion in limine had been made since the prosecutor was well known for such improper comments. (R 735-6, 3538-41) Defense counsel also contended that the prosecutor pointed at the appellant when he uttered the objectionable epitaph. (R 737) The prosecutor maintained that he was gesturing in the direction of the defense table, probably almost directly toward Mr. Hill, the defense attorney. (R 738-9)

Unable to come to any sort of agreement, Appellant maintained his request for a mistrial. (R 743) Both the state and the defense submitted written argument on this issue. (R 746, 3563-3634) A cassette tape recording of the pertinent cross-examination was also placed in the record. After considering all of the argument, the trial court denied the motion for mistrial out of an abundance of caution. (R 751) The court formally admonished both the prosecutor and the defense counsel and attempted to cure any error by reading a special instruction to the jury to disregard any improper comments. (R 751-7, 3561-2) Defense counsel's renewal of his previous motion in limine regarding improper prosecutorial conduct was again denied, but the trial court admonished counsel to avoid the pitfalls sought to be prohibited by the motion. (R 749-51)

A trial court has the discretion to control the conduct of counsel throughout the trial. See Murray v. State, 154 Fla. 683, 18 So.2d 782 (1944). Additionally, the prosecuting attorney has a duty to refrain from conduct which might affect an accused's right to a fair and impartial trial. The trial judge must ensure that this duty is not breached. Tribue v. State, 106 So.2d 630 (Fla. 2d DCA 1958). Generally, expressions by attorneys to a jury as to their personal opinion of guilt are highly improper. Tyson v. State, 87 Fla. 392, 100 So. 254 (1924).

It is so clearly established that an accused has a fundamental right to a fair trial free from improper prosecutorial comments that the Supreme Court of Florida, in Stewart v. State, 51 So.2d 494, 495 (Fla. 1951) noted:

> This court has so many times condemned pronouncements of this character that the law against it would seem to be so commonplace that any layman would be familiar with and observe it.

* * *

> It would seem trite to state that the reason the courts throughout the country have condemned this type of abuse is that we are committed to the principle of fair and impartial trial, regardless of the offense one is charged with... He is entitled to a fair and orderly trial in an environment reflecting the constitutional guarantees which constitute fair trial. Under our system of jurisprudence, prosecuting officers are clothed with quasi-judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament.

In Washington v. State, 86 Fla. 533, 542, 98 So. 605, 609 (1923), the court spoke of the high standards which are expected of a prosecutor. The prosecutor is a sworn officer of the government with the great duty imposed on him of preserving intact all the great sanctions and traditions of law:

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

Similarly, the Fourth District Court of Appeal in Kirk v. State, 227 So.2d 40, 42-43 (Fla. 4th DCA 1969), stated:

> It is the duty of the trial judge to carefully control the trial and zealously protect the rights of the accused so that he shall receive a fair and impartial trial. The trial judge must protect the accused from improper and harmful statements, or conduct by a witness or by a prosecuting attorney during the course of a trial. It is also the duty of a prosecuting attorney in a trial to refrain from making improper remarks or committing acts which would or might tend to affect the fairness and impartiality to which the accused is entitled. [citation omitted] The prosecuting attorney in a criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case he represents the great authority of the State

> of Florida. His duty is not to obtain convictions but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. His case must rest on evidence, not innuendo. If his case is a sound one, his evidence is enough. If it is not sound, he should not resort to innuendo to give it a false appearance of strength. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client...

The Supreme Court of the United States has observed that the average jury has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, the court noted, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. Berger v. United States, 295 U.S. 78, 88 (1935).

In Pait v. State, 112 So.2d 380, 384 (Fla. 1959), it was stated:

> Certainly a trial judge should be given an opportunity to correct such highly prejudicial although sometimes impulsive remarks of prosecuting officials. However, we think there are situations where the comments of the prosecutor so deeply implant seeds of prejudice or confusion that even in the absence of timely objection at the trial level it becomes the responsibility of this court to point out the error and if necessary reverse the conviction.

Washington v. State, supra, held that it was not reversible error for the prosecutor to refer to the defendant as a "murderer" when the indictment charged murder and the evidence supported the charge. At the time of the objectionable comment in the instant case, only four witnesses had been called and their testimony did not strongly support the charge. As this Court stated in Huff v. State, 437 So.2d 1087 (Fla. 1983), the state's case was totally circumstantial and the evidence of Appellant's guilt was not the strongest. Each case involving an alleged inflammatory or abusive remark by a prosecutor must be considered on its own merits and within the circumstances

exsisting at the time that the questionable statement was made. Fireson v. State, 339 So.2d 312 (Fla. 3d DCA 1976). Harris v. State, 414 So.2d 557 (Fla. 3d DCA 1982) held that a prosecutor's comments which included an expression of his personal belief in the guilt of the defendant resulted in a denial of the defendant's fundamental right to a fair trial. Another close case is McMillian v. State, 409 So.2d 197 (Fla. 3d DCA 1982), where the prosecutor told the jury "...if you want to let Larry McMillian walk out of here, if you want to let this kind of horrible crime go on in Dade County, Florida -", resulting in a reversal and remand for a new trial. The prosecutor's comment in the instant case suggested that a murderer should not "walk free". (R 734-5) See also Gomez v. State, 415 So.2d 822 (Fla. 3d DCA 1982).

Furthermore, there is no way to determine what effect a prosecutorial comment such as the one sub judice may have had on the jury. The remark so fundamentally tainted the defendant's right to a fair trial so as to warrant a new trial. See Davis v. State, 214 So.2d 41 (Fla. 3d DCA 1968). There is nothing in the record from which an appellate court can tell whether the offensive argument contributed to the conviction. Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968). If, upon an objection and a timely motion for mistrial, the appellate court is not satisfied beyond a reasonable doubt that the improper prosecutorial comment did not contribute to the conviction, reversal is appropriate. McMillian v. State, supra. The comments sub judice are so prejudicial that "neither rebuke nor retraction may entirely destroy their sinister influence [and]... a new trial should be awarded, regardless of the want of objection or exception". Carlile v. State, 129 Fla. 860, 176 So. 862, 864 (1937). The evidence here cannot be said to be "overwhelming" against the appellant, as this Court stated in Huff v. State, 437 So.2d 1087 (Fla. 1983). As a result, the comment of the prosecutor could have decided the case:

> There was, however, vast room for the jurors to differ on the question of the proof establishing defendant's guilt beyond a reasonable doubt. It may well be that the juror was influenced by the prosecutor's unsuitable remarks and that this tipped the scale of justice against the defendant. Oglesby v. State, 156 Fla. 481, 23 So.2d 558, 560 (1945).

The error resulted in a denial of Appellant's constitutional rights to due process and a fair trial guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution. The motion for mistrial should have been granted. Accordingly, reversal is required.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER THE TRIAL JUDGE COMMENTED ON APPELLANT'S CREDIBILITY AS A WITNESS WHILE TESTIFYING RESULTING IN A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO A FAIR TRIAL.

Throughout the trial but especially during cross-examination of the appellant, the prosecutor engaged in a method of cross-examination which forced the witness to call other witnesses liars if their testimony differed from the witness at hand. A good example of this method is revealed during a portion of the state's cross-examination of Appellant. (R 2765-2770) The state questioned the appellant about Francis Foster's testimony that the appellant told him that two men had forced him off the road. The prosecutor then asked the appellant if Francis Foster was telling the truth when he testified to that effect. (R 2766) Following four pages of the prosecutor attempting to elicit an answer to this improper and unanswerable question, the appellant was finally able to respond:

> Mr. Brown, you are asking me to call Mr. Francis a liar and I don't believe he is. I believe he testified to the best of his recollection. I was in a highly emotional state. I don't remember exactly what I told the man, so

> therefore I can't tell you. I believe that Francis Foster answered the question truthfully to the best of his ability, but I don't believe it's exactly what I said. (R 2770)

Appellant points out this example (of which there are many others) to illustrate the extreme problems created for the witness by this type of questioning. This relates to the problems presented in this issue.

The discrepancies between the appellant's testimony and that of Francis Foster resulted in the error at hand. The appellant testified that he did not believe that Francis Foster heard him yelling at the screen door prior to observing the appellant standing at the door. (R 2759-2760) Foster had testified that he would have heard him even without his hearing aid which he did not have in at the time. (R 2760) The prosecutor continued asking extremely argumentative questions on this issue:

> MR. BROWN: Are you telling us, sir, that that testimony is probably not accurate?
>
> APPELLANT: I'm saying that he could have had a lot of trouble hearing me without his hearing aid in.
>
> MR. BROWN: Could you please tell me, Mr. Huff, do you feel that you are a better expert on Francis Foster's hearing capabilities than is Francis Foster himself?
>
> APPELLANT: No, sir.
>
> MR. BROWN: And if Francis Foster then said that he could have heard you or would have heard you, would you not then accept him and what he said as true and accurate?
>
> APPELLANT: If he didn't have a hearing problem, I would, yes.
>
> MR. BROWN: If he said -- my question, Mr. Huff, was -- if Francis Foster, who knows his hearing better than you do, said that he would have heard it through his open screen door with him just a few feet away, if he says he would have heard it and that you weren't doing it, do you still dispute his testimony, sir?

> APPELLANT: What I'm saying is I believe the man did not hear me.
>
> MR. BROWN: So the answer to my question is, yes, you do dispute Francis Foster's testimony; is that correct, sir?
>
> MR. HILL: Judge, Mr. Brown is testifying now. Clearly the answer is coming from the witness stand, Mr. Brown, it is not what you think the answer is.
>
> MR. BROWN: If the Court please, the witness is deliberately trying to play semantical games with me and is not answering the questions directly.
>
> MR. HILL: Mr. Brown, if you would just simply ask the question in a straight forward manner instead of playing games yourself --
>
> MR. BROWN: Your Honor, if the Court please, I will not engage in cross-debate with Mr. Hill.
>
> MR. HILL: Then simply ask to approach the bench.
>
> THE COURT: The answer by the witness was vague.
>
> MR. BROWN: Thank you, your Honor. (R 2760-2761)

Prior to the answer to the next question, counsel approached the bench and requested a mistrial based upon the judge's comment implying that the appellant was being evasive in his testimony. (R 2761-2762) Counsel contended that it was a direct comment on Appellant's credibility. The trial court denied the motion. (R 2762)

Appellant contends that the trial judge violated Section 90.106, Florida Statutes, providing: "A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused." In Ehrhardt, Florida Evidence, §106.1, p. 22, it is stated:

> During a jury trial, the judge occupies a dominant position. Any remarks and comments that the judge makes are listened to closely by

> the jury and are given great weight. Because of the credibility that the comments are given and because they would likely overshadow the testimony of the witnesses themselves and of counsel, Section 90.106 recognizes that a judge is prohibited from commenting on the weight of the evidence, or the credibility of the witness, and from summing up the evidence to the jury. If such comment and summing up were permitted, impartiality of the trial would be destroyed. (Footnotes omitted).

During cross-examination of Appellant, the judge's comments "could have been interpreted by a jury as a comment on Appellant's veracity and therefore influence their deliberations." Gordon v. State, 449 So.2d 1302, 1304 (Fla. 4th DCA 1984). In Gordon, in sustaining the prosecutor's objection to defense counsel's question on redirect that the defendant's statements had been consistent, the trial judge stated that the testimony was not true. Admonitions to a witness, if they tend to suggest to the jury a doubt on the part of the court as to his veracity are improper. Robinson v. State, 80 Fla. 736, 87 So. 61 (1920). Likewise, questions directed to a witness which indicate the judge's opinion of the defendant's guilt or the weight or sufficiency of the evidence are also improper. Williams v. State, 305 So.2d 45 (Fla. 1st DCA 1974).

Appellant points out that this comment by the trial court was not an isolated incident. During the cross-examination of Terry Overly, the prosecutor was again engaging in the same type of abusive, improper cross-examination. When the witness refused to call another witness a liar, defense counsel objected on the basis of the fact that the question had been asked and answered ten times. (R 2253) The court responded, "It hasn't been answered to the Court's satisfaction... They were not direct answers responsive to the question." (R 2253-4) Appellant contends that this was also error. It is interesting to note that the trial court's comments on the credibility of witnesses came during the testimony of two key defense witnesses, the appellant and Terry Overly.

Most recently in Millett v. State, 9 FLW 2559 (Fla. 1st DCA, December 10, 1984), the trial court made four separate comments which the appellate court determined were comments on the defendant's credibility before the jury. Two of these comments stated that the defendant was not being responsive to the questions, while another stated that the defendant had given double statements and asked for clarification. The remaining comment related to the clarity of the witness' response. In holding that the denial of the motion for mistrial was harmless error, the First District Court of Appeal pointed out the overwhelming evidence of guilt which rendered the error harmless. However, the defendant in Gordon, supra, never denied striking the child and no other cause was offered for the victim's near-fatal injuries. The Court cautioned that another case with less evidentiary force may require reversal.

Appellant submits that the case at bar is one such case. This Court's opinion reversing this cause for the instant retrial [Huff v. State, 437 So.2d 1087 (Fla. 1983)], stated that the evidence of Appellant's guilt wasn't the strongest, as the trial judge himself stated. Likewise, the state's case was totally circumstantial. Id. at 1091. Therefore, the error in the instant case cannot be deemed harmless. Appellant has been denied his right to a fair trial. Art. I, §§ 9 and 16, Fla. Const. and Amends. V, VI, and XIV, U.S. Const.

POINT IV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT WHERE THE STATEMENT WAS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

Appellant filed a written motion to suppress the incriminating statement that he made to Sheriff Johnson shortly after his arrest. (R 3309-10, 3559-60) After voir dire, defense counsel reminded the court of its

previous order that the motion to suppress would be heard after the jury was picked. After hearing argument as to the viability and applicability of the law of the case doctrine, the trial court agreed with the state and denied the motion to suppress determining that the previous ruling by the trial judge at the first trial was the law of the case. (R 518-30) When Terry Overly, the key state witness in establishing the proper predicate concerning the advisement of rights to the appellant upon his arrest, was called as a witness, the state agreed that his testimony should be proffered. (R 787) His testimony revealed that Chief Lynum told Overly to place the appellant in custody almost immediately upon their arrival at the crime scene. After a brief pat down, Overly placed the appellant in the backseat of his police cruiser. He then advised the appellant of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). Overly advised the appellant that he had a right to remain silent, that anything he said would be used against him in a court of law and that he was allowed to have an attorney present at any time. The advisement of rights apparently did not include informing the appellant that he would be furnished an attorney at no cost if he could not afford to hire one. In addition to the testimony at this trial, the court took judicial notice of the transcript of the hearing on the motion to suppress held prior to the first trial in October of 1980. The appellant was extremely upset during the advisement of his rights and Overly had to calm him and, in essence, force him to listen to the Miranda warnings. (R 790-815; T 1810-39) Overly concluded upon reflection that the appellant did not actually understand the Miranda warnings. (R 800) Overly was not really sure that the appellant had understood the advisement of his rights even prior to the first trial. (T 1834-5) Following extensive argument, Judge Huffstetler denied the motion to suppress. Specifically, the court ruled that the state had shown by

a preponderance of the evidence that adequate Miranda warnings were given and that the prior ruling of Judge Booth at the first trial was the law of the case. (R 877-8) As to Appellant's verbal exercise of his right to remain silent, Judge Huffstetler applied the doctrine of the law of the case and then agreed with the state's interpretation that the appellant was answering affirmatively that he understood his rights. When defense counsel pointed out specific testimony of Overly that the appellant did not want to talk to him about anything, Judge Huffstetler simply stated that his previous ruling would stand. (R 877-81)

Overly testified that when he asked the appellant if he wished to remain silent, the appellant responded affirmatively. Overly felt that he was acknowledging his rights so that Overly would leave him alone. Overly concluded that the appellant did not wish to talk to him about anything. (R 867-70; T 1834-5)

The appellant was very upset at the time and did not appear to understand Overly completely. He did not appear to be cognizant of what was happening. Overly constantly had to get the attention of the appellant who sobbed and complained throughout Overly's advisement. He talked of his parents and was not completely coherent as a result of his excited stated. (R 851-3) Overly concluded that the appellant understood possibly half of what he said to him. (R 854)

Initially, Appellant contends that the trial court erred in failing to adequately consider the merits of the motion to suppress in holding that the doctrine of the law of the case required the court to deny the motion. The law of the case precludes relitigation of all issues necessarily ruled upon by the court, as well as of all issues upon which an appeal could have been taken, but which were not appealed. State v. Stabile, 443 So.2d 398 (Fla. 4th DCA 1984). The views and decisions of an appellate court on issues

which were properly raised and decided in disposing of the case are, unless reversed or modified by a higher court, binding on the lower court as the law of the case. Bunn v. Bunn, 311 So.2d 387 (Fla. 4th DCA 1975). Appellant contends that since the confession which was the subject of the motion to suppress was not used by the state at the first trial, any ruling on its admissibility at that first trial cannot now be said to be the law of the case. Judge Booth's ruling on the motion was not necessary since the state did not in fact use the confession at the first trial. As a result, Judge Booth's initial denial of the motion could not have formed any basis for the subsequent appeal. It is clear that this Court has not yet been presented with this issue until now.

At any rate, there are exceptions to the doctrine of the law of the case. When a subsequent hearing or trial develops different facts and different issues, the "law of the case" doctrine will not preclude a conclusion at variance with the initially adjudicated result. Steele v. Pendarvis Chevrolet, Inc., 220 So.2d 372 (Fla. 1969). Usually, an exception to the general rule binding the parties to the law of the case at a retrial should not be made except in unusual circumstances and for most cogent reasons and only where manifest injustice would result from strict and rigid adherence to the rule. Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965). A court also has the power to reconsider and correct an erroneous ruling that has become the law of the case. Id. For all of these aforementioned reasons, it was clearly error for Judge Huffstetler to decline to hear the merits of the motion to suppress and hold that the law of the case doctrine precluded relitigation. Certainly this Court has a duty to consider the suppression issue even though the trial court declined. This duty arises from Florida Statutes, the Rules of Appellate Procedure, the interest of justice, substantive due process requirements and Florida's constitutional and statutory scheme of death penalty review. Preston v. State, 444 So.2d 939 (Fla. 1984).

Returning to the merits of the motion, Appellant contends that it should have been granted for a variety of reasons. First and foremost is the fact that the appellant chose to exercise his right to remain silent immediately after being advised of this right. While the testimony is somewhat ambiguous, Appellant submits that the gist of Overly's testimony was that the appellant replied affirmatively to Overly's question regarding his wish to remain silent. (R 867-70; T 1834-5) Approximately 15-20 minutes later, Sheriff Johnson arrived at the scene where the appellant was in custody in the back of Overly's cruiser. (T 1837) Overly informed Sheriff Johnson that he had a suspect in custody and that he had already been advised of his rights. (T 1623-4) Without any further readvisement of his rights or even reminding him of his Miranda rights, Sheriff Johnson questioned the appellant about what happened. The appellant responded, "I shot them in the face". (T 1624)

The admission of Appellant's statements to Sheriff Johnson violated the principles of Miranda v. Arizona, 384 U.S. 436 (1966). The Miranda court made it clear that when a suspect in police custody indicates that he wishes to remain silent, further interrogation at that time must cease. Once a person has asserted that right, any statements obtained from that person are admissible only if the interrogating officer has scrupulously honored the accused's right to remain silent. Michigan v. Mosely, 423 U.S. 96 (1975). When Sheriff Johnson approached the appellant 20 minutes after he invoked his right to remain silent and commenced interrogation without readvisement of his rights pursuant to Miranda, his action rendered the statements involuntary and in violation of Appellant's right to remain silent. Article I, §9, Fla. Const.; Amends. V and XIV, U.S. Const. While Sheriff Johnson was certainly not prohibited from approaching the appellant since he failed to invoke his right to counsel pursuant to Edwards v. Arizona, 451 U.S. 477 (1981), any

statement obtained from the appellant at this point would still be inadmissible unless Sheriff Johnson at least reminded the appellant of the previous advisement of his constitutional rights.

The state also failed to lay a sufficient predicate for the introduction of Appellant's statement. This predicate was deficient for two reasons; (1) the Miranda rights given were insufficient and (2) the totality of the circumstances revealed that the appellant failed to understand his rights. Addressing the latter first, Terry Overly's testimony reveals that the appellant was very upset at the time that Overly encountered him. The appellant did not appear to be cognizant of what was happening at all times. Overly repeatedly had to redirect Appellant's attention throughout the advisement of rights. The appellant was incoherent, sobbing and complaining throughout the process and repeatedly talked of his parents. Overly concluded that the appellant understood possibly 50% of the Miranda warnings. (R 851-4)

A waiver of constitutional rights must be knowing and intelligent before any evidence obtained as a result of interrogation can be used at trial. Miranda v. Arizona, supra. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The issues of whether a waiver has been knowingly and intelligently made and whether the subsequent confession was voluntarily given will be resolved only upon consideration of the "totality of the circumstances" surrounding the waiver and confession. Greenwald v. Wisconsin, 390 U.S. 519 (1968); Williams v. State, 156 Fla. 300, 22 So.2d 851 (1945). Among the factors to be considered in determining the voluntariness of a confession and a waiver of rights is the mental capacity or ignorance of the accused. State v. Chorpenning, 294 So.2d 54, 56 (Fla. 2d DCA 1974). The burden of proving that a confession has been freely and voluntarily given lies upon the state. Reddish v. State, 166 So.2d 858 (Fla. 1964).

In Reddish v. State, supra, the defendant was in the hospital and under the influence of doctor-administered narcotics when a statement was made to the police. After considering whether the mind of the accused was sufficiently cleared and unhampered by the combination of his physical condition and the impact of the narcotic medication, the Court concluded that the totality of the circumstances revealed that the statement was not the product of free will in that the defendant did not fully appreciate the significance of his admissions.

In the instant case, Officer Overly had severe doubts about Appellant's ability to understand the Miranda warnings even shortly after the crime occurred. After several years of reflection on the matter, Overly held a steadfast belief that the appellant could not have possibly understood the advisement of rights. The state had no way to contradict Overly's opinion on this subject. Therefore, the state completely failed to meet its burden in proving that the statement was free and voluntary. The motion to suppress should have been granted on this ground.

The state failed in one other respect as well. The state never established the proper predicate that sufficient Miranda warnings were given by Overly. At no time did Overly ever remember telling the appellant that he was entitled to appointed counsel if he could not afford one. At the motion to suppress hearing in October of 1980, Brown directly asked Overly if he advised the appellant anything about the appointment of an attorney. Overly simply reiterated his prior testimony that he only advised him of what was on the card which did not contain any mention of appointment of counsel. (T 1821-2) This issue was revisited at the recent trial during which defense counsel specifically argued this omission. (R 859-67) The state essentially argued that the appellant probably was aware of this right, since he was told that he had the right to an attorney and that he had been arrested once in the past. (R 863-6)

Inadequate advisement of Miranda warnings is a consideration in determining the admissibility of any subsequent statement by the accused. See Cribbs v. State, 378 So.2d 316 (Fla. 1st DCA 1980). While a virtual incantation of the precise language contained in the Miranda opinion is not required, the police must fully convey to a defendant his rights as required by Miranda. California v. Prysock, 453 U.S. 355 (1981). Prysock was told of his right to have a lawyer present prior to and during interrogation and of his right to have a lawyer appointed at no cost if he could not afford one in addition to the other standard Miranda warnings. The U.S. Supreme Court held that these warnings were sufficient to convey to Prysock his right to have a lawyer appointed if he could not afford one prior to and during interrogation. The implication is clear that if the sum and substance of all of the Miranda rights are deficient, any subsequent statement would be inadmissible. See also Irvin v. State, 246 So.2d 592 (Fla. 4th DCA 1971) and Anderson v. State, 212 So.2d 57 (Fla. 3d DCA 1968).

In the instant case, it is uncontroverted that the appellant was not advised of his right to appointed counsel if he could not afford one. This as well as the fact that the evidence was uncontradicted that the appellant could not have fully understood his rights in light of his emotional state, as well as the fact that he actually invoked his right to remain silent required the motion to suppress to be granted. Any of these grounds alone would be sufficient, while all of them considered together undoubtedly require reversal and remand for a new trial without the incriminating statement which was unconstitutionally obtained.

POINT V

THE TRIAL COURT ERRED IN ALLOWING LAY WITNESSES TO GIVE OPINION TESTIMONY CONCERNING AN ULTIMATE ISSUE WHICH THE WITNESSES WERE NOT QUALIFIED TO GIVE THUS DENYING APPELLANT HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL.

A. The testimony of Francis Foster as to how the circumstances of the killings that the appellant relayed to Foster did not "look right".

Francis Foster, an elderly man who lived close to the crime scene, was the first person to come into contact with the appellant. Foster testified that the appellant appeared at his front door in an extremely agitated state asking for help. Once the police had been summoned and the appellant taken into custody, Foster evidently went to the crime scene to gawk. After returning to his house, he remarked to his son that, "[T]his 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. That's all I said to my son." (R 659) The prosecutor then asked why the situation did not look right; i.e. what was wrong with it. (R 660) The defense objected on the grounds that the question called for an opinion as well as the contention that the question had been asked and answered. The objection was overruled and Foster testified:

> Well, he told me two men runned him off the road. I asked him where the men were and he said they're gone. And then he came to our house to call the police. Over there near the bodies were approximately about five to six hundred feet away and he came over there. I just said to myself now thinking, if two men run you off -- run me off the road and three was in the car and two men run us off the road, two got killed, how am I so fortunate?
>
> * * *
>
> I said, well, there's three people supposed to be in the car, two men run me off the road, two got killed and I just walk away. I said it doesn't look right. (R 660-1)

Non-expert witnesses must ordinarily confine their testimony to facts and may not give their opinions and conclusions. Thomas v. State, 317 So.2d 450 (Fla. DCA 1975). Similarly, if the facts are within the ordinary experience of jurors, conclusions to be drawn therefrom are to be left to the jurors. Id. If the jury is as well qualified as the witness to form an

opinion on the subject, the opinion of the witness on that fact in issue is not admissible. Id. Where an opinion is nothing more than speculation of an admitted non-expert on the issue involved, it invades the province of the jury. Mills v. Redwing Carriers, Inc., 127 So.2d 453 (Fla. 2d DCA 1961).

In Bowles v. State, 381 So.2d 326 (Fla. 5th DCA 1980), four police officers testified on rebuttal that they knew the general reputation of the defendant in the community for truth and veracity, and that it was bad. Over objection, each was then asked if he would believe the defendant under oath and each answered in the negative. The appellate court pointed out that no legal principle is more firmly established than that which makes the jury the sole arbiter of the credibility of witnesses, including the reasonableness, probability and credibility of a defendant. Id. at 328.

Francis Foster's testimony as to why the circumstances of the murders did not "look right" to him was completely incompetent evidence which should have been excluded. The testimony apprised the jury that Mr. Foster held the opinion that something was definitely peculiar about the fact that the appellant was not killed along with his parents. It was a clear inference of guilt on the part of Mr. Foster. Even worse, it was Mr. Foster's opinion drawn from his own inference. The circumstances of the murders and the fact that the appellant survived was the precise issue that the jury was there to determine. As such, it invaded the province of the jury and resulted in a denial of Appellant's constitutional rights to a fair trial. The timely objection should have been sustained and the evidence excluded.

B. The testimony of Mabry Williams that he believed that the appellant was guilty of the murders.

During the re-direct examination of Mabry Williams, one of the homicide investigators at the scene, the following exchange occurred:

> MR. BROWN: Do you feel that you were fair to the Defendant?

ANSWER: Yes, sir I do.

MR. BROWN: If the evidence had shown that the Defendant, in your mind, that the Defendant was not guilty, would you have relayed that information in your report and to me?

ANSWER: Most definitely.

MR. BROWN: Okay. At the conclusion of the entire investigation, after all the follow-up that you did, did you find anything to give you any reason to disbelieve that that Defendant is, in fact, guilty as you arrested him?

MR. HILL: Judge, that's not a proper question. That's a question for the jury to decide and not this man or not Mr. Brown.

MR. BROWN: Your Honor, if the Court please, based on a question which was asked by Ms. Pepperman, I think it is a proper question.

THE COURT: Overruled.

MR. BROWN: Okay. Mr. Williams, is there anything -- Once you had totally completed all of the investigation, was there anything to change your opinion or your mind that the person you arrested, the Defendant, was, in fact, guilty of each of the those murders?

ANSWER: No, sir, there was nothing.

MR. BROWN: In the Courtroom today do you still hold that opinion?

ANSWER: Yes, sir, I do. (R 1354-5)

Appellant contends on appeal that this was clearly reversible error. The testimony revealed that one of the primary homicide investigators in this case believed that the appellant was guilty of the offenses and that nothing in his subsequent investigation changed that opinion. It is clear that the opinion of witnesses as to the guilt or innocence of an accused is not admissible. Farley v. State, 324 So.2d 662 (Fla. 4th DCA 1975) and Gibbs v. State, 193 So.2d 460 (Fla. 2d DCA 1967). Such an error can constitute reversible error. Id. A closely analogous case is that of Blackwell v.

State, 76 Fla. 124, 79 So. 731 (1918). There, the court held that, in a prosecution for murder, it was error to admit evidence by the sheriff that in his opinion there was sufficient evidence before the jury to convict. Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. Bowles v. State, 381 So.2d 326 (Fla. 5th DCA 1980). A jury is inclined to give great weight to their opinions as officers of the law. Id.

The net effect of Mabry Williams' testimony was that during the investigation, he developed the belief that the appellant was guilty of the murders and that nothing in the interim had dispelled that belief. Williams even testified that he still believed that the appellant was guilty. The timely and specific objection should have been sustained and the testimony stricken. The failure of the trial court to do so and to also allow the objectionable testimony of Francis Foster resulted in a denial of Appellant's constitutional rights to due process of law and to a fair trial. Art. I, §§ 9 and 16, Fla. Const.; and Amends. V, VI and XIV, U.S. Const.

POINT VI

THE TRIAL COURT ERRED IN ALLOWING EVIDENCE OF CRIMES FOR WHICH THE APPELLANT WAS NOT CHARGED RESULTING IN A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

During the trial, the state was permitted to introduce evidence over defense objection that Wildwood Police Chief Ed Lynum had seen the appellant at the crime scene within a couple of months prior to the murders. Lynum testified that he had seen the appellant in the afternoon on two or three different occasions in his parked car. On one of these occasions, the appellant approached Lynum and conversed with him about possibly buying the property. On this occasion, the appellant was drinking a beer. On the other occasions, the appellant was drinking something, but Lynum was unable to

determine what. On each of these occasions, the appellant was in the company of a black female. Lynum was unable to testify if it was the same woman each time. Except for the one instance when they conversed, the appellant remained in the vehicle with the woman on the other occasions. Lynum was unable to see what was happening inside the car. He did not know much about the appellant's personal life nor his marital status. (R 694-707) All of this testimony was offered over strenuous defense objection that it was irrelevant, prejudicial testimony which implied the commission of other crimes or at least moral indiscretions on the part of the appellant. The state contended that the evidence was relevant to show that the appellant was familiar with the area (which was not disputed by the defense and was shown by other evidence) and that the appellant felt "safe" in that area. The trial court agreed with the state and allowed the testimony.

Appellant contends that the evidence was irrelevant at best and, more likely, intended as an unwarranted character attack. Young v. State, 141 Fla. 529, 195 So. 569 (1939), set forth the firmly entrenched proposition that the state may not assail a defendant's character unless it has been put in issue by the defendant. Young, supra, involved a situation in which the prosecutor brought out the fact that the defendant's address was within a neighborhood notorious as a prostitution district. This inflammatory evidence required a reversal of his conviction. Jordan v. State, 171 So.2d 418 (Fla. 1st DCA 1965), pointed out that the state may not attack an accused's character by showing a propensity to commit crimes. With certain very limited exceptions, character evidence is generally not admissible in Florida. §90.404, Fla. Stat. This section also allows evidence of other crimes, wrongs and acts if it is probative of a material issue other than the bad character or propensity of the individual.

Over a timely and specific objection, the jury heard testimony that the appellant (a married, white male) was seen alone in a car parked in a secluded area in a rural county with a black female. While the witness was unable to discern what activity was taking place in the car, Appellant submits that the obvious conclusion that the jury reached was that the appellant was engaging in interracial, adulterous fornication. This is the precise inference that the prosecutor wanted the jury to draw. Aside from being highly prejudicial, the testimony constituted evidence of crimes and bad acts by the appellant. The possible crimes at issue involve adultery and/or lewd and lascivious behavior. Ch. 798, Fla. Stat. (1983). Even discounting the commission of criminal acts, the objectionable testimony certainly impugned Appellant's moral turpitude.

The prosecutor used this objectionable testimony during closing argument to the jury, contending that it showed that the appellant did feel safe in that area:

> I submit to you also from the testimony of Chief Lynum about some of the defendant's other activities out there, about him being out there with a female or females, that that is something you should consider because it shows the defendant felt safe there. As Chief Lynum testified, he and the defendant had talked about how secluded an area that was, how far away from traffic it was, how far away from State Road 44, how quiet. (R 2968-9)

Even if this Court finds that the evidence has even minimal relevance, Appellant contends that any probative value is substantially outweighed by the danger of unfair prejudice. In that case, the evidence would be inadmissible under Section 90.403, Florida Statutes. This section is directed at evidence which inflames the jury or appeals improperly to the jury's emotions. See Westley v. State, 416 So.2d 18 (Fla. 1st DCA 1982). Evidence with some probative value has been excluded on the basis that the

danger of prejudice outweighs its relevance. See Demps v. State, 395 So.2d 501 (Fla. 1981) and Aho v. State, 393 So.2d 30 (Fla. 2d DCA 1981). Appellant contends that the evidence should have been excluded. Its admission resulted in confusion of the issues with a tendency to show bad character and propensity for criminal activity on the part of the appellant. This resulted in a denial of Appellant's constitutional right to a fair trial. Art. I, §§ 9 and 16, Fla. Const. and Amends. V, VI, and XIV, U.S. Const.

POINT VII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED UPON THE PROSECUTOR'S IMPROPER COMMENT REGARDING THE CREDIBILITY OF A WITNESS THUS RESULTING IN A DEPRIVATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL.

A key witness at the trial was former police officer Terry Overly who testified for both the state and the defense. At some point, Overly was declared a court witness. (R 790-935, 2220-76) Overly was one of the first persons present at the crime scene and his testimony was crucial, since he advised the appellant of his constitutional rights before placing him in custody. Overly's testimony was also significant concerning the contamination of various evidence at the crime scene. During cross-examination of Overly, the prosecutor engaged in the type of questioning condemned in Point III, supra. This consisted of badgering the witness concerning testimony that differed from other witnesses. Pointing out these differences, the prosecutor would then ask the witness if the previous witness' testimony was false since it differed from the instant witness' testimony. (R 2252-6)

At another point in the state's cross-examination of Overly, the prosecutor questioned Overly about the difference in his own testimony and that of Trooper Matthews. (R 2261-2) During argument of counsel after an objection, the prosecutor stated, "It goes to his credibility and how much of

what he can say or does say, if any, can be believed." (R 2263) Defense moved for a mistrial based upon the prosecutor's comment on the witness' credibility which motion was denied. (R 2263-5) A curative instruction was also denied.

Prior to the prosecutor's cross-examination of Overly, argument was heard concerning how far the state could proceed in any attempt to impeach the witness. (R 2230-43) The prosecutor wanted to ask Overly about specific bad acts relating to the circumstances surrounding his departure from the Miami and Wildwood Police Departments. These concerned alleged brutality, over-zealousness and poor judgment on the part of Overly. The trial court determined that the fact that Overly was fired from the Miami Police Department was not material to the trial. All parties agreed that the state could elicit the fact that Overly had been fired from the Wildwood Police Department by Chief Lynum. It was also agreed that the state could not ask why Overly had been fired from the Wildwood Police Department unless he denied that fact. (R 2242-3) It is extremely important to note that Overly had already admitted in the state's case-in-chief that he had been fired. (R 898)

The state then asked Overly if he considered himself a good law enforcement officer. The prosecutor then asked why Overly had left the Miami Police Department. (R 2271-2) Overly questioned the relevance of the inquiry and the prosecutor said, "Would you prefer not to answer my question, Mr. Overly?" (R 2272) Defense counsel then objected and requested that the question be specific so that objectionable evidence concerning the reason that Overly was fired was not elicited. The trial court overruled the objection and the prosecutor again asked Overly why he left that department. (R 2272-3) Overly replied that he did not feel like telling the jury and that if the prosecutor knew anything about the circumstances, he could tell the jury himself. (R 2273-4) The prosecutor replied that this would not be proper and

again questioned Overly about the unfavorable circumstances of his departure. Overly again refused to answer. The state then elicited the fact that Overly had been fired from the Wildwood Police Department by Chief Lynum. (R 2275) In spite of this admission and the previous ruling by the trial court, the prosecutor inexplicably questioned Overly about the reason for his termination. (R 2275-6) Overly stated that Lynum never gave a reason, but Overly suggested that it was due to the fact that he had to take time off from his job for army reserve duty. At this point, the prosecutor gestured at his co-counsel and stated words to the effect of "We got him now" or "Get that". There was an immediate motion for mistrial based upon the prosecutor's misconduct. There was argument on this issue both oral and written. There was also a mini-evidentiary hearing during which spectators at the trial were called as witnesses and testified as to what they observed regarding the prosecutor's conduct. Interestingly enough, the trial judge was absent from the courtroom during this testimony. (R 2294-2356) While there was some disagreement as to what actually occurred and what the jury could have seen or heard, it was generally established that the prosecutor made a gesture toward his own counsel table and stated words to the effect of either "We got him now" or "Get that down". After considering argument by counsel but without hearing the testimony of the courtroom spectators, the trial court denied the motion for mistrial and instructed the jury that comments and argument of counsel are not evidence and that evidence should be the sole basis for their verdict. (R 2357-60)

Appellant contends that the motion for mistrial should have been granted based upon the cumulative misconduct of the prosecutor during the cross-examination of Terry Overly. Appellant cites this Court to the argument contained in Point II, supra, regarding other improper prosecutorial comments and hereby incorporates that argument in the instant point. Appellant submits

that the comment was unfair and prejudicial in that it could easily be interpreted to be a comment that the witness had perjured himself. It is significant to note that the state never introduced any substantive evidence to refute Overly's testimony concerning the reason for his termination. While counsel may comment on the credibility of a witness where his remarks are based on facts appearing in the evidence, such is not the case here. Mabery v. State, 303 So.2d 369 (Fla. 3d DCA 1974) and Herzig v. State, 213 So.2d 900 (Fla. 4th DCA 1968). In essence, the prosecutor gave the jury the impression that the state had evidence that the witness was lying. Such evidence was never presented. In Murray v. State, 425 So.2d 157 (Fla. 4th DCA 1983), a new trial was required where the prosecutor argued in closing that the defendant thought he could twist and bend the law and lie in court to obtain an acquittal. Appellant submits that the prosecutor's misconduct, especially taken in its entirety during the cross-examination of Overly, resulted in a denial of a fair trial. Amends. V, VI and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const. Although unfortunate, this Court must again reverse and remand for a new trial due to this prosecutor's misconduct.

POINT VIII

IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW THE COURT BELOW ERRED IN NOT GRANTING THE APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL WHERE THE ONLY EVIDENCE OF THE APPELLANT'S GUILT WAS CIRCUMSTANTIAL AND THE CIRCUMSTANTIAL PROOF ADDUCED AT TRIAL DID NOT EXCLUDE EVERY REASONABLE HYPOTHESIS OF INNOCENCE.

At the close of the state's case, the appellant made an oral motion for a directed judgment of acquittal. The thrust of the appellant's argument was that the case against him was totally circumstantial and that the state's proof did not exclude every reasonable hypothesis of innocence. Appellant also contended that the evidence was totally insufficient to prove the

requisite premeditation for first-degree murder. At the conclusion of the argument, the trial court denied the motion. (R 2145-61) The motion was renewed following presentation of all of the evidence and again denied. (R 2905-6) The motion for new trial was also denied. (R 3826-30) The appellant asserts that the evidence adduced against him at trial was legally insufficient to support his convictions for first degree murder. Accordingly, the appellant urges that the trial court erred when it denied his motions for judgment of acquittal and for a new trial.

Although it is clear in Florida that a conviction may be based solely on circumstantial evidence, it is well settled that the circumstantial evidence must be inconsistent with and to the exclusion of every reasonable hypothesis of the defendant's innocence. MacArthur v. State, 351 So.2d 972 (Fla. 1977). In considering a motion for judgment of acquittal made by a defendant at the close of the state's case, the trial court is faced with ruling upon the legal sufficiency of the evidence put forth by the state to sustain a conviction for the crime charged. McKnight v. State, 341 So.2d 261 (Fla. 1977). In the McKnight decision, the Court stated that a directed verdict should be granted "when it is apparent that no legally sufficient evidence has been submitted from which a jury could legally return a verdict of guilt." Id. at 262.

A number of Florida decisions have set forth the standard that whether a motion for judgment of acquittal at the close of the state's case should be granted depends upon whether the state has made out a prima facie case against the defendant. This does not suggest, however, that the prima facie standard means anything less than requiring the state to prove its case beyond and to the exclusion of every reasonable doubt. In Weinshenker v. State, 223 So.2d 561 (Fla. 3d DCA 1969), the court explained as follows:

> [W]hether a motion for a directed verdict of acquittal made at the close of the state's case

> should be granted depends upon whether the state met its burden of proof by making out a prima facie case against the defendant, that is, whether the state "establish[ed] the guilt of the accused beyond and to the exclusion of every reasonable doubt." Id., at 563, citing Adams v. State, 102 So.2d 47 (Fla. 1st DCA 1958).

The Weinshenker court further explained the standard for considering a motion for directed judgment of acquittal:

> As we understand it, the foregoing principal would require a trial judge, in ruling on a motion for a directed verdict of acquittal made at the close of the state's case, to ask himself the following question: If the trial were to end now, could the jury as reasonable men find the defendant guilty beyond and to the exclusion of a reasonable doubt? If his answer is affirmative, the trial judge must deny the motion; if it is negative, he must grant the motion. Id. at 563.

In the opinion of this Court reversing this cause for the instant retrial, this Court stated:

> As the trial judge himself stated, the evidence of appellant's guilt presented by the state wasn't the strongest. The state's case was totally circumstantial. Huff v. State, 437 So.2d 1087, 1091 (Fla. 1983).

However, this Court found that the evidence presented at the first trial was sufficient to sustain the verdicts for first-degree murder. Id. In so doing, this Court pointed out that circumstantial evidence alone is sufficient to convict in a capital case in the absence of a reasonable alternative theory. Appellant submits that it is important to note that he took the stand and testified at the retrial providing a reasonable alternative theory that was inconsistent with guilt. Certainly, Appellant's testimony is as reasonable a hypothesis of innocence as the one accepted by this Court in Jaramillo v. State, 417 So.2d 257 (Fla. 1982), wherein this Court reversed two convictions for first-degree murder and vacated two death sentences and remanded with instructions to discharge Jaramillo.

In finding that the evidence presented at the first trial was sufficient, this Court pointed out that the appellant was seen in the backseat of the car with his parents an hour and a half before the murders were reported, the evidence that the killer had to be positioned in the backseat, the evidence that the car had been moved some time subsequent to the murders, and the testimony of Joyner that he saw the appellant alone driving a car immediately after the time of the murders. Huff v. State, supra, at 1088-9. However, the evidence did not show that the appellant was in the backseat of the car when it left Bergman Realty. In fact, no witnesses saw a car leave the realty office. The appellant's testimony on this issue must then be believed, since the state cannot refute it. See, e.g., Snipes v. State, 22 So.2d 506 (Fla. 1945) and McKnight v. State, 341 So.2d 261 (Fla. 3d DCA 1977). Furthermore, the evidence that the shots came from the backseat was not overwhelming. One state witness even admitted that the state's theory as to the order and trajectory of the bullets was inconsistent in at least one respect. (R 1674-81) In these very important areas, Appellant submits that this Court should reconsider its prior rejection of this issue.

The state's case against the defendant was replete with reasonable doubts, and it did not exclude every reasonable hypothesis of the defendant's innocence. The defendant was seen with his parents at a realty office in Leesburg around 3:25 p.m. on the day of their death. Mrs. Huff was on her way to the Sandalwood Condominiums to take care of a rental problem; thereafter they planned to visit their attorney in Wildwood.

When the defendant first hailed a neighbor near the crime scene to explain that his parents had been killed, he was upset and complaining that he had been hit on the head. He asked Francis Foster, "Can't anybody help me." Wildwood Police Chief Ed Lynum, one of the first people to see Huff at the scene, stated that Huff was hysterical, crying and upset. A number of other

witnesses at the initial crime scene testified that the defendant was extremely upset and nervous. The appellant would suggest that all of these descriptions are consistent with a man who has just regained consciousness to find his parents murdered.

Huff told a number of the initial officers at the crime scene that the automobile in which he and his parents had been riding had been hijacked by an armed man who later struck Huff in the head and rendered him unconscious. Although the various witnesses who spoke with the appellant about this event had minor differences in their recollections as to the specifics of Huff's statements, he was consistent that he and his parents had been overtaken at gunpoint and forced to drive to the sandy dump area. The appellant had sand on his forearms when he spoke to Francis Foster, thereby indicating that he had in fact been on the ground in the sandy landfill. Significantly, however, the appellant had no blood on his clothes, hands or forearms. Since Dr. Schutze, the medical examiner, testified that the injuries sustained by the decedents would be especially bloody, it would seem likely that there would have been significant amounts of blood on the appellant's clothes. This is especially true if one follows the state's argument that the assailant shot the decedents while the assailant was in the car with them. Moreover, Dr. Schutze testified that the injury to Genevieve Huff's skull would have been extremely bloody in that it, if made by a pistol butt, would have splattered blood onto the assailant's hands. There was no blood on the appellant's hands or arms.

There was also reasonable doubt created by the fact that the murder weapon was never found or introduced into evidence. The gunshot residue test taken from the defendant shortly after his arrest did not indicate that the defendant had recently fired a weapon. In addition, although the fatal shots were determined to have been fired from a .32 caliber automatic pistol, there

was never any direct evidence that the defendant had such a pistol. The testimony of Paul Moore regarding his alleged conversation with the defendant about a handgun is suspect, especially since it occurred some six (6) months prior to the killings and since Moore never actually saw the defendant possess such a gun.

Other physical evidence discovered at or near the crime scene also tended to cast a reasonable doubt as to the appellant's guilt. Deputy Mabry Williams observed footprints in the garden of a nearby neighbor leading away from the crime scene. In addition, evidence at the first trial revealed that the appellant's wallet and contents were found strewn along Highway 44 west of the landfill road turnoff. The officer testifying about the recovery of that wallet stated that from the position of the wallet and contents on the ground, it appeared to have been thrown from a moving vehicle. Also, Mrs. Huff's wallet which had apparently been removed from her purse, was never found. It is significant, however, that fingerprints lifted from documents inside the purse were not the fingerprints of the appellant, James Roger Huff.

All of this evidence again is consistent with the appellant's explanation of what happened to him and his parents that day in the car. The missing gun, the footprints, the missing wallet, the wallet strewn along the side of the highway and the fingerprints in Mrs. Huff's purse which did not match that of the appellant all lend credence to the hypothesis that the Huff family was waylaid and robbed by an unknown assailant or assailants on the day in question. Recall also that Buddy Joyner, who allegedly saw the appellant in the Huff's car, testified at the first trial that he initially referred to the appellant as "Roger". Although some of the witnesses testified that they had been acquainted with the appellant for a long time, none of the witnesses said they had ever heard the appellant referred to as "Roger." Nevertheless, Buddy Joyner inexplicably referred to the appellant in his initial report as

"Roger." If he was so unfamiliar with the appellant that he did not know the appellant's name, it is reasonable to assume that Joyner's identification of the appellant might also be erroneous.

At the very least, the state failed to conclusively prove premeditation. For a killing to constitute premeditated murder in the first-degree, it must be established by the state, not only that the accused committed an act resulting in death, but that before the commission of the act he had formed a definite purpose to take life, and had deliberated on his purpose for a sufficient time to be conscious of a well-defined purpose and intention to kill. Purkhiser v. State, 210 So.2d 448 (Fla. 1968). Premeditation is the one essential element which distinguishes first-degree murder from second-degree murder, and thus, a premeditated design to effect the death of a human being is more than simply an intent to commit a homicide and more than an intent to kill must be proven to sustain a first-degree murder conviction. Tien Wang v. State, 426 So.2d 1004 (Fla. 3d DCA 1983). Appellant submits that the circumstances of the instant case are not inconsistent with the hypothesis that the appellant intended to kill without premeditation. The state's evidence is not inconsistent with the occurrence of an argument between the appellant and his parents resulting in a killing in the heat of passion. It is possible that the appellant was even acting in self-defense. The state's evidence is so paltry that this hypothesis cannot be ruled out. This hypothesis seems extremely reasonable in light of the evidence adduced by the state at the first trial that intimated that the appellant had forged his father's signature on a guarantee agreement. The trio were on their way to the family attorney where this would in all probability be discovered by the elder Huff. Perhaps he confronted his son with this accusation resutling in a heated discussion ending in death.

All of the above facts create a reasonable doubt about the defendant's guilt. The circumstantial proof adduced against him at trial was entirely consistent with the account of the incident that the appellant first relayed in substance to a number of law enforcement officials and to which he later testified at trial. The state's case was built solely upon inference and suspicion thereby leaving the jury free to impermissibly speculate about facts not in evidence. Circumstantial evidence is not sufficient when it requires the pyramiding of assumption upon assumption in order to arrive at the conclusion necessary for a conviction. Chaudoin v. State, 362 So.2d 398 (Fla. 2d DCA 1978).

The jury obviously felt that it needed to blame someone for these brutal killings; conveniently, it chose the only person presented to it by the state, James Roger Huff. Any circumstantially incriminating evidence against the defendant must also be considered in light of the reality of the appellant's relationship to the victims. The testimony at trial showed that the appellant lived near his parents and had worked with them for many years in the family business. The court also found in its findings of fact that the defendant possessed no significant criminal history. The notion that a person in the appellant's situation would shoot both of his parents in a bloody spree, is simply not reasonable. Since the state's evidence did not exclude every reasonable hypothesis of the appellant's innocence, the court should have granted the appellant's motions for directed judgment of acquittal.

POINT IX

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL FOLLOWING PREJUDICIAL AND IRRELEVANT CROSS-EXAMINATION OF THE APPELLANT THUS DEPRIVING HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

During cross-examination of the appellant, the prosecutor questioned the appellant concerning he and his parents' final destination that fateful

day. The appellant testified that the trio was headed to an attorney's office in Wildwood. (R 2683) When the prosecutor questioned the appellant as to the reason for this visit, the appellant suggested that the testimony be proffered. (R 2683) The prosecutor then asked, "You would prefer -- If I understand correctly, you would prefer to answer without the jury present?" (R 2683) The appellant responded that he would be most happy to answer with the jury present but that a proffer was needed. (R 2684) Defense counsel objected based upon the fact that the testimony was outside the scope of direct examination and that it was the subject of attorney-client privilege. Contending that the exchange was prejudicial, Appellant moved for a mistrial which was denied following much argument. (R 2684-6) Defense counsel pointed out that they had a standing objection to this complete line of questioning about the attorney as being outside the scope of direct examination. (R 2685) At the state's suggestion, defense counsel asserted the attorney-client privilege on behalf of the appellant concerning the reason why the trio was headed toward the attorney's office. (R 2686-7) The prosecutor then responded:

> MR. BROWN: If I understand correctly, is Mr. Hill instructing the witness not to answer on the basis of the attorney-client privilege?
>
> MR. HILL: Yes, sir, Judge, I am.
>
> MR. BROWN: Does the witness wish to accept Mr. Hill's advice and not answer?
>
> APPELLANT: Mr. Hill is being paid a lot of money for his advice so I think I should take it.
>
> MR. BROWN: All right, sir. Let me ask you this question then, could you tell us, please, do you know if your parents had a specific purpose for going to Mr. Cushman's office that day?
>
> MR. HILL: Judge, we would enter the same objection.

> MR. BROWN: If you're also advising him in reference to that I assume that the witness would not answer on the strength of Mr. Hill's objection.
>
> MR. HILL: We would argue, Judge, that is the attorney-client privilege. It's clearly no one's business. And I instruct Mr. Huff not to answer it. It's up to you, Mr. Huff, but --
>
> MR. BROWN: Well, if Mr. Hill has instructed you not to answer, I assume that as you said paying him a lot of money, you are going to respect his advice?
>
> APPELLANT: I'm not paying his money -- I'm not paying the money, but I am going to respect his advice, yes, sir.
>
> MR. BROWN: Refuse to answer that question?
>
> APPELLANT: Yes, sir. (R 2687-8)

Appellant contends that this was clearly prejudicial error that should result in a reversal with a remand for a new trial. This is yet another example in this trial of the prosecutor's blatant misconduct. Misconduct in this instance involved an inferential comment on the appellant's credibility as a witness, implied knowledge by the prosecutor of evidence of guilt not introduced at trial and could be construed as a comment on Appellant's failure to fully testify.

Through the prosecutor's misonduct, he clearly implied to the jury that the defense was hiding something from them, i.e. that this question involved something that the defense did not wish the jury to hear. The prosecutor certainly made a big production out of this inference, milking it for all that it was worth. The prosecutor wanted the jury to draw this inference based upon the appellant's assertion of a constitutional right. The Florida Standard Jury Instructions provide the following:

> The attorneys are trained in the rules of evidence and trial procedure, and it is their duty to make all objections they feel are proper. When an objection is made you should not speculate

> on the reason why it is made; likewise, when an objection is sustained, or upheld, by me, you must not speculate on what might have occurred had the objection not been sustained, nor what a witness might have said had he been permitted to answer.

The prosecutor was clearly ignoring this standard instruction and the reasoning behind it. The prosecutor certainly did want the jury to speculate on the appellant's refusal to answer and what it meant to the case.

The prosecutor's misconduct could also be construed as an implication that the state had additional evidence of guilt which they were not permitted to present due to procedural difficulties presented by the appellant's assertion of the attorney-client privilege. This is clearly improper and should have resulted in a mistrial. Attorneys are prohibited from stating facts of their own knowledge which are not in evidence. United States v. Rodriguez, 585 F.2d 1234 (5th Cir. 1978). It is clearly error for a prosecutor to imply that the state had further evidence of guilt which they did not present. Tyson v. State, 87 Fla. 392, 100 So. 254 (1924).

Appellant also submits that the prosecutor's abusive and improper questioning and remarks constituted a comment on the appellant's failure to testify. While the appellant did in fact testify, Appellant submits that the prosecutor's remarks clearly inferred that the appellant was not testifying to the complete truth. This Court is well aware of the body of law prohibiting a comment on the failure of an accused to testify. 3.250, Fla.R.Crim.P. Appellant submits that a complete reading of the exchange between the prosecutor and Huff during his testimony reveals highly improper conduct on the part of the state. The motion for mistrial should have been granted. Amends. V, VI and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

POINT X

> THE TRIAL COURT ERRED IN OVERRULING THE TIMELY DEFENSE OBJECTION AND ALLOWING THE STATE TO IMPROPERLY INTRODUCE EVIDENCE RESULTING IN A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS TO CONFRONTATION OF WITNESSES AND TO DUE PROCESS OF LAW.

During the testimony of Terry Overly during the state's case-in-chief, an important issue was the sufficiency of the warnings given to the appellant upon his arrest pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) (See Point IV, supra). During the trial, the state attempted to lay the proper predicate for the introduction of the statement into evidence such that the jury could also consider the voluntariness. By the time of the trial, Terry Overly's memory concerning the specific constitutional rights that he had read to the appellant upon his arrest had faded. Using what was reported to be Overly's deposition taken in 1980, the prosecution attempted to refresh Overly's memory concerning the warnings that were read. While Overly's memory was refreshed somewhat, some of the rights were simply read to the jury from the transcript of the purported deposition by either the prosecutor or Overly. This entire process was objected to by the defense as improper. (R 900-17) The trial court overruled the standing objection ruling that it was Overly's own statement. (R 908)

Appellant contends on appeal that the introduction of the evidence in this manner constitutes reversible error. From the transcript of his testimony, it is clear that Overly's memory was not actually refreshed by looking at the transcript of his previous statement. Hence, he had no independent recollection at the time of trial regarding the specific rights of which he advised the appellant upon his arrest. The prosecutor then proceeded to read certain questions and answers from the transcript of Overly's prior statement which established the predicate upon which the court ruled Appellant's statement admissible and upon which the jury obviously determined the voluntariness of the statement. This was done by the prosecutor actually reading certain questions and answers from this transcript. (R 911-17) This transcript was never introduced into evidence at the trial. As such, the prosecutor was reading from a document which was not in evidence over specific defense objection.

Actually, the questions and answers that the prosecutor read to witness Overly came from the transcript of the motion to suppress hearing held October 23, 1980, prior to the first trial. (T 1810-1851) Nevertheless, Appellant contends that since Overly's memory was not refreshed at trial, the state was then obligated to proceed under the past recollection recorded hearsay exception. See generally Ehrhardt, Florida Evidence §803.5 (2nd Ed. 1984). This would have required Overly to identify the transcript as a true and accurate recording of his prior testimony. Id. This was never done below. In fact, after looking at the transcript at one point in his testimony, Overly stated, "Well, if that is my statement that I made back then, this is a truthful document, then I did make that statement back then and I'll go along with that." (R 799) As one can readily determine, Overly's "adoption" is based on several inferences. At another point in his testimony, Overly was under the mistaken impression that the transcript was probably his deposition rather than his testimony at the suppression hearing. (R 803)

Since Overly did not specifically adopt the transcript as a true and accurate representation of his prior testimony, the only other proper method of authentication would have been for the state to call the court reporter as a witness to testify that it was a true and accurate transcription of the testimony. See Middleton v. State, 426 So.2d 548 (Fla. 1982) and Montgomery Ward & Co. v. Rosenquist, 112 So.2d 885 (Fla. 2d DCA 1959). This was not done either and the timely and specific objection by the defense should have been sustained. Garrett v. Morris Kirschman & Mark Company, Inc., 336 So.2d 566 (Fla. 1966). The error cannot be considered harmless since this inadmissible evidence was used as the predicate for the introduction of Appellant's incriminating statement to Sheriff Johnson. The jury also used this objectionable evidence in determining the voluntariness of the statement. Donovan v. State, 417 So.2d 674 (Fla. 1982). As a result, Appellant was

denied his constitutional rights to due process of law, to confrontation of witnesses and to a fair trial. Amends. VI and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const. The incompetent evidence should have been excluded or properly authenticated.

POINT XI

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHERE THE TRIAL JUDGE AND THE PROSECUTOR ENGAGED IN CONDUCT WHICH UNDOUBTEDLY GAVE THE JURY THE DISTINCT IMPRESSION THAT THE PROCEEDINGS WERE NOT TO BE TAKEN SERIOUSLY.

While not directly raised at the trial below, Appellant now contends that the cumulative effect of the behavior of both the prosecutor and the trial judge resulted in a denial of Appellant's fundamental right to a fair trial. Art. I, §§ 9 and 16, Fla. Const.; Amends. V, VI and XIV, U.S. Const. Appellant submits that a close reading of the record on appeal will reveal numerous occasions where it is abundantly clear that the state and the trial court were not behaving in a manner warranted by a first degree murder trial where the possible penalty is death. The following examples are intended to be an inclusive listing rather than exclusive. Counsel is sure that he has missed certain incidents. The undersigned counsel is also sure that the following list omits certain instances of levity and misconduct which are contained in the record but, due to time limitations and constraints, counsel is unable to report a record citation, therefore, those instances are omitted.

One particularly disturbing aspect of the instant trial was the trial court's evident fascination of a wooden model of a skeleton which was present in the courtroom. At one point, the judge suggested to the attorneys that the skeleton be placed in the judge's chair while wearing judicial robes. This was ostensibly for the jury's humor. Defense counsel replied that he did not think that this would be a good idea. (R 1860) This apparently did not stop the trial judge from consummating the prank at some point in the trial.

See attached appendix. The trial judge evidently placed a part of the skeleton under this robe so that the hand and part of the arm protruded from the sleeve. A cigarette was placed between two of the fingers of the skeleton. It appears certain that the jury was present and reacted with laughter. Id. On another occasion, the trial judge may have again placed the skeleton in the judge's chair. It is unclear whether or not the jury was present during this episode. Id. If this Honorable Court is of the opinion that an evidentiary hearing on this matter is necessary, Appellant would so move.

At another point in the trial, the judge took a photograph of the court personnel. (R 2000) Counsel had no objection to this procedure. This photograph was evidently then given to the jury. When they returned to the courtroom, the following exchange occurred:

> THE COURT: Ladies and gentlemen of the jury. Serious business first. Is that one photograph satisfactory to y'all?
>
> JUROR MAHON: Not really.
>
> THE COURT: I'm going out of the photograph business.
>
> JUROR MAHON: Don't try to make a living at it.
>
> THE COURT: I think the moral to yesterday's story is, don't use real fast film with a flashbulb where you have a white ceiling, but we all live and learn. (Emphasis added) (R 2135-6)

The trial court also referred to a dog which the jury had apparently adopted during their sequestration. He mentioned to the jury the responsibility of the dog's care after the trial was concluded. (R 2135-7)

The prosecutor was also capable of jocular frivolity. During the legal argument by the female member of the defense team, the prosecutor winked at her. He admitted this action but attempted to justify it by pointing out that the jury was not present, and that he thought she was kind of cute

anyway. While it is true that the jury was not present, Appellant submits this example as another one indicating the frivolous atmosphere that pervaded his trial.

While Appellant cannot cite this Court to any pertinent case law that directly deals with a situation of this type, Appellant simply relies upon the cumulative effect resulting in a denial of Appellant's constitutional right to a fair trial. Appellant relies generally upon the well-settled case law dealing with the conduct of the trial judge and the prosecutor. These arguments are set forth in this brief in Points II and III.

POINT XII

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW BY THE FAILURE OF THE STATE TO MAINTAIN CERTAIN PHYSICAL EVIDENCE PRIOR TO TRIAL.

Appellant filed a pretrial motion to exclude testimony and evidence concerning the blood types of the victims based upon the state's failure to preserve the blood samples taken by the office of the medical examiner for purposes of inspection and testing by defense attorneys or witnesses for the defense. (R 3431-2) Appellant also objected to other physical evidence that was introduced at trial based upon similar argument. This physical evidence included the appellant's clothing which he was wearing upon his arrest and which contained certain blood stains. This clothing was removed from the appellant and balled up inside a brown paper bag thus failing to maintain complete separation of the various blood stains. (R 1770, 1856-7, 2039-40) Appellant also objected to the failure of the state to maintain the vehicle in which the victims were shot. (R 1744) Appellant also objected to the failure of the state to preserve or to produce the car mirror for purposes of defense inspection for fingerprints. (R 2847-8) Finally, Appellant objected to the introduction of test results based upon the gun shot residue test which was

performed upon the appellant shortly after his arrest. This objection was based upon the fact that the instructions for administering the test were not available. (R 546-8, 1965-6)

Rule 3.220(a) of the Florida Rules of Criminal Procedure, provides for a defendant's examination of any tangible papers or objects which the prosecuting attorney intends to use at trial. The rule also requires the prosecutor to disclose any material information within the state's possession or control which tends to negate the guilt of the accused. It is the defendant's right to examine tangible evidence as a part of his right to the confrontation and to a full and complete cross-examination of the witnesses who are presented against him. Johnson v. State, 249 So.2d 470 (Fla. 3d DCA 1971). It is a violation of state and federal due process for the state to unnecessarily destroy the most critical inculpatory evidence in its case and then be allowed to introduce essentially irrefutable testimony of the most damaging nature. Stipp v. State, 371 So.2d 712 (Fla. 4th DCA 1979). If the state has an evidentiary item it expects to destroy by testing, the better rule is to notify the accused and to allow him to have some minimal participation in the testing process. Id. The determination of any discovery sanction to be imposed in cases where the state loses evidence depends upon the deliberate nature of the act and the degree of prejudice to the defendant. State v. Snell, 391 So.2d 299 (Fla. 5th DCA 1980). Where an insufficient record has been reviewed by the trial court or no opportunity was afforded to create such a record to serve as a determinative basis for a factual finding of prejudice or non-prejudice resulting from the admission of the non-preserved evidence, remand to the trial court for further proceedings may be necessitated. Id. If this Court concludes that the numerous failures of the state to preserve evidence were not flagrant and that a review of the record does not establish prejudice due to the state's failure, this Honorable Court should remand for an opportunity to determine these two issues.

POINT XIII

THE TRIAL COURT ERRED IN LIMITING APPELLANT'S CROSS-EXAMINATION OF A KEY STATE WITNESS REGARDING HIS BIAS AND MOTIVE IN VIOLATION OF APPELLANT'S RIGHT OF CONFRONTATION AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

Sheriff Ernie Johnson was the sheriff of Sumter County from 1977 to 1980. (R 999-1000) His testimony at the trial was crucial, since it dealt with a statement that the appellant made shortly after his arrest at the crime scene. According to Sheriff Johnson, the appellant stated that he shot his parents in the face prior to his next statement which was, "They shot them in the face". (R 1005-1007) During the cross-examination of Sheriff Johnson, Appellant attempted to impeach his testimony by showing that the witness was under investigation for alleged sexual improprieties with his employees in the late months of 1979. The state objected and much argument and discussion ensued. (R 1046-1072) The defense pointed out that the state had brought in evidence over defense objection which inferred that the appellant had engaged in misconduct of a sexual nature with black females on numerous occasions at the crime site. The state contended that this evidence was offered simply to show that the appellant was familiar with the area and felt safe there. (R 1052-1055) See Point VI, supra.

Appellant presented a proffer of the testimony which he sought to have admitted. (R 1065-1070) The proffer revealed that, during the late months of 1979, Sheriff Johnson was under investigation for alleged sexual improprieties while he was in office. (R 1066-1067) The murders for which Mr. Huff was on trial occurred some four months after the administrative investigations were completed. (R 1067-1068) 1980 was an election year and the sexual charges had a detrimental effect on Sheriff Johnson's campaign. In

fact, Sheriff Johnson lost his bid for re-election that year. (R 1068) Although Sheriff Johnson denied the truth of the allegations, the defense stated that it was prepared to present witnesses contradicting Sheriff Johnson's denial. (R 1047-1072)

Appellant argued below and maintains on appeal that the trial court's restriction of cross-examination of this key state witness regarding his potential bias and motive in testifying unfairly violated Appellant's constitutional right of confrontation as guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 16 of the Florida Constitution. The right of a criminal defendant to cross-examine adverse witnesses is derived from the Sixth Amendment and the due process right to confront one's accusers. One accused of crime therefore has an absolute right to full and fair cross-examination. Coco v. State, 62 So.2d 892 (Fla. 1953). A limitation on cross-examination that prevents the defendant from achieving the purposes for which it exists may be harmful error. A trial court cannot preclude an inquiry as to the animus, interest, or motives of a witness in reference to the party's litigant or the subject-matter of the suit. Tischler v. Apple, 30 Fla. 132, 11 So. 273 (1892). In Coxwell v. State, 361 So.2d 148, 152 (Fla. 1978), this Court held:

> [T]hat where a criminal defendant in a capital case, while exercising his sixth amendment right to confront and cross examine the witnesses against him, inquires of a key prosecution witness regarding matters which were both germane to that witness' testimony on direct examination and plausibly relevant to the defense, an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error.

The state below argued that the defense was attempting to engage in a general character attack of the witness. This would clearly be error and the state's objections would have been properly sustained. Pandula v.

Fonseca, 145 Fla. 395, 199 So. 358 (1940). However, in the instant case Appellant argued that Sheriff Johnson's testimony was motivated by his desire to successfully solve these two capital murder cases and in focusing on that as a campaign issue rather than the controversial issue involving the allegations of sexual misconduct. (R 2238-2239) The defense contended that the investigation damaged Johnson politically, creating a situation in which he would go to any lengths to solve a case of this magnitude and to attain a conviction at any cost (including perjury) to aid him in his re-election bid. (R 3652-3653)

Under this theory, the proffered cross-examination certainly should have been allowed. This is especially true here in a capital case, where this crucial witness' testimony condemned the appellant to die in the electric chair. Coxwell v. State, 361 So.2d 148 (Fla. 1978). Sheriff Johnson was the only witness who testified that the appellant made an incriminating statement concerning his involvement with the murders. In Davis v. Alaska, 415 U.S. 308 (1974), the Supreme Court of the United States held that the right to cross-examination includes as its essential ingredient the right to impeach one's accusers by showing bias, impartiality, and by discrediting the witness:

> Cross-examination is the principal means by which the believability of the witness and the truth of his testimony are tested. Subject always to broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner had traditionally been allowed to impeach, i.e., discredit, the witness. 415 U.S. at 316. (emphasis added).

Clearly, the opportunity to cross examine and impeach Sheriff Johnson was essential to the defense in this case. His credibility was the "linch-pin of the Government's case". Levin v. Katzenbach, 363 F.2d 287, 292

(D.C. Cir. 1966). The state's case would largely "stand or fall on the jury's belief or disbelief" of his testimony. Napue v. Illinois, 360 U.S. 264, 269 (1959). Any infringement upon the opportunity to effectively cross-examine this key prosecution witness would constitute "error of the first magnitude". See Davis v. Alaska, 415 U.S. at 318. Defense counsel was improperly limited in the fundamental right to cross-examination of the state's key witness, requiring reversal and a new trial.

POINT XIV

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE BLOODY CLOTHING OF THE VICTIMS AS WELL AS GRUESOME PHOTOGRAPHS WHICH HAD THE EFFECT OF INFLAMING THE JURY THEREBY DENYING APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Although the appellant was willing to stipulate to the cause of death, the state insisted upon introducing gory photographs of the victims as well as their bloody clothing. (R 1581-4, 1589-91, 1604-15, 1619-32, 1642-46, 1650-4, 1673, 3101-3) Aside from the offered stipulation, defense contended that the evidence was also unnecessary since the state had introduced diagrams and testimony which amply demonstrated the location and severity of the fatal wounds. (R 1594-1600, 1647-9) The state contended that the clothing and the photographs were relevant and necessary to prove premeditation.

The initial tests for the admissibility of photographic as well as physical evidence is one of relevance. Straight v. State, 397 So.2d 903 (Fla. 1981). However, even "relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice." Section 90.403, Fla. Stat. Thus, even though technically relevant, before photographs can be admitted into evidence, "the trial judge in the first instant and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury." Leach v. State, 132 So.2d 329, 332 (Fla. 1961). When a photograph is relevant it is

admissible, unless what it depicts is so shocking in nature as to overcome the value of its relevancy. Alford v. State, 307 So.2d 433 (Fla. 1975). This Court in Adams v. State, 412 So.2d 850 (Fla. 1982), cited the trial judge's reasoned judgment in prohibiting the introduction of "duplicitous photographs."

Appellant contends that the admission into evidence of the photographs and the bloody clothing of the victims was erroneous. In the case of the photographs, the probative value is outweighed by the prejudicial effect and the pictures were "so shocking in nature" that they should have been excluded. See Alford v. State, supra at 440. Appellant can discern no relevance at all in the bloody clothing which certainly should have been excluded as they undoubtedly had no purpose other than to inflame the jury. Amends. V, VI and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

POINT XV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT, THEREBY PLACING HIM IN DOUBLE JEOPARDY, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

Prior to Appellant's retrial pursuant to this Honorable Court's reversal of Appellant's conviction and remand for new trial [Opinion found at Huff v. State, 437 So.2d 1087 (Fla. 1983)], Appellant filed a motion to dismiss the indictment on double jeopardy grounds. (R 3157-3158) Appellant also filed a memorandum of law in support of this motion. (R 3168-3174) Following argument, the trial court denied the motion. (R 3-4, 3241, 3244-3258) Appellant contends that this was error. At the very least, the trial court did not apply the correct standard in determining the merits of the motion.

The facts relating to this issue were recited by this Court in the opinion reversing Appellant's convictions and ordering a new trial. Huff v. State, supra. Briefly, prior to the first trial held in 1981, the state revealed that Appellant's court-ordered hand writing samples had not been analyzed. Defense counsel expressed concern that the state intended to introduce testimony that the appellant had forged his deceased's father's signature to a guarantee agreement thereby furnishing a possible motive for the murders. Defense counsel asked the trial court to exclude this testimony if the state failed to analyze Appellant's handwriting. Initially, the court refused, but a motion in limine was renewed during the trial and the court agreed to suppress any testimony tending to indicate that Appellant had forged the signature. Prior to the state's calling of witness Middlebrooks, defense counsel reminded the court of its prior ruling granting the motion in limine. The prosecutor again argued in opposition to the motion, but the court reaffirmed its prior ruling. Notwithstanding this, the prosecutor engaged in lengthy argument over defense objection intimating that the appellant had forged his father's signature to the guarantee agreement. Two motions for mistrial were denied. This argument formed the basis for this Court's reversal of the conviction and remand for the instant trial. Id. at 1089-1091. In so reversing, this Court called the state's suggestions of forgery "so highly improper" that Appellant was denied a fair trial. Id. at 1091.

Appellant asserted below and maintains on appeal that the prosecutor's conduct in ignoring the trial court's ruling on the motion in limine (of which he was again reminded during trial) was intentionally designed to provoke the subsequent two motions for mistrial. As this Court recognized, the state attorney commented on matters unsupported by the evidence and intimated that the appellant was guilty of a crime for which he was not charged. This was so clearly improper that no other conclusion can be reached

under the facts of this case other than that this argument was intentionally designed to provoke the motions for mistrial. This conclusion is mandated in light of the clear rulings by the trial court on the motion in limine at trial.

The case of State v. Kirk, 362 So.2d 352 (Fla. 1st DCA 1978) involved a criminal defendant's claim that prosecutorial conduct in his first trial was such as to bar retrial, based on double jeopardy grounds. The facts of this case indicate that the prosecutor repeatedly elicited testimony from State witnesses regarding collateral offenses which were arguably violative of the Williams Rule [Williams v. State, 110 So.2d 654 (Fla. 1959)]. The trial court sustained a number of defense objections to this testimony; yet, the prosecutor again attempted to elicit such testimony on cross-examination of a defense witness. At this point, defense counsel objected and moved for a mistrial. The trial court granted the motion for mistrial because of possible prosecutorial misconduct. The First District Court of Appeal cites a number of the more recent United States Supreme Court opinions dealing with this issue, and adopts the holding that, "where a defendant's mistrial motion has been necessitated by judicial or prosecutorial overreaching, rather than judicial or prosecutorial error, the double jeopardy protections may bar reprosecution." Id. at 353. (emphasis added) The Court also appears to adopt the United States Fifth Circuit Court of Appeal definition of "prosecutorial overreaching" as including gross negligence as well as intentional misconduct. In this particular case, the Court concluded that the facts of the case did not warrant the conclusion that there was prosecutorial gross negligence or intentional misconduct. The Court reaches this conclusion based on the fact that the prosecutor had not been "specifically advised to avoid inquiry into these matters and since the admissibility of these matters were perhaps debatable." Id. at 354. As already stated, this is not the scenario of the instant case.

In the case of United States v. Broderick, 425 F.Supp. 93 (S.D. Fla. 1977), the United States District Court for the Southern District of Florida granted a Defendant's Motion to Dismiss based on double jeopardy grounds, where the defendant alleged that his mistrial was caused by prosecutorial overreaching. This case involved the prosecutor eliciting hearsay statements from a witness after a bench conference in which she advised both the defense counsel and the judge that she would not elicit said testimony. This opinion quotes the United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976), opinion which states that "a stringent analysis of the prosecutor's conduct, considering the totality of the circumstances prior to the mistrial," is necessary to determine if there was prosecutorial overreaching. 425 F.Supp. at 96. The District Court gives great weight to the defendant's argument that this particular testimony was extremely prejudicial to him and tainted the jury's consideration of the evidence. The Court held that there was indeed prosecutorial overreaching involving both intentional misconduct and gross negligence on the part of the prosecutor. The facts of this case are somewhat similar to the Huff case in that the prosecutor was reminded of the Order in Limine and was warned several times not to elicit the prejudicial comments. Yet the prosecutor continued his overreaching by commenting on items not in evidence and inviting jurors to make expert comparisons. These matters had not been introduced into evidence and the prosecutor had been reminded throughout the trial concerning the Order in Limine. Yet, comments were made to the jury about matters which the prosecutor knew were not in evidence constituting gross negligence on his part.

The recent case of Oregon v. Kennedy, 456 U.S. 667 (1982), held that a criminal defendant may invoke to bar double jeopardy only if the conduct giving rise to the successful motion for mistrial was prosecutorial or judicial conduct intended to provoke the defendant into moving for a mistrial.

In reaching this result, the court specifically rejected the more general test of "overreaching" due to the lack of standards for its application. Although Florida case law appears to be primarily based upon Federal Constitutional standards, Appellant points out that this Honorable Court can apply a higher standard. The standard set forth in Oregon v. Kennedy, supra, has recently been applied in Florida. State ex rel. Gibson v. Olliff, 452 So.2d 110 (Fla. 1st DCA 1984). See also State v. Breland, 421 So.2d 761 (Fla. 4th DCA 1982).

Appellant contends on appeal that the record from the previous trial clearly shows that the prosecutor's conduct was intentionally designed to provoke the subsequent motions for mistrial. No other interpretation makes sense. Even if this Honorable Court disagrees with such an interpretation, Appellant submits that the trial court erred in not applying the proper standard. The court should have made a finding one way or the other if the conduct of the prosecutor was intended to provoke the motion for mistrial. Instead, the trial court summarily denied the motion without making any such finding. (R 3-4, 3244-3258)

Appellant is aware that there is a body of law which seems to suggest that double jeopardy is not a bar to reprosecution where the defendant successfully appeals as in the instant case. United States v. DiFrancesco, 449 U.S. 117 (1980); United States v. Scott, 437 U.S. 82 (1978); United States v. Tateo, 377 U.S. 463 (1964); and State v. Cappetta, 395 So.2d 283 (Fla. 3d DCA 1981). However, it makes no sense to reward a trial judge for erroneously denying a motion for mistrial which the appellate court later finds to be reversible error. There should be no difference between a criminal defendant who ultimately triumphs on appeal and one who immediately succeeds on the same basis at the trial court level by having his motion for mistrial granted. In terms of a double jeopardy bar to reprosecution, there should be no difference between the two situations.

Therefore, Appellant contends that the double jeopardy clause of the Fifth Amendment to the United States Constitution and Article I, Section 9, of the Florida Constitution prohibits retrial of the appellant where the prosecutor engaged in conduct which deliberately provoked the motion for mistrial which was subsequently denied at the first trial. The fact that the appellant did not prevail on the motion for mistrial until appeal should not have any effect on the outcome. At the very least, the trial court erred in not making a finding that the prosecutor's conduct in the first trial was deliberate or inadvertent in prompting the motion for mistrial. This Honorable Court should remand with instructions to discharge the appellant or, in the alternative, remand with instructions to determine the intentional nature of the prosecutor's conduct at the first trial.

POINT XVI

THE TRIAL COURT ERRED IN CONDUCTING PORTIONS OF THE TRIAL WITHOUT THE PRESENCE OF THE APPELLANT THEREBY DENYING HIM HIS CONSTITUTIONAL RIGHT TO BE PRESENT AT ALL STAGES OF THE TRIAL GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

At several points in the trial, the appellant was not present. Perhaps the most critical of these times was during the testimony of the medical examiner at the penalty phase of the first trial. (T 1285-95) While this admittedly occurred at the previous trial, Appellant points out that the trial court took judicial notice of the first trial (especially the penalty phase) in determining that the sentence of death was appropriate in the instant case. This judicial notice was over defense objection. The request to be absent was made through Appellant's first trial counsel, while the appellant apparently sat in the courtroom without voicing either agreement or opposition to the request. Appellant's attorney indicated that the request was made to avoid emotional distress on the part of the appellant during the graphic medical testimony about the death of his parents.

The appellant was also not present during other stages of the instant trial. He was apparently not present in chambers during a discussion between the attorneys and the judge regarding the presentation of some prior testimony. (R 2064-5) The appellant was also not in the same vehicle as the jury and the court personnel who instructed the jury at that time during the jury view of the various roads and geographical points pertinent to the trial. (R 595-9) While he was not present in the vehicle itself, he was in another vehicle within the general vicinity. (R 597-8) The appellant was also involuntarily absent from the courtroom during a brief discussion concerning the admissibility of certain physical evidence. (R 1616-8)

A criminal defendant has the constitutional right to be present at stages of his trial where fundamental fairness might be thwarted by his absence. Snyder v. Massachusetts, 391 U.S. 97 (1934); Francis v. State, 413 So.2d 1175 (Fla. 1982). Just as an accused has the right to the assistance of counsel, he also has the right to assist his counsel in conducting the defense. See Snyder v. Massachusetts, supra; See Faretta v. California, 422 U.S. 806 (1975). This Court held in Francis, supra, that a defendant was entitled to a new trial where he was involuntarily absent during a portion of jury selection (specifically during the exercise of peremptory challenges). It made no difference that his counsel waived his presence since Francis did not personally acquiesce in or ratify this waiver. Likewise, the appellant did not personally acquiesce in or ratify the waiver of his presence in the case sub judice. Recently, in Herzog v. State, 439 So.2d 1372 (Fla. 1983), this Court held that the voluntary absence of a defendant during a defense motion to suppress certain photographs was not error in spite of the waiver of the defendant's presence by his counsel. The underlying rationale of the Court was based upon the fact that the absence was voluntary and was not during a crucial stage of the trial. The motion hearing dealt with the

defense's request to suppress certain photographs as evidence. The trial court elected not to rule on the admissibility of the photos at that time, but rather, to rule on the photos individually before they were introduced. In reaching this holding, this Court specifically declined to answer the question of whether the defendant's involuntary absence, during a non-crucial stage of the trial for a capital offense, would be error.

Rule 3.180, Fla.R.Crim.P. states that a defendant shall be present at, inter alia, any view by the jury; all proceedings before the court when the jury is present; and when evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of such evidence. These are precisely the three situations which are presented in the instant case. Appellant submits that a defendant in a capital case has a per se right to be present at all stages, critical or not. Appellant submits that every stage is critical to a capital defendant. This arises from his right to participate, at least on a limited basis in his defense. See Faretta v. California, 422 U.S. 806 (1975). This Court has held in the past that any communication with the jury outside the presence of the prosecutor, defendant and defense counsel is so fraught with potential prejudice that it cannot be considered harmless. Ivory v. State, 351 So.2d 26 (Fla. 1977). Ivory, supra, specifically overruled Kimmons v. State, 178 So.2d 608 (Fla. 1st DCA 1965), to the extent that it was in conflict with the Ivory opinion. Kimmons, supra, held that the sending of a written instruction to the jury in the absence of the defendant and his attorney is at most an irregularity which could not require reversal when no prejudice is shown to have resulted. Bear in mind that this holding was specifically overruled by Ivory, supra.

Since James Roger Huff did not voluntarily and specifically absent himself from these proceedings, he was denied his constitutional right to be

present at all stages of his trial. A new trial is mandated. Amends. VI and XIV, U.S. Const.

POINT XVII

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BASED UPON NUMEROUS ERRORS THROUGHOUT THE PROCEEDINGS WHICH HAD THE CUMULATIVE EFFECT OF DENYING THIS RIGHT.

Due to space and time constraints, Appellant includes this point as a type of catch-all point containing issues which either considered alone, in combination with each other or in combination with other points presented in this brief had the cumulative effect of denying Appellant his constitutional right to a fair trial.

Appellant submits that the trial court erred in allowing the prosecutor to engage in certain improper voir dire over timely and specific defense objection. One question involved the prosecutor's opinion as to the definition of reasonable doubt saying, "It's not the type of thing where you would say well, maybe this or maybe that, or what if this." (R 244-5) This is not a correct statement of the law since a reasonable doubt can be based upon the lack of evidence. Other objectionable questions pertained to circumstantial evidence. (R 336, 364-5) Appellant submits that this was improper voir dire and should have been precluded based upon the timely objection.

Appellant also objects to certain restrictions placed upon him regarding voir dire. Appellant was precluded from asking potential jurors to describe the appellant. The state's "golden rule" objection was sustained. (R 369-70) Appellant submits that this was not an improper "golden rule" question and it should have been allowed. Wide latitude in voir dire is allowed. Cross v. State, 107 So. 636, 89 Fla. 212 (1925). Voir dire examinations should be so varied as would seem to require in order to obtain

fair and impartial jurors whose minds are free of all interests, bias or prejudice. Gibbs v. State, 193 So.2d 460 (Fla. 2d DCA 1967). Appellant was also denied his request to personally ask the jury if they would give him a fair trial. (R 497-9) Appellant submits that this was also error. Just as the accused has the right to the assistance of counsel, he also has the right to assist his counsel in conducting the defense. See Snyder v. Massachusetts, 291 U.S. 97 (1934); See also Faretta v. California, 422 U.S. 806 (1974).

Appellant also submits that the trial court erred in excusing Juror Merrian for cause. Merrian had been having emotional problems and wanted to serve on the jury but thought that it would be a hardship under her circumstances. Appellant refused to stipulate to the excusal. (R 259-60) At a later point in voir dire, it became clear from the record that the trial judge had the bailiff speak individually to Juror Merrian about her personal pressures. The bailiff was of the opinion that she would go to pieces if she served on the jury. The state challenged her for cause, but the defense would not stipulate. The court initially reserved its ruling and later granted the state's challenge for cause. This was based on the extrajudicial examination of the juror by the bailiff. (R 324-5) Although there was no objection below concerning the propriety of the bailiff's examination of the juror, Appellant submits that this was highly improper. In effect, the juror was excused for cause over defense objection based upon information obtained by the court bailiff without the proper safeguards that usually accompany voir dire examination. This was done outside the presence of both attorneys and the trial court. Appellant submits that this was highly improper and constitutes reversible error.

Appellant also submits that he was denied a fair trial due to the fact that the jury saw him in shackles. While there was some doubt if the jury actually did see him, Appellant submits that the record read in its

entirety leads to the inescapable conclusion that they did. (R 1633-9, 1642, 1646, 1673, 1717-23) Appellant concedes that this Court has said that the declaration of a mistrial rests with the sound discretion of the trial court and such discretion is not abused where the jury's view of the shackled defendant is momentary and inadvertent. Neary v. State, 384 So.2d 881 (Fla. 1980) and McCoy v. State, 175 So.2d 588 (Fla. 1965).

Appellant submits that the improper method of cross-examination and general prosecutorial misconduct throughout the trial denied Appellant his constitutional right to a fair trial.

Appellant also submits that the trial court erred in overruling Appellant's numerous objections and in allowing much testimony and argument concerning Appellant's alleged refusal to submit to a gun shot residue test. These questions were objected to numerous times throughout the trial based upon the contention that it was a comment on Appellant's exercise of his constitutional right to remain silent. (e.g., 2823-4) Appellant also contended that his initial negative response to Investigator Elliott's request to administer the test was ambiguous, since it was unclear if the appellant was refusing the test or, in fact, exercising his right to remain silent. Florida case law indicates that evidence of a refusal to comply with a court order for a test of this type is admissible as evidence of guilt. State v. Esperti, 220 So.2d 416 (Fla. 2d DCA 1969). There, the court reasoned that the conduct of the defendant in submitting to a chemical test only after force was used was susceptible of no prima facie explanation except consciousness of guilt. The opinion pointed out that the defendant may avoid that inference by offering a reasonable explanation. The instant case is distinguishable since there was no court order to submit and since the appellant did offer a reasonable explanation for his negative response. The introduction of testimony and argument on this issue constituted reversible error.

Appellant submits that it was fundamental error for the trial judge to absent himself from the courtroom during the mini-evidentiary hearing concerning the prosecutor's actions during the cross-examination of Terry Overly. See Point VII, supra. (R 2294, 2347-8) In so doing, the trial court made it impossible for him to observe the demeanor of the various witnesses and Appellant contends severely hampered his ability to rule on Appellant's motion for mistrial which was subsequently denied. Id.

The due process clauses of the United States and Florida Constitutions provide an accused the right to a fair trial. Although an accused is not entitled to an error-free trial, he must not be subjected to a trial with error compounded upon error. See Perkins v. State, 349 So.2d 776 (Fla. 2d DCA 1977). Appellant submits that he was denied his right to a fair trial, and thus is entitled to a new trial. Alvright v. State, 378 So.2d 1234 (Fla. 2d DCA 1979).

POINT XVIII

THE IMPOSITION OF THE TWO DEATH PENALTIES BY THE TRIAL COURT WAS NOT WARRANTED UNDER THE CIRCUMSTANCES OF THIS CASE THUS DENYING APPELLANT HIS CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION.

After the jury returned with verdicts of guilty as charged on each murder, the appellant vocalized his personal wish to waive the second phase and accept the death sentence. (R 3089-93) The appellant stated that he was willing to waive all error in the second phase and accept death sentences on both counts stating that everyone had been through enough. (R 3094) After consulting with his counsel, Appellant provided a written waiver to the penalty phase as well as a colloquy in open court. This waiver was over the advice of his defense counsel and over the objection of the state. At the request of the state, the trial court took judicial notice of the entire court

file from the first trial of this cause, particularly the sentencing phase. This was done over defense objection. The court found the waiver voluntary and intelligent and sentenced the appellant to death on each count. (R 3096-3115) In imposing the two sentences of death, the trial court filed written findings of fact as well as supplemental findings. (R 3788-3804) In imposing these sentences, the trial court found that the state had proved beyond a reasonable doubt three aggravating circumstances, to wit: (1) that the murders were committed for pecuniary gain; (2) that the murders were especially heinous, atrocious or cruel; and (3) that each murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The trial court found in mitigation that the appellant had no significant history of prior criminal activity.

Initially, the appellant wishes to voice some general objections to the procedure used by the trial judge in imposing the two sentences of death. When the trial court accepted the waiver of the penalty phase, he agreed to take judicial notice of the entire court file from the first trial of this cause over defense objection. (R 3096-7) This was improper not only because it was done without Appellant's consent, but also due to the fact that it contains evidence and argument which was deemed improper by this Court in reversing Appellant's previous conviction. Huff v. State, 437 So.2d 1087 (Fla. 1983). Therefore, it is clear that the trial judge relied upon improper considerations in imposing the two death sentences.

A second problem that the appellant has with the trial court's findings of fact relates to the written findings regarding pecuniary gain. A mere glance at the written findings of fact filed by Judge Booth in the previous trial in this cause reveal that Judge Huffstetler simply repeated verbatim Judge Booth's findings regarding these circumstances. (R 3790-2, 3794-6; T 1737-9, 1740-2) This clearly reveals the failure of the trial judge

in the instant case to individually review the evidence and make particularized findings of fact regarding each aggravating and mitigating circumstance. By simply reiterating word for word the findings of the prior judge on this circumstance, Judge Huffstetler totally abdicated any responsibility regarding his legal duty. This renunciation on the part of the trial court is further evidenced by the recitation in the written findings of fact regarding the reasons that the appellant chose to waive the second phase. The trial court found that one of these reasons was to avoid the jury and the court having to accept the responsibility of determining the appropriate sentence to recommend and to impose respectively. (R 3804) It is clear from the trial court's action that the judge chose to accept the avoidance of this responsibility. See Palmes v. State, 397 So.2d 648 (Fla. 1981).

Finally, the appellant objectes strenuously to the trial court's heavy reliance upon what he determined was a lack of remorse on the part of the appellant. This consideration pervades the findings of fact. (R 3794, 3798, 3801) In so doing, the trial court repeatedly focused upon the fact that the appellant had steadfastly denied his guilt from the moment the killings were discovered right through to the end of trial. This is precisely the situation presented in Pope v. State, 441 So.2d 1073 (Fla. 1983), where, in finding the murders especially heinous, atrocious or cruel, the trial court commented that the defendant has not shown any remorse, having elected to steadfastly deny his guilt. Id. at 1077. This Court pointed out the severe problems inherent in inferring a lack of remorse from the exercise of constitutional rights. This Court held that henceforth lack of remorse should have no place in the consideration of evaluating factors. The instant case does not present a situation such as that in Stano v. State, 9 FLW 475 (Fla. Case No. 63,947, November 1, 1984), where lack of remorse was considered only briefly by the trial judge in support of an aggravating factor which was

already amply supported by the record. In the case sub judice, it is clear that the trial court relied heavily upon the appellant's assertions of innocence equating them to lack of remorse. Additionally, there is little else in the record to support the attendant aggravating circumstances.

A. The trial court erred in finding that the capital felony was committed for pecuniary gain.

As already stated, in support of its finding that the murders were committed for pecuniary gain, the trial court simply repeated the written findings made by Judge Booth following the first trial. In support of the general finding that the appellant was in serious financial difficulty at the time the crimes were committed, the trial court stated:

> Lynum further testified that within this short period prior to the crime, that the defendant told him he would be receiving an amount of money soon and desired to purchase the property adjacent to the crime scene. (R 3790, 3795)

This particular finding is unsubstantiated by the evidence. Wildwood Police Chief Lynum, with whom the alleged "settlement" discussion took place, testified that in a prior discussion with Huff, Huff had expressed an interest in purchasing some of Lynum's property. According to Lynum, Huff told him that he expected some money and would buy the property then. (R 702-3) This testimony is significantly different from that in the first trial when Lynum testified, "hopefully, you know, in the future, he would have the money to purchase the home." (T 517) There was simply no testimony about any anticipated settlement on the part of the appellant.

The trial court also found that the testimony of E. Campbell Middlebrooks, Jerry Eubanks, and John C. Williams established that the murders were for pecuniary gain. Middlebrooks and Eubanks testified at the first trial that the appellant's business, H.B.H., Inc., appeared to be in financial difficulty. (T 1028, 1040) Middlebrooks also testified that the appellant

and his corporation had recently been sued by Westinghouse Credit. (T 1030) Williams, the victims' attorney, testified that the decedents' wills left bequests to the appellant, his brother and sister. (T 1463)

There was, however, no testimony that the decedents' estates were of sufficient value to fulfill their bequest to their son. Further, one of their bequests to their son was the remaining stock of H.B.H., Inc., an asset of questionable value indeed in light of the financial state of that corporation. The wills also left Huff the victims' automobile, the value of which was diminished by the shootings that took place inside of it. Phippen v. State, 389 So.2d 991 (Fla. 1980). See also Porter v. State, 429 So.2d 293 (Fla. 1983); Simmons v. State, 419 So.2d 316 (Fla. 1982) and Peek v. State, 395 So.2d 492 (Fla. 1980). Perhaps most importantly, the record is devoid of any evidence that the appellant actually knew of his bequest prior to his parents' deaths. Without such knowledge, there can be no conclusion that the killings were for pecuniary gain. There is certainly a genuine, reasonable doubt as to whether a pecuniary gain by the appellant could have been anticipated. The court below erred in finding this aggravating circumstance.

B. The court erred in finding that the capital felony was especially heinous, atrocious or cruel.

The trial court found that both of the murders were especially heinous, atrocious or cruel. As to Norman Huff, the court cited the testimony of the pathologist and concluded that he was aware that he was about to be killed. The court also cited the testimony that at the time the first bullet struck Norman Huff, he was turned in the front seat looking into the back seat with his hand raised "in a futile attempt at defense." (R 3792-3) Finally, the court relied upon the fact that the appellant was the son of Norman Huff.

The medical examiner admitted that Norman Huff would have been conscious for most probably one-hundredths of a second after the first bullet

struck him. Although the doctor opined that Mr. Huff felt some pain, it was difficult to say how much. (T 1292-4) The second bullet would have killed Mr. Huff immediately upon entrance into the body since it transected the brain stem. (R 1611) Finally, the trial court considered that this circumstance had been established through a showing of Appellant's lack of remorse and attempts to conceal his crimes. (R 3794)

Regarding the murder of Genevieve Huff, the trial court relied upon the medical examiner's testimony that the first bullet wound would have caused a moderate amount of pain without unconsciousness; that the second bullet would have caused substantial pain without unconsciousness; and that she would have remained conscious through part or all of the administration of the blows to the back of the head with corresponding pain. The fourth wound (third gun shot wound) would have resulted in death. The trial court also relied upon his belief that Mrs. Huff would have been aware she was about to be killed and that the appellant was her son. (R 3797) Finally, the trial court considered that this circumstance had been established through a showing of Appellant's lack of remorse and attempts to conceal his crimes. (R 3798)

This Court has defined "heinous, atrocious, and cruel" in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) as such:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of other.

Recognizing that all murders are heinous, in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that this aggravating circumstance only apply to crimes especially heinous, atrocious and cruel:

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such

> additional acts as to set the crime apart from the norm of capital felonies--the consciousless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, 283 So.2d at 9.

Following the above definition, those cases where death occurs without prior physical or mental torture do not warrant this aggravating circumstance. See Halliwell v. State, 323 So.2d 557 (Fla. 1975); Cooper v. State, 336 So.2d 1133 (Fla. 1976); Knight v. State, 338 So.2d 201 (Fla. 1976). The facts sub judice fail to support a finding of this circumstance. In Fleming v. State, 374 So.2d 954 (Fla. 1979), this Court rejected a finding of heinous, atrocious, or cruel where the victim died from a single shot.

It is the duty of this Court to review the case in light of other decisions and determine whether or not the punishment is too great. State v. Dixon, supra at 10; McCaskill v. State, 344 So.2d 1276, 1278-1279 (Fla. 1977). A comparison to other cases wherein this Court has reduced death sentences to life imprisonment reveals that the instant crime was not more shocking than the norm of capital felonies.

In Halliwell v. State, 323 So.2d 557 (Fla. 1975), the defendant beat the victim's skull with lethal blows from a 19 inch breaker bar and then continued beating, bruising, and cutting the victim's body with the metal bar after the first fatal injuries to the brain. The Halliwell crime is surely more brutal than that of the instant case, yet this Court found in Halliwell's conduct "nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court." Halliwell, 323 So.2d at 561.

Similarly, the cases of Burch v. State, 343 So.2d 831 (Fla. 1977) (36 stab wounds during frenzied attack); Chambers v. State, 339 So.2d 204 (Fla. 1976) (severely beat girlfriend to death--victim bruised over her entire head and legs, had a deep gash under her left ear; her face was unrecognizable, and she had several internal injuries); Jones v. State, 332 So.2d 615

(Fla. 1976) (38 "significant" lacerations on rape victim); and Demps v. State, 395 So.2d 501 (Fla. 1981) (multiple stab wounds, victim lived long enough to identify attackers, evidence of formulate plan to kill, victim said held by two men while third stabbed him) involve similar or more gruesome killings. In each of these cases, however, this Court has vacated the death sentences.

In factually similar gunshot murder cases, this Court has refused to find such killings to be heinous, atrocious and cruel. See Armstrong v. State, 399 So.2d 953 (Fla. 1981) and Edmund v. State, 399 So.2d 1362 (Fla. 1981) (two victims, one shot six times, one shot twice, some evidence that screams were heard); and Lewis v. State, 398 So.2d 432 (Fla. 1981) (victim killed with shotgun, defendant asked two others to drive with him to house to kill victim, borrowed gun for that purpose).

The appellant's death sentences must likewise be vacated. Were the impositions of life sentences in these and other similar or more heinous cases to be ignored, Florida's death penalty statute could not be upheld under the requirements of Proffitt v. Florida, 428 U.S. 242 (1976), and Furman v. Georgia, 408 U.S. 238 (1972). See also Godfrey v. Georgia, 446 U.S. 420 (1980).

The evidence shows that Norman Huff was unconscious within a matter of seconds, hence he was completely unaware of any activity that occurred after that point. Furthermore, the wound that was characterized as defensive could very well have resulted from Mr. Huff lunging for the gun. (R 1685-6) At any rate, Appellant submits that Norman Huff's death was certainly quick and without any suffering. Likewise, the death of Genevieve Huff was not proven beyond a reasonable doubt to be a slow one. No one could determine the increment of time during which the wounds were administered. This case does not involve the imposition of a high degree of physical pain or psychological torture and suffering necessary in order to characterize the crime as

especially atrocious or cruel. Tedder v. State, 322 So.2d 908 (Fla. 1975) and Knight v. State, 338 So.2d 201 (Fla. 1976). The expert testimony established that Norman Huff died almost immediately. Although Genevieve Huff may not have died instantly from her wounds, she was rendered unconscious before the fatal shot was fired into her neck. Although it is possible that the Huffs were aware of their peril for a split second, this is not a case where the victims begged for mercy and were tormented before their deaths. See Barclay v. State, 343 So.2d 1266 (Fla. 1977). The fact that the appellant was the natural son of the victims does not render their killings any more heinous, atrocious or cruel. See Phippen v. State, supra.

Finally, Appellant once again strenuously objects to the trial court's utilization of Appellant's exercise of his constitutional rights in support of the finding of this aggravating circumstance. See Argument Introduction, infra.

C. The court erred in finding that the murders were committed in a cold, calculated and premeditated manner without any pretense of legal justification.

In finding that this aggravating circumstance had been established beyond a reasonable doubt, the trial court relied almost exclusively on the trial judge's rejection of Appellant's testimony at trial. (R 3793-4, 3798-9) The court also considered Appellant's alleged lack of remorse and the fact that the murders occurred in a location with which the appellant was familiar. As already argued, the trial court's reliance upon the lack of remorse was highly improper. Pope v. State, 441 So.2d 1073 (Fla. 1983). There was no direct evidence of any premeditation or planning on the part of the appellant. The entire case on the issue of Appellant's guilt was circumstantial. See Point VIII and Huff v. State, 437 So.2d 1087 (Fla. 1983). Evidence at the trial as to Appellant's premeditation was even more circumstantial. The fact that the appellant was familiar with the general location of the crime scene

is hardly a legal basis to show premeditation, especially in light of the fact that he had been an area businessman for a number of years. This aspect of "support" of this aggravating circumstance is, in fact, disproved by the evidence showing that the appellant was interested in buying the property near the crime scene. At any rate, it is clear that the state failed to prove this aggravating circumstance beyond a reasonable doubt as required by State v. Dixon, 283 So.2d 1 (Fla. 1973). At the first trial in this cause, the judge recognized the highly circumstantial nature of the state's case when ruling on the appellant's motion to reduce the charge to second-degree murder. Although he denied the motion, the judge stated:

> Here again, it is not the strongest, but I think it is sufficient to take to the jury. (T 1075)

If the proof of premeditation at the guilt phase was that uncertain, certainly the high level of premeditation required under this aggravating circumstance could not have been proved. See Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982).

D. Conclusion - The two death sentences must be vacated.

For the above-stated reasons, it is clear that the aggravating circumstances were improperly found by the trial court. Since the trial court did find one mitigating circumstance, this cause should be remanded for imposition of two life sentences. Amends. V, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17, Fla. Const.

POINT XIX

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or impliedly rejected each of

these challenges to the constitutionality of the Florida statute and thus detailed briefing would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

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

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, 446 U.S. 420 (1980); Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980) (England, J. concurring).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Locket v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

The failure to provide the defendant with notice of the aggravating circumstances which make the offense a capital crime and on which the state will seek the death penalty deprives the defendant of due process of law. See Gardner v. Florida, 430 U.S. 349, 358 (1977); Argersinger v. Hamlin, 407 U.S. 25, 27-28 (1972); Amend. VI and XIV, U.S. Const.; Art. I, §§ 9 and 15(a), Fla. Const. Appellant's motion for a statement of aggravating circumstances on which the state intended to rely was denied. (R 4-7, 3637)

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

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

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968). Appellant filed a motion to declare §913.08(1)(a) unconstitutional due to insufficient peremptory challenges. (R 3440-1)

The Elledge Rule (Elledge v. State, 346 So.2d 998 (Fla. 1977), if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the 8th and 14th Amendments to the United States Constitution.

The amendment of Section 921.141, Florida Statutes (1979) by adding aggravating factor 921.141(5)(i) (cold and calculated) renders the statute in violation of the 8th and 14th Amendments to the United States Constitution because it results in death being automatic unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating. Amend. V, VIII and XIV, U.S. Const.; Art. I, §9 and Art. X, §9, Fla. Const.

It is a denial of equal protection to allow an aggravating circumstance the fact that the defendant committed a capital felony while on parole and legally not incarcerated, but to prohibit a finding of an aggravating circumstance for a defendant on probation.

Additionally, a disturbing trend has become apparent in this Court's recent decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 459 U.S. 895 (1982)(Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra, at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833, 834 (1978) cert. denied, 414 U.S. 956 (1979)-(emphasis added).

In view of this Court's abandonment of its duty to make an independent determination of whether or not a death sentence is warranted, the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated arguments, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the 8th and 14th Amendments to the United States Constitution.

CONCLUSION

Based upon the foregoing cases, authorities and policies, Appellant respectfully requests the following relief:

As to Points I, II, III, IV, V, VI, VII, IX, X, XIII, XIV, XVI and XVII, Appellant respectfully requests that this Honorable Court reverse the judgments and sentences and remand for a new trial.

As to Point VIII, Appellant respectfully requests that this Honorable Court reverse the judgments and sentences and remand for discharge or, in the alternative, remand with instructions to enter a judgment and sentence for a lesser included offense.

As to Points XI and XII, Appellant respectfully requests that this Honorable Court reverse the judgments and sentences and remand for a new trial or, in the alternative, for an evidentiary hearing.

As to Point XV, Appellant respectfully requests that this Honorable Court reverse the judgments and sentences and remand for discharge or, in the alternative, remand for an evidentiary hearing on the intent of the prosecutor at the first trial.

As to Points XVIII and XIX, Appellant respectfully requests that this Honorable Court vacate the sentences and remand for imposition of two life sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to: Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014 and Mr. James Roger Huff, Inmate No. A075985, Florida State Prison, Post Office Box 747, Starke, Florida 32091 this 11th day of March, 1985.

CHRISTOPHER S. QUARLES
CHIEF, CAPITAL APPEALS
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