IN THE SUPREME COURT OF FLORIDA

JOHN EDWARD BOGGS,

Appellant,

v. CASE NO. 73,499

STATE OF FLORIDA,

Appellee.

IN THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

JOHN EDWARD BOGGS will be referred to as the "Appellant," "defendant," or John Boggs in this brief. The **STATE OF FLORIDA** will be referred to as the "Appellee," or the State. The record on appeal, consisting of nine (9) volumes and a supplement, will be referred to by the symbol "R", followed by the appropriate page number. Many references to counsel for the parties appear in this brief. Appellant was represented below by Assistant Public Defender William K. Eble and John Carballo. Assistant State Attorneys Allen Allweiss and Phil Van Allen appeared on behalf of the State. The Honorable Wayne L. Cobb presided over the trial and sentencing.

STATEMENT OF THE FACTS

Dean Rush (Gerald Dean Rush) and Jerry Boggs (Geraldine Marie Boggs) were childhood sweethearts in Ohio. (R952). In 1965, after John and Jerry Boggs were married, Boggs caught Jerry and Dean Rush together in the living room of the Boggs residence. John Boggs put a .22 caliber pistol between Dean Rush's eyes and made Rush promise never to see or contact Jerry Boggs again or Boggs would kill him. (R 952,954). In 1987, Dean Rush and Jerry Boggs renewed their relationship. Also, the Boggs began divorce proceedings. Just before Christmas in 1987, angered that his wife was leaving him, John Boggs threatened to kill Jerry, his kids, and his granddaughter, and then turn the gun on himself Christmas day. (R 892). Pat Cantor, a friend of Jerry's, overheard this threat over the telephone. (R 892). During that same period of time, Boggs took a twelve-gauge shotgun into his workshop, sawed off the barrels, then brought it back into the house and told his wife he would kill her with it. (R 927-29). At trial, Jerry Boggs identified the alleged murder weapon as that same shotgun. (R 927-28). The divorce became final on January 11, 1988. (R 916). On that date, just before Jerry Boggs came to Florida, her husband told her he was going to kill her and Dean Rush (R 924-25). Jerry Boggs, in fear for her life, fled Ohio on January 11, 1988, to join Dean Rush in Riverview, Florida. (R 916,919). She did not want her ex-husband to track her down, so she kept her address and telephone number secret. (R 893-94,923). During the week preceding the murders, Jerry called John Boggs collect from a pay phone three times. Each

time they talked, the conversation ended with John Boggs threatening to "kill that bastard Dean." (R 924). Jerry told Boggs that she and Dean were living in a trailer. (R 923). When Jerry left Ohio, she told her friend Pat Cantor to let Jerry know if Boggs' car or camper was missing from the driveway for any length of time. (R 894). Ms. Cantor phoned Jerry on Tuesday, February 9, 1988, and told Jerry that the Boggs' camper truck had been missing at least since Monday morning at 8:00 AM (R 895-96, 920).[1] Ms. Cantor warned Jerry that John Boggs was on his way to Florida to kill Jerry and Dean Rush (R 920). Alarmed, Jerry Boggs called the Pasco County Sheriff's Department to tell them that her ex-husband was on his way to kill her. She described John Boggs' truck and gave the license tag number. (R 921). Later that day, Jerry received a telephone call. She identified the voice as John Boggs' and was sure the call was local. (R 921). John Boggs, in a disguised voice, said "I seek, I seek, I seek." (R 921). Jerry Boggs called the Sheriff's Department again and told them about the phone call. (R 922).

Meanwhile, on February 9, 1988, at approximately 7:00 PM, a man phoned the Sandalwood Mobile Home Community and asked for a Gerald Rush. (R 726). When a salesman said there was no one by that name in the trailer park, the man then asked about a Jerry Rush or Jerry Boggs. (R 726). The answer again was no. On the 9th or 10th of February, an adult male also called the Casa del Sol Mobile Home Park and asked for Boggs or Rush. (R 719). The

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[1] Dean Rush testified at trial that Vermilion, Ohio is a little over 1,000 miles from Florida. Before I-75 was constructed, it took him nineteen or twenty hours to make the trip. (R 954-55).

secretary said there was no one with those names and wrote down the name "Rush." (R 720-21). At about 10:00 AM on Wednesday, February 10, 1988, a man called on the Colony Hills Mobile Home park line. The secretary-manager of the trailer park, Pat Spurlock, told the caller there was no resident names Boggs, but suggested he call the Oaks Royal park. (R 734). Within an hour the same man called on the Oaks Royal line and asked for Boggs. When Ms. Cantor said no, he asked about someome named Rush. Ms. Cantor told the caller there was someone named Rush renting the trailer at Lot 11. She told him to come by and get the address. (R 734). Around 1:00 PM, Pat Cantor walked from the back of her office and saw a man standing at her desk. She stepped back because the man was dressed unusual for coming into the office. He was dressed like he came from the woods or was a hunter. (R 936). The man said he was the one who had inquired about Lot 11. (R 737). After taking a phone call at her desk, Pat Cantor started to write down the five-digit address for the trailer at Lot 11, but the visitor did not want it written down. He repeated the number to himself as he walked out of the office. (R 738). Ms. Cantor was close enough to the man to brush against him as she went around her desk. (R 737). She looked at the stranger during her phone conversation, and she observed the gentleman for at least five minutes. (R 738).

The address Ms. Cantor gave to the visitor in her office belonged to Harold Rush. Mr. Rush had rented the trailer for three months for vacation, accompanied by his companion of three years, Nigel Maeres. (R 596). Nigel's daughter, Betsy Ritchie,

was visiting with the couple. The three were planning to take a one-week cruise starting on Thursday, February 11, 1988. (R 600). Friday would have been Nigel's 71st birthday. (R 596). Harold, Nigel, and Betsy went to the dog track in Tampa on Wednesday afternoon and spent the rest of the evening at home in the trailer. (R 600).

At trial, Betsy Ritchie described the terrible events that occurred later that night. Everyone went to bed after the 11:00 PM news. (R 606). Betsy was sleeping on the couch in the living room, Harold was sleeping in the middle bedroom, and Nigel was sleeping in the master bedroom in the rear of the mobile home. (R 604-05). Sometime in the night, Betsy was awakened by a noise. (R 607). She checked all the rooms and looked outside, but could see nothing amiss. (R 608-09). The trailer was dark, but there was some light from an outside sentinel light which penetrated the sheer window curtains. (R 607-08). Betsy went back to sleep and then heard a loud, crashing noise. She jumped off the ocuch, ran to Harold's bedroom and said, "Harold, somebody is breaking in!" (R 610). She could see the "black shoulder" of someone on the outside of the utility room door. Harold instantly ran out of his bedroom, clapped his hands, and said, "Hey, ho, whoa. You don't belong in here. You get out of here." (R 611). Then Harold took off toward the kitchen-dining area. Betsy looked toward the utility room and said, "Bang, bang," hoping to scare a would-be robber. (R 614). At that point, the intruder had entered the home. The man ran at Betsy. She described him as wearing a big, black flowing coat, and it

looked like his pockets were bulging. It looked like he had something in his right hand. The object appeared to be about the same size as John Boggs' sawed-off shotgun. (R 615). Betsy ran as fast as she could into Harold's bedroom She hit the dresser and ran for the corner behind it. She screamed, fell down, and rolled into a ball in the corner. (R 616). Then she heard her mother's voice say, "What in the world is going on down here?" (R 617). Right after that, Betsy heard loud shotgun blasts directed at her. (R 617). Debris from the dresser fell over her. She thought she had been hit. Betsy saw Harold's wallet lying beside her, and she hid it under the dresser to keep it from the robber. (R 617). Then she heard a "loud commotion" like an earthquake, and, there were two more loud blasts in the hall outside Harold's bedroom. (R 618). After the thunderous commotion in the hall, the intruder entered Harold's bedroom and shot Betsy Ritchie five times with a pistol. She related this experience at trial:

> . . .I never looked up. I only -- I felt the bullets go through my legs and I watched the bullets go through my legs and I never looked up. I just -- I saw them go through my legs and I saw my legs bleeding and I was being shot at and it was ping, ping, ping, ping, ping, ping, very rapid fire, very rapid fire. And when this one went in here, this whole arm went numb and these two fingers went very tingly and very numb and I was sitting, looking down a my legs and when this hit here, I went like this and I slumped and I was -- I couldn't look up or I could't move my head because it felt like this whole shoulder had been shot off. I was afraid to look. (R 623).

Betsy was shot four times in the legs and once in the shoulder. (R 625). Because some of the bullets exited her body, she had a total of eight wounds. (R 625) After Ms. Ritchie was shot the

mobile home became silent. Then she heard a "Gr-r-r" sound and then heard rustling in the kitchen. She heard Harold Rush groan and pull the telephone to the floor in the kitchen. (R624-25). Harold said on the phone, "For God's sake, send help. There's three of us. We've been broken into. We've been shot." (R625) The call was received by the Zephyrhills Police Department at 1:48 AM on Thursday, February 11, 1988. (R 769). Harold gave a description of the intruder as 5'8" to 5'10", 170 to 180 pounds, with a mask over his face. (R 771). Deputies from the Pasco County Sheriff's Department arrived at the crime scene about ten minutes later. (R 778). They found Harold on the kitchen floor in a pool of blood. He had a wound to the abdomen and he was talking on the phone. (R 780). The deputies also found Nigel Maeres lying on her back on the floor in the dining area. (R 781). She was dead from gunshot wounds to the head. Deputies secured the crime scene area and collected evidence, while Betsy Ritchie and Harold Rush were taken to hospital emergency. The technicians recovered several shotgun pellets and waddings, spent bullet casings, and expended .22 caliber bullets from various areas around the trailer. (R 788-90). They also found a pry bar which was apparently used to gain entry. (R 790-91). The night of the murders, Harold Rush's car was parked in the carport. The intruder had to walk around the car to enter the utility room door. The car had a personalized Illinois license tag that depicts the name "Rush." (R 639,640, 797-98).

Later, Nigel Maeras' death was determined to have been caused by either of two bullet wounds to the head and neck. (R

698-99). The gunshot wounds were caused by a standard rifle or handgun, consistent with a .22 caliber weapon. (R 697-98). The doctor who treated Harold Rush removed twenty-nine (29) number six shotgun pellets from Mr. Rush's abdominal area. (R 857). He died about five weeks later as a result of a shotgun wound of the chest. (R 708). Betsy Ritchie was treated by Dr. Apte. A bullet which was removed from Ms. Ritchie's breast was turned over to police. (R 632).

Pat Spurlock noticed the police cruisers when she came to work on Friday morning, February 12, 1988. When she learned that there had been a shooting at Lot 11, she told police that she had information about the crime. (R733). Ms. Spurlock told police about the man who asked for a "Boggs" or a "Rush" the day before. Detective Linda Alland remembered the name Boggs from the report Jerry Boggs made to the Sheriff's Deprtment two days before. (R 848-49). Detective Alland interviewed Jerry Boggs and police obtained a photograph of John Boggs from Ohio. (R 853).

The detectives put together a photopack and showed it to Pat Spurlock on Saturday. (R 855). Ms. Spurlock picked out John Boggs' photo and said she was 75% sure he was the man in her office. (R 748). She saw a different picture of John Boggs in a newspaper at her bank a few days later and was 100% certain he was the man. (R 746). Ms. Spurlock again identified Boggs at his extradition hearing in Ohio. (R 749). At trial, Mrs. Spurlock positively identified Appellant in the courtroom and said the identification was based solely on the fact that he was the one she saw in her office. (R 750).

Patrolman Kevin Sooy of the Vermilion Police Department was staked out on the highway near Appellant's home as a result of a report received by the Pasco County Sheriff's Office that John Boggs may have been involved in a murder in Florida and was returning home. (R967). On Friday, February 12, 1988, at 10:00 AM, Officer Sooy observed Appellant coming off the interstate, State Route 2, and turning towards his residence on Vermilion Road. (R 965-66). Boggs' camper truck was snow-covered and had a build-up of snow in the wheel wells. The snow had a dirty color to it, as if the vehicle had been on the road a long time. (R 966).

Pasco County Sheriff's detectives traveled to Ohio and procured a warrant to search John Boggs' house and vehicles. The search of Appellant's camper truck revealed a map of the United States laying haphazardly on the seat of the truck. (R 980). A yellow line on the map highlighted the route along interstates from Ohio south to I-75 in Florida and Route 54 in Zephyrhills.[2] (R 986-88). Inside the house, detectives found a long black coat hanging in Boggs' closet which matched the description given by Betsy Ritchie. (R 994-95). The pockets were full of shotgun shells which fit a 12-gauge shotgun. (R 996). Searchers also found a black ski mask in the rear bedroom. (R 1037-38). A .22 caliber automatic pistol and a 16-gauge

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[2] Defense counsel pointed out at trial that the large map also showed route markings to Jacksonville, Florida. (R 1002). Apparently, the Jacksonville marking was made when Jerry and John Boggs traveled there together prior to their divorce. (R 1936).

shotgun was discovered behind Appellant's couch in the living room. (R 1018).

The investigators did not stop searching for weapons after the discovery of those guns, however. Sergeant Fred Barck, of the Vermilion Police Deprtment, searched the crawlspace of the attic by way of an opening in the bedroom closet. The sergeant stood on a closet shelf with his upper body protruding into the attic. (R 1088-89). Under the 8-inch layer of insulation, within immediate reach, the sergeant found five shotguns and rifles, but no sawed-off shotguns or handguns. (R 1021). A large amount of ammunition was also found under the insulation.[3] The officers kept looking and observed an area about ten to twelve feet away from the opening where the dust on the furnace duct work appeared to have been disturbed. (R 1022). Sergeant Barck crawled to that area, checked under the insulation, and found a .22 caliber semiautomatic Colt Huntsman pistol with a loaded clip, and a sawed-off 12-gauge double barrel shotgun. (R 1023). A spent shell was found next to the shotgun. (R 1028).

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[3] In addition to the firearms, searchers found 18 boxes of 16 gauge number 4 shot shells, 25 boxes of 16 gauge number 8 shells, 25 boxes of number 6-12 gauge shot shells, 2 boxes of 12 gauge number 4 shot shells, 24 boxes of 16 gauge number 8 shot shells, 5 boxes of Remington Sure Shot 16 gauge number 8 shot shells, 25 boxes of 16 gauge number 4 shot shells, 50 boxes of 410 gauge 7½ inch shot, 2 boxes of smokeless 12 gauge number 6 shot shells, 2 boxes of Remington 12 gauge number 5 shot shells, 25 boxes of 16 gauge number 6 shot shells, and 35 boxes of Remington high-velocity .22 shorts (R 881-82). There were also 21 boxes of 16 gauge number 8 shot shells, one box of 12 gauge shotgun shells, 39 boxes of .22 high velocity shorts, 4 boxes of 16 gauge Harrington and Richard shot shells. (R 881-82,883,884). Defense counsel objected to the prosecutor's use of the word "arsenal" to describe this evidence. (R 884).

At trial, Mr. Michael Hall, a senior crime laboratory analyst in the firearms and tool marks section of the Florida Department of Law Enforcement, testified as the State's ballistics expert. (R 1044). Mr. Hall test-fired the .22 caliber pistol and the 12-gauge shotgun found in Appellant's attic, and testified that both weapons were operable. (R 1051-1089). The shotgun can fire number six shot, the size of the pellets recovered from Harold Rush's abdomen. (R 1053). Mr. Hall examined the spent shell casing found in the attic and concluded that it was fired from Appellant's 12-gauge sawed-off shotgun, State's Exhibit 17. (R 1066). Mr. Hall also determined with absolute certainty that the spent .22 casings found in the kitchen and dining area and middle bedroom of Harold Rush's mobile home were fired from the .22 caliber semi-automatic Colt Huntsman pistol found behind the furnace duct in John Boggs' attic. (R 1092,1096,1103). The expert also testified that the two expended bullets found in the middle bedroom of the trailer and the one removed from Betsy Ritchie's breast, "to the exclusion of all other firearms", were fired from the .22 caliber Colt Huntsman pistol found hidden in Appellant's attic beside the shotgun. (R 1112,1114-15,1117).

Appellant was found guilty of the first degree murder of Nigel Maeras, first degree murder of Harold Rush, attempted first degree murder of Betsy Ritchie, and armed burglary. (R 1323-24). During the penalty phase, held on September 24, 1988, the jury heard evidence comparing the physical characteristics of the victims and the intended victims. At the time of the murders,

Betsy Ritchie was 51 years old, 5'4" to 5'4½" tall, weighed about 130 pounds, and had blond hair. (R 612, 1348). Nigel Maeres was 70 years old, 5'6" to 5'7" tall, weighed 130 pounds and had blond hair with some gray. (R 613,1348). Ms. Ritchie testified that Jerry Boggs is five to seven inches shorter than Betsy and has very black hair. (R 1348). Jerry Boggs and Betsy Ritchie stood side-by-side before the jury so that the jury could see the difference in their sizes and appearances. (R 1349). At the time of his death, Harold Rush was 69 years old, 6' to 6'1" tall, heavyset (about 180 to 200 lbs.), and had gray hair "with a little dark in it." (R 612). Harold was five or six inches taller than Dean Rush and was much "bigger around" than Dean. (R 1347).

Although the defense presented testimony from family members that Appellant was a good provider and a stable family man, those same witnesses revealed incidences or statements in the past that indicated Appellant was a violent person. Earlier in the marriage, Appellant beat his wife, Jerry. (R 1366, 1455). His beatings sent her to the hospital at least twice, once with a broken nose (R 1394). He once threw hot grease on his wife during an argument. (R 1415, 1431). Appellant "smacked" his son Guy around a lot. (R 1395). When a troublemaker approached Appellant's son Brandy in jail, Appellant instructed his son how to kill the other man with a fork. (R 1425-27). Appellant also told Brandy that he should have "bumped off" Dean Rush. (R 1371, 1422). There was some evidence that Appellant threatened his daughter Brenda's life should she decide to come to Florida to testify against him. (R 1402-03).

The jury voted 9 to 3 to recommend death for the murder of Nigel Maeras, and voted 8 to 4 to impose the death sentence for the murder of Harold Rush. (R 1538). The court followed the jury recommendations and imposed death sentences for both murders. Judge Cobb found two aggravating circumstances: (1) The murders were committed while Appellant was engaged in a burglary of the dwelling of Mr. Rush, and (2) the murders were committed in a cold, calculated, and premeditated manner and without any pretense of moral or legal justification. (R 1885). The court found two mitigating circumstances to exist: (1) No significant history of prior criminal activity, and (2) the defendant was under the influence of some emotional disturbance at the time of these murders. (R 1885).

SUMMARY OF THE ARGUMENT

As to Issue I: The trial court did not err in failing to order a psychological exam and competency hearing because there were no reasonable grounds to believe Appellant may have been incompetent to stand trial. Not only did Appellant refuse to cooperate with examining experts, but the court determined after lengthy colloquy with Appellant that Appellant had sufficient present ability to consult with his lawyers with a reasonable degree of rational understanding and had a rational, as well as factual, understanding of the proceedings against him.

As to Issue II: The trial court properly refused to grant the defense motion for continuance because Appellant, who was already found competent, would not agree to a continuance.

As to Issue III: The trial court properly refused to allow transportation of the ballistics evidence for examination by a defense expert or to order a recess mid-trial for the same purpose. The ballistics evidence was known and available to the defense upon proper request several weeks before trial, but the request to transport the evidence was not made until the Friday before trial, when the evidence was submitted to the clerk of the court. The request for a recess of several hours did not come until the State rested its case. Moreover, Appellant could not demonstrate any possible benefit from an independent examination. Accordingly, there was no abuse of discretion.

As to Issue IV: The identification procedure (photopack display) used by police in this case is not unduly suggestive. Even if somewhat suggestive, however, the circumstances

surrounding Ms. Spurlock's confrontation with Appellant in the trailer park office provide sufficient indices of reliability so that there was no likelihood of misidentification. Consequently, the out-of-court and in-court identifications of Appellant were admissible.

As to Issue V: The affidavits in support of the application for the search warrant contained sufficient information to establish probable cause to believe evidence of the Zephyrhills murders would be found in Appellant's residence or vehicles. Even if probable cause was not established, however, the evidence was admissible pursuant to the "good faith" exception to the exclusionary rule. The affiant made no intentional misstatements of fact, nor were the affidavits executed with a reckless disregard for the truth.

As to Issue VI: The trial court properly refused to deny defense counsel's motion to excuse prospective jurors Ethel Smith and Lillian Harrison for cause. Mrs. Harrison never indicated bias against Appellant. Ms. Smith, while she originally expressed an opinion as to Appellant's guilt, later stated unequivocally that she could set aside any bias or prejudice and render her verdict solely upon the evidence presented and the court's instructions on the law.

The trial court also properly denied Appellant's request for additional preemptory challenges. Appellant's contention that many jurors had read newspaper articles about the case was not relevant, in light of the fact that a fair, unbiased jury was selected.

Because there were no grounds for striking the entire prospective jury panel, the trial ocurt's refusal to do so was proper.

As to Issue VII: This issue was not properly preserved for review. Moreover, the limited testimony making reference to Appellant's appearance at an extradition hearing in Ohio was not prejudicial.

As to Issue VIII: The trial court properly overruled defense counsel's objection to testimony about Appellant's 1965 threat to kill Dean Rush. This evidence was relevant and inseparable from the crimes charged. Therefore, the testimony did not constitute Williams Rule evidence to which the ten-day notice provision applies. There was no discovery violation necessitating a Richardson hearing.

As to Issue IX: The trial court properly allowed the State's ballistics expert to give an opinion whether the alleged murder weapon could have caused the wound in Harold Rush's abdomen. The testimony was based on sufficient facts, was within the realm of the witness' expertise, and aided the jury in its fact-finding process.

As to Issue X: The prosecutor was properly allowed to discuss the penalties for the lesser-included offenses of first-degree murder during closing argument. The trial court instructed the jury on the possible penalties for the lesser-included offenses without objection by the defense, and the Assistant State Attorney placed no particular emphasis on the penalties during his explanation of the lesser offenses.

As to Issue XI: The issue concerning the prosecutor's references in closing argument to Appellant's ability to produce certain witnesses or evidence was not preserved for review. Moreover, the references were made in fair reply to, and were invited by, defense counsel's earlier comments about the State's failure to present this evidence to the jury. The prosecutor's remarks concerning the defense "smoke screen" were in reply to defense counsel's references to matters not in evidence before the jury. The prosecutor merely advised the jurors that their decision must be based solely on the evidence.

As to Issue XII: The trial ocurt's failure to prepare and utilize a guidelines scoresheet for the noncapital felonies, even if error, was harmless. The court can, and certainly would have, departed upward on the basis of the two unscored convictions for first-degree murder.

As to Issue XIII: The evidence at trial amply supports the finding that Appellant committed the two murders in a cold, calculated and premeditated manner, in the nature of an execution-style slaying. Moreover, neither Mrs. Boggs nor Dean Rush threatened Appellant in any way, which might have provided at least a pretense of legal or moral justification. Appellant's distress over the divorce, without more, is insufficient to justify the cold-blooded murders in this case.

As to Issue XIV: The trial court did not engage in speculation in its sentencing order. Rather, the court proposed alternative theories which were both supported by the direct and circumstantial evidence presented. Most importantly, either

scenario suggested by the evidence would support a finding of cold, calculated, and premeditated murder.

This Court's recent ruling in Campbell v. State, 15 FLW S 342 (Fla. June 14, 1990), should not be applied retroactively to this case. The trial court's discussion of mitigating factors, which was sufficient in light of this Court's earlier holdings, was proper. The additional mitigating factors proposed by the defense were either not in evidence, were contradicted by the evidence, or were not truly mitigating in nature.

As to Issue XV: The sentences of death were not disproportionate to other death cases upheld by this Court. The facts and circumstances reveal that the murders were committed in a contract-style execution manner, which sets this case apart from those involving a heated domestic confrontation which, although premeditated, most likely resulted from reflection of a short duration. Here, Appellant clearly formed the intent to kill. He armed himself with a shotgun, pistol, ammunition, ski mask and dark clothing and a highlighted route map, and then drove over 1,000 miles to Florida to accomplish this plan. The death sentences in this case are appropriate.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY REFUSING TO ORDER AN EXAMINATION AND COMPETENCY HEARING PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.210. (As Stated by Appellant).

On September 12, 1988, the defense moved for appointment of a confidential psychiatric expert to assist defense counsel pursuant to Rule 3.216(a), Florida Rules of Criminal Procedure. (R 1782-83). After hearing argument of counsel, the judge granted the motion and appointed Dr. Richard L. Meadows, M.D. as Appellant's confidential psychological expert for the purpose of mental examination. (R 1784-85). Defense counsel then filed a motion to determine Appellant's competency to stand trial pursuant to Rule 3.210(a) and Rule 3.211, Florida Rules of Criminal Procedure, on September 15, 1988. (R 1787-89). Defense counsel represented in the motion that Appellant did not cooperate with Dr. Meadows during the course of the mental examination. However, Dr. Meadows concluded that Appellant does not meet the criteria for competence to stand trial based on copies of depositions forwarded to Dr. Meadows which allegedly recite unusual behavior on behalf of Appellant in the State of Ohio prior to and including February 1988. (R 1787, 1788). Defense counsel's belief that Appellant was incompetent to stand trial was further based upon Appellant's refusal to permit release of medical and psychiatric records, a 1985 psychiatric evaluation of Appellant indicating a diagnosis recommending psychiatric hospitalization, and past reports of Appellant's

family members that Appellant believes in and practices out-of-body experiences. (R 1788-89). Neither the 1985 psychiatric evaluation nor the depositions were made part of the official record.

A hearing to determine competency was held on September 15, 1988. (R 1553-74). Defense counsel, Mr. Eble, essentially reiterated the grounds in the motion, adding that Dr. Meadows' opinion was founded on the limited verbal and nonverbal responses during the examination. (R 1556). Dr. Meadows was out of the country on vacation, and could not appear to give live testimony. (R 1562-63). The letter stating his opinion was received by defense counsel and filed on September 20, 1988, on the second day of trial. (R 1918). Counsel requested the appointment of two other experts, but candidly admitted, "Quite frankly, I don't think Mr. Boggs will talk to them. I really don't." (R 1557). Mr. Eble added:

> Now, you know, the Court, I think, has the right to inquire as to his [Appellant's] understanding of the process and of his ability to relate to counsel and his ability to assist us in planning a defense, but I felt compelled in light of our current situation, Judge, to put this as a matter of record. (R 1559).

The Assistant State Attorney, Mr. Allweiss, prompted by Mr. Eble's remark above, suggested that the court conduct an inquiry or colloquy with Appellant, pursuant to Rolle v. State, 493 So.2d 1089 (Fla. 4th DCA 1986) and Muhammad v. State, 494 So.2d 969 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987) to determine whether Appellant was entitled to an exam. (R 1560-62). Defense counsel did not object, except

to request that the inquiry be conducted in camera without the State present. (R 1562). The judge refused that request, and the following colloquy ensued:

> THE COURT: Well, I believe the State has a right to be present, and this would not be appropriate to do this in camera, Mr. Eble.
>
> Mr. Boggs, you understand why we are here today?
>
> THE DEFENDANT: Your Honor, my name and picture was spread across every newspaper in this country that I had committed this crime when there was no eyewitness or evidence that I or anyone else had committed this crime.
>
> THE COURT: What crime, Mr. Boggs?
>
> THE DEFENDANT: The crime that I am accused of.
>
> THE COURT: What is that?
>
> THE DEFENDANT: First-degree murder. I have been deprived of my constitutional rights of life, liberty and the pursuit of happiness.
>
> THE COURT: How have you been deprived of that, Mr. Boggs?
>
> THE DEFENDANT: Approximately eight months.
>
> THE COURT: How have you been deprived of that?
>
> THE DEFENDANT: By being incarcerated without bond.
>
> THE COURT: Okay. Okay.
>
> THE DEFENDANT: I was just given these depositions of neighbors saying odd and unusual behavior. I worked for over 30 years swing shift, daylight, 3:00 to 11:00, 11:00 to 9:00.
>
> THE COURT: What did you do, Mr. Boggs?

THE DEFENDANT: What I had to do at home is -- I'm going to explain this. What I had to do at home is work before I went to work or work after I got home.

THE COURT: What kind of work did you do, Mr. Boggs?

THE DEFENDANT: And if it's raining, I go out to sit in the boat to see if my canvas top is leaking or not in my camper, and that --

THE COURT: Mr. Boggs, are you going to listen to me?

THE DEFENDANT: Do I have the right to speak or not?

THE COURT: What kind of work did you do?

THE DEFENDANT: Steel work.

THE COURT: Where?

THE DEFENDANT: At a steel mill.

THE COURT: Where?

THE DEFENDANT: In Lorain, Ohio.

THE COURT: What was the name of the mill?

THE DEFENDANT: U.S. Steel.

THE COURT: In Lorain, Ohio?

THE DEFENDANT: Right.

THE COURT: How long did you do that?

THE DEFENDANT: Would you like me to explain this odd and unusual behavior, because people don't know how I work.

THE COURT: I may.

THE DEFENDANT: I have to work in the snow and the rain.

THE COURT: Yes, sir.

THE DEFENDANT: Before I go to work or after I get off, because I do not have a

garage. That's odd and unusual behavior. Because a neighbor has his garage on my property, I won't sell him a piece of property and he comes over to my yard and builds a flower garden, and I extend my driveway over to his so they cannot do this, and claim my property for working it and squatter's rights, that's odd and unusual behavior. Things like that. I don't have windshield wipers on my boat to work in the rain, and if I go out and start up my motorcycle for five minutes and shut it off, it's exactly -- you can see that. It is to see if it will start up. Is that odd and unusual behavior?

THE COURT: Mr. Boggs, do you know why you are here in court today?

THE DEFENDANT: To delay my trial. I am entitled to a fast and speedy trial and I want it.

THE COURT: You want a speedy trial?

THE DEFENDANT: Yes, sir. I want no delay.

THE COURT: All right sir. Do you understand that your attorney has said that he is not ready to go to trial?

THE DEFENDANT: For two and a half months my attorney did nothing, absolutely nothing. That was time wasted that he could be preparing for this trial.

THE COURT: So you would rather go to trial now?

THE DEFENDANT: Yes, sir.

THE COURT: Rather than have him say he's completely ready?

THE DEFENDANT: Yes, sir. This is the first time I have been in jail. I don't want none of it.

THE COURT: Do you know who this gentleman is to your right?

THE DEFENDANT: Yes, sir, I do.

THE COURT: Who is that?

THE DEFENDANT: William Eble.

THE COURT: And who is he?

THE DEFENDANT: He's my attorney.

THE COURT: Who is this gentleman here?

THE DEFENDANT: John Carballo, my attorney.

THE COURT: All right, sir. Are you willing to cooperate with them during this trial?

THE DEFENDANT: I have all along, sir, when I see them. I haven't been able to see them for 35 days. I put in an application every morning to see these gentlemen. I got no response that I cannot see you, I can see you. So for 35 days, and then somebody shows up.

THE COURT: Okay. The trial will be conducted in a courtroom. Have you ever seen a trial before?

THE DEFENDANT: No, sir.

THE COURT: You have seen it on TV or something like that?

THE DEFENDANT: Maybe Divorce Court or something like that.

THE COURT: Okay. Are you going to be able to conduct yourself properly and not talk except when you're supposed to?

THE DEFENDANT: I will remain silent, sir, except to explain to my attorney when something comes up that conflicts with what I know, and then I will tell him that.

THE COURT: But you will do that at appropriate times?

THE DEFENDANT: Yes, sir.

THE COURT: Do you read and write, Mr. Boggs?

THE DEFENDANT: Not too good.

THE COURT: Can you make notes on a piece of paper?

THE DEFENDANT: Not fast enough for him. I would have to whisper in his ear.

THE COURT: Okay. Mr. Boggs, do you know what the possible penalties are for this charge?

THE DEFENDANT: Yes, sir.

THE COURT; What are they?

THE DEFENDANT: Death.

THE COURT: And you understand that you could be sentenced to death if you are found guilty as charged?

THE DEFENDANT: I've seen that in the newspaper. I understand that.

THE COURT: You are willing to risk that at this time? That's what you want to do?

THE DEFENDANT: Yes, sir. Yes, sir.

THE COURT: Okay. Do know what year this is?

THE DEFENDANT: '88.

THE COURT: Mr. Boggs, do you know where we are?

THE DEFENDANT: In the chambers.

THE COURT: What city? Do you know?

THE DEFENDANT: Dade City.

THE COURT: What state?

THE DEFENDANT: Florida.

THE COURT: You did not live here; is that correct?

THE DEFENDANT: No, sir.

THE COURT: You lived where?

THE DEFENDANT: In Lorain, Ohio.

THE COURT: Still do?

THE DEFENDANT: Vermilion, Ohio, yes.

THE COURT: Are you retired from the steel mill?

THE DEFENDANT: Yes.

THE COURT: How old are you, Mr. Boggs?

THE DEFENDANT: Fifty-five.

THE COURT: How long have you been retired?

THE DEFENDANT: Since '85. No one is entitled to my medical records without my permission. Nobody can give that permission except me. (R 1563-69).

Defense counsel informed the court that a pending lawsuit existed due to a fall suffered by Appellant at the steel mill. (R 1569). The judge specifically inquired about this alleged injury:

THE COURT: Mr. Eble has indicated that he thinks you had a head injury on the job, that you fell on your head; is that true?

THE DEFENDANT: I have a head injury and back injury and arm injury and medical problems, but this is for my attorney in Ohio to straighten out. This has nothing to do with this case.

THE COURT: Do you believe that you have any mental problems as a result of that?

THE DEFENDANT: I would say I'm competent.

THE COURT; But you may have some problems, you think?

THE DEFENDANT: I have medical problems I don't wish to discuss.

THE COURT: Those medical problems, do you think they impair your ability, your judgment at all?

THE DEFENDANT: No.

THE COURT: Do you think that they'd keep you from cooperating with you attorney?

THE DEFENDANT: No.

THE COURT: Or presenting yourself properly to the jury or the Court?

THE DEFENDANT: No.

MR. ALLWEISS [ASSISTANT STATE ATTORNEY]: Can we ask him if you would appoint a psychiatrist or a psychologist whether he would talk to them or cooperate with them?

THE DEFENDANT: I would not. I want no delay in this trial.

THE COURT: If there were not going to be any delay, would you talk to them?

THE DEFENDANT: No, sir.

THE COURT: Can you tell me why you do not want to talk to the psychiatrist?

THE DEFENDANT: I want no delay in this trial.

THE COURT: Well, if you were promised that it would not delay the trial?

THE DEFENDANT: No, sir. I have the right to remain silent and I would do so.

THE COURT: You don't want to tell me why you don't want to cooperate with the psychiatrist?

THE DEFENDANT: Mainly for no delays in this trial. (R 1570-71).

The judge then articulated his findings:

Gentlemen, you know, I'm not a psychiatrist or a psychologist, but it appears clearly to

> me that Mr. Boggs is capable of assisting his attorney, he understands what we are here for. He understands what the charges are. He understands what the consequences of the charges are, and I can't tell you that he doesn't have any neurosis or even psychoses, but I don't see any indication that they affect his ability to cooperate with his attorney or understand the processes that we are here for. (R 1571-72).

The court orally denied the Motion to Determine Competency at the close of the hearing and entered a written order on September 16, 1988, finding that "there are no reasonable grounds to believe the Defendant is not competent to stand trial." (R 1572; 1791).

Appellant contends that the judge's refusal to grant the defense motion for a competency hearing in accordance with Florida Rule of Criminal Procedure 3.210, and the judge's refusal to order a competency determination when requested by counsel throughout the trial violated Boggs' constitutional due process rights.

The procedure for raising the issue of incompetency to proceed to trial is set out in Rule 3.210, Florida Rules of Criminal Procedure. The pertinent subsection provides:

> (b) If, at any material stage of a criminal proceeding, the court of its own motion, or upon motion of counsel for the defendant or for the State, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days after the date of the filing of the motion, and shall order the defendant to be examined by no more than three, nor fewer than two, experts prior to the date of said hearing. Attorneys for the State and the defendant may be present at the examination.

(emphasis added). Section 916.12, Florida Statutes (1987) provides the applicable standard for determining competency to stand trial:

> 916.12 Mental competence to stand trial. -- (1) A person is incompetent to stand trial within the meaning of this chapter if he does not have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or if he has no rational, as well as factual, understanding of the proceedings against him.

Section 916.12, Florida Statutes, is an almost verbatim adoption of the competency test established in Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). The Dusky test requires a determination of (1) whether the defendant has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and (2) whether he has a rational as well as a factual understanding of the proceedings against him. 362 U.S. at 402, 80 S.Ct. at 789.

In this case, the trial court's finding that there were no reasonable grounds to believe that Appellant was incompetent to proceed to trial was well-supported by the evidence. Appellant refused to cooperate with the court-appointed confidential expert and clearly expressed his intention to remain uncooperative should the court appoint additional experts for the purpose of conducting a psychological evaluation. (R 1571). Defense counsel acknowledged this fact. (R 1557) Although Dr. Meadows opined that Appellant is likely psychotic and is "medically unlikely to relate, communicate or work with counsel to plan a defense and also is unlikely to manifest appropriate courtroom behavior," (R 1918), Appellee notes that it is the trial court's

responsibility to determine a defendant's competency to stand trial; expert reports are simply advisory. Gilliam v. State, 514 So.2d 1098, 1100 (Fla. 1987), citing Muhammad v. State, 494 So.2d 969 (Fla. 1986). See also, Brown v. State, 245 So.2d 68, 70 (Fla. 1971), vacated in part on other grounds, 408 U.S. 938, 92 S.Ct. 2870, 33 L.Ed.2d 759 (1972). This Court in Muhammad also stated that a defendant may not thwart the process by refusing to be examined by experts. If the trial court has abided by the procedural rules and "the defendant's own intransigence deprives the court of expert testimony, the court must still proceed to determine competency in the absence of such evidence." 494 So.2d at 973. See also Christopher v. State, 416 So.2d 450, 452 (Fla. 1982). The trial court may make a determination whether it reasonably appears necessary to conduct a competency hearing based upon the court's own observations of the defendant's behavior throughout the proceedings and other evidence available from outside sources. Muhammad, 494 So.2d at 973. The trial court is in a much better position than the reviewing court to determine whether Appellant's courtroom demeanor provided any basis for doubt as to his competency. Trawick v. State, 473 So.2d 1235, 1239 (Fla. 1985), cert. denied, 476 U.S. 1143, 106 S.Ct. 2254, 90 L.Ed.2d 699 (1986).

Pursuant to a suggestion initially tendered by defense counsel and agreed upon by the State, Judge Cobb engaged in an extensive, detailed colloquy with John Boggs to determine his understanding of the proceedings and his ability to consult with his attorneys. (R 1559, 1561). A review of Appellant's

responses during this dialogue shows that he understood the charges against him and the possibility of receiving a death sentence. (R 1563, 1568). He understood the role of the judge and the parties and indicated his willingness and ability to consult with his attorneys during the course of the trial.[4] (R 1567-68). Appellant said he would maintain appropriate courtroom behavior. (R 1567). Although not dispositive, Appellant considered himself to be competent. (R 1570). Appellant was clearly aware of his right to speedy trial, his right to remain silent, and his right to refuse to submit to a psychiatric exam or release confidential medical records. (R 1566, 1569, 1571). The fact that Dr. Meadows' report diagnosed Appellant as likely suffering from a psychosis does not undermine the trial court's finding of competency. One need not be mentally healthy to be competent to stand trial. Muhammad, supra, at 973. The trial court was entitled to reject the psychological report and the allegations of prior "bizarre" behavior in light of Appellant's obvious present ability to consult with his attorneys and his understanding of the proceedings expressed during the discussion with the court. Appellee submits that Appellant met the Lusk test for competency to stand trial. Thus, the court was correct in finding no reasonable grounds to conduct a full-blown competency hearing.

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[4] It appears from the record that Appellant did consult with his attorneys, at least during the jury selection process. (R 184, 431).

ISSUE II

THE TRIAL COURT ERRED IN NOT CONSIDERING AND GRANTING DEFENSE COUNSEL'S MOTION FOR CONTINUANCE BECAUSE THE APPELLANT WAS NOT COMPETENT TO REFUSE TO SIGN THE MOTION; THUS, THE APPELLANT WAS DENIED DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL. (As Stated by Appellant).

On September 19, 1988, the morning of trial, defense counsel filed a Motion for Continuance in open court. (R 1803-04). The motion alleged that despite diligent effort, twenty-two (22) witnesses listed by the State in discovery had not yet been deposed by defense counsel. Of those witnesses, thirteen had either been recently listed by the State or have moved requiring the State to furnish defense counsel with updated addresses. (R 1803). The undeposed witnesses were not identified in the motion or during the hearing, so it is not possible to determine whether any of these witnesses actually appeared at trial on behalf of the State. The record does reflect, however, that four witnesses were made available by the State for defense depositions on September 19, 1988 pursuant to the court's earlier request. (R 3).

The trial court denied the request for a continuance because Appellant did not sign the motion as required by the Rules of Judicial Administration (R 2,3). Defense counsel argued that Appellant was incompetent to proceed to trial and was therefore not competent to make a decision whether, in his best interests, he should agree to a continuance. (R 3). Counsel acknowledged, however, that Appellant's refusal to sign the motion was knowing

and deliberate because of Appellant's desire to receive a speedy trial, with no delays. (R 2, 2566, 1571). (See Argument in Issue I, infra).

A continuance may be granted in a trial court's discretion, but only for good cause shown. Jent v. State, 408 So.2d 1024, 1028 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). The trial court's ruling should not be disturbed unless a palpable abuse of discretion is demonstrated to the reviewing court. Magill v. State, 386 So.2d 1188 (Fla. 1980), cert. denied, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981). Appellee submits there was no abuse of discretion in this instance.

Appellant clearly desired to receive a speedy trial, as is his right. Hence, he would not sign the motion for continuance prepared by counsel. The trial court had previously found Appellant competent to stand trial and therefore competent to insist upon his constitutional and statutory rights. Moreover, defense counsel was unable to demonstrate prejudice because counsel did not specify to the court which witnesses had not been deposed or whether their testimony was likely to be material.[5]

Defense counsel were appointed on May 13, 1988, as soon as Appellant was extradited from Ohio. (R 1743). Demand for discovery was filed on July 7, 1988. (R 1746-1750). There was no showing of exceptional circumstances entitling Appellant to an

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[5] The record reveals that depositions were used to impeach the following State's witnesses: Pat Cantor (R 903); Jerry Boggs (R 938); Dean Rush (R 958); Sergeant Barck (R 1031); Nicholas Mayer (R 1041).

extension of the time period provided under the speedy trial rule, Rule 3.191(f), Florida Rules of Criminal Procedure. Most important, of course, was Appellant's refusal to sign the motion for continuance and his own desire to proceed without delay. There was no abuse of discretion in the trial court's compliance with a defendant's wishes.

ISSUE III

THE TRIAL COURT ERRED BY REFUSING EITHER (1) BEFORE TRIAL, TO AGREE TO ALLOW THE FIREARMS EVIDENCE TO BE TRANSPORTED TO TAMPA FOR AN INDEPENDANT EXAMINATION OR (2) DURING TRIAL TO RECESS THE TRIAL FOR FOUR TO SIX HOURS TO ALLOW THE FIREARMS EVIDENCE TO BE TRANSPORTED TO AN INDEPENDENT EXPERT FOR EXAMINATION. (As Stated by Appellant).

On July 8, 1988, the State filed an Answer to Demand for Discovery pursuant to Rule 3.200, Florida Rules of Criminal Procedure. (R 1752-59). Joseph M. Hall, the Florida Department of Law Enforcement firearms expert who performed ballistics tests on the firearms and ammunition at issue in this case, and who testified for the State at trial, was listed in the Answer. (R 1757). Defense counsel did depose Mr. Hall prior to trial. (R 1580). On September 16, 1988 (Friday prior to trial), defense counsel moved for the appointment of a confidential expert by the name of Whittaker to examine the bullets in this case. (R 1578-79). Counsel informed the court that Mr. Whittaker would be available to fly from Miami to Tampa on Monday and conduct the examination, and that he would prefer to use the FDLE (Florida Department of Law Enforcement) equipment. (R 1579-80). The State objected to the appointment of an expert at that late date:

> MR. ALLWEISS [ASSISTANT STATE ATTORNEY]: The reason why we would have an objection to the appointment of an expert, Judge, is that there is nothing factually in the motion that gives rise to this Court's spending the kind of money that counsel is asking for at this late date in time, especially when the trial is ready to begin Monday and we're ready to present the evidence to the clerk for marking. (R 1580)

The judge did grant Appellant the expert and a reasonable fee for an examination. However, the judge would not allow confidentiality and stated that he could not order FDLE to allow the expert to use their equipment (R 1581). The Assistant State Attorney pointed out to the court that the State's intention was to get the evidence marked and delivered to the clerk that day. Because of the large quantity of evidence, the State preferred that the evidence not leave the courtroom once it was marked. (R 1581-82). The court agreed, and announced that the expert would need to conduct the examination at the courthouse under the circumstances. (R 1582). Defense counsel protested these arrangements and explained the previous difficulty in locating an independent expert. The court responded:

> THE COURT: I'll appoint him, Mr. Eble, even though I think Mr. Allweiss is right. There has not been shown any grounds and I think it's going overboard. I'll appoint him, but he's going to have to take the evidence where he finds it. And apparently Monday morning, it's going to be the clerk's possession. So he's going to have to do it here. I can't order FDLE to allow him to use their equipment. I don't have that kind of authority. (R 1582-83).

The factual circumstances surrounding defense counsel's further requests to remove the ballistics evidence from the courtroom and delay the trial to allow a defense expert to conduct an independent examination are set out extensively in Appellant's Initial Brief and need not be repeated.

Appellant claims he was denied his constitutional confrontation and due process rights because the trial court denied him an opportunity to examine the State's tangible

ballistics evidence. At no time, however, does Appellant allege that the State prevented the defense from gaining access to the weapons or ammunition at issue. All the cases cited by Appellant for the proposition that when tangible evidence is unavailable for examination by a defense expert pursuant to Rule 3.220(a)(1), Florida Rules of Criminal Procedure, a defendant has been denied his constitutional rights to confrontation or due process involve situations wherein the tangible evidence has been lost or destroyed. Such evidence can truly be deemed "unavailable" through no fault of the defendant. See, e.g., Johnson v. State 249 So.2d 470, 472 (Fla. 3d DCA 1971), writ discharged, 280 So.2d 673 (Fla. 1973); Stipp v. State, 371 So.2d 712 (Fla. 4th DCA 1979), cert. denied, 383 So.2d 1203 (Fla. 1980); State v. Ritter, 448 So.2d 512 (Fla. 5th DCA 1984). In the case at bar, any delay in the procurement of a defense expert was due to the actions of the defense, not the State or the trial court. Therefore, contrary to Appellant's assertions, the line of cases he cites are not analogous. There is nothing in the instant record to contradict the fact that at all times the ballistics evidence was available for testing upon proper request. Appellate counsel notes in the brief at page 47 that "Boggs' counsel indicated that he had difficulty inspecting some of the evidence because of rules requiring approval from the assistant state attorney prior to inspection of items held by the sheriff." This is probably a reference to two incidents appearing on the record. During cross-examination of the State's witness, William Ferguson, defense counsel requested certain tire track photographs in open court:

MR. CARBALLO: Judge, I would ask to have those produced. Those are items of evidence and I am allowed to question this witness from those. The sheriff doesn't have them. Apparently the State Attorney has them.

MR. VAN ALLEN: Mr. Carballo and Mr. Eble have been through all the pictures last week. If they wanted them and asked for copies, we would have gotten them for him. I'm not going to produce anything for him now.

THE COURT: They are not in evidence, Mr. Carballo.

MR. CARBALLO: Yes, sir. I'm aware of that, but I would like to haave the opportunity to have them here while I question this witness.

MR. ALLWEISS: He could have asked before trial, just like we all do, and he had the opportunity to make all the copies he wanted, and now he's pulling this stunt in front of the Court, which I thin is totally improper. . . . (R 827-28).

MR. VAN ALLEN: I have a couple hundred of them. I don't know which ones he wants.

THE COURT: We are not going to stop and go through them.

MR. CARBALLO: I think it's important for the Court to know, Judge, that I had three hours of time with the sheriff to review all the evidence, and I was telephoned back by Ms. Alapaz, who had been advised that I was not allowed to view any evidence unless the State Attorney was present, and she refused to allow me to go down and look at the evidence. I think you probably know about that.

MR VAN ALLEN: I asked for a specific time and you wouldn't give me one, and I said make an appointment and we'll be glad to meet you there, and you never got back with me.

THE COURT: Mr. Carballo, the Court is at all times at your disposal for aid in discovery. (R 829).

Later, during the testimony of Detective Roger Hoefs, defense counsel asked to see the contents of the box of maps which the State wished to introduce into evidence:

> MR. CARBALLO: Your Honor, I would like to have the opportunity to go through the contents of that box before I agree to have it admitted into evidence. If the Court is aware, my appointment to look at all the evidence was canceled by the sheriff's office. This is the first time I have seen any of this and I need to have the opportunity to go through what is in there before.
>
> MR. VAN ALLEN: Excuse me, Judge. I don't know if the Court is aware of anything, number one. And number two, to make appointments, to make appointments to see evidence with the State Attorney's Office, not the sheriff and we have never had one of these in eight months and he has been through this box. (R 988-89).

As for the ballistics evidence, the court granted the defense request to appoint an independent expert (R 1581), agreed to the transportation of the evidence (R 1155), and even agreed to order the FDLE to allow their test equipment to be used. (R 1101). What the Court would not do, however, was disrupt the orderly proceedings of the trial and grant a continuance or a recess of up to one full day.[6] (R 1155).

The trial court has inherent discretion whether or not to grant a recess or continuance once trial has begun. The denial of the defense requests for a recess was reasonable in this case.

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[6] Defense counsel estimated that the trial would need to be recessed for four to six hours. (R 1155). However, the State would need to be given an opportunity to depose the defense expert, thus causing a further delay of perhaps a full day. (R 1151).

As the trial court noted, the examination of the firearms evidence should have been taken care of a "long time ago." (R 1154). The denial of defense counsel's eleventh-hour requests was proper.

ISSUE IV

THE COURT ERRED BY DENYING DEFENSE COUNSEL'S MOTION TO SUPPRESS THE IDENTIFICATION OF APPELLANT BECAUSE THE STATE FAILED TO PROVE THAT THE WITNESS' IN-COURT IDENTIFICATION WAS GROUNDED UPON A RECOLLECTION OF THE MAN IN HER OFFICE INDEPENDENT OF THE SUGGESTIVE PRETRIAL IDENTIFICATION. (As Stated by Appellant).

First, Appellee asserts that the photopack, or photographic lineup, displayed to Pat Spurlock after the murders was not suggestive. The five pictures were photocopied and attached to Appellant's motion to suppress as Exhibit "1." (R 1780-81). Of course, the reproduction of these photographs is of too poor a quality to make a conclusive determination. However, it appears that the men in the photos all have similar facial characteristics. The age discrepancies are not readily apparent; nor can one determine that Appellant's photo was taken outdoors in a northern state. The photo of Appellant from Ohio showed a mustache. Consequently, the police included in the photopack only men with mustaches. Merely because there are some differences between the various photographs in the display does not render the procedure unduly suggestive. Compare, Marsden v. Moore, 847 F.2d 1536, 1545 (11th Cir. 1988) cert. denied, ___U.S.___, 109 S.Ct. 534, 102 L.Ed.2d 566 (1988) (Defendant was the only male in photographs shown to witness); Dobbs v. Kemp, 790 F.2d 1499, 1506 (11th Cir. 1986), cert. denied, 481 U.S. 1059, 107 S.Ct. 2203, 95 L.Ed.2d 858 (1987), reh. denied, 483 U.S. 1012, 107 S.Ct. 3246, 97 L.Ed.2d 751 (1987) (Procedure unduly suggestive where witness was shown four photographs, all

of the defendant). Also, although the witness in this case was aware that the police were obtaining a photograph of the suspect, Ms. Spurlock was not told that it was among the photos she was first given. (R743). See Perez v. State, 539 So.2d 600, 601 (Fla. 3d DCA 1989) (Police did not tell either of the eyewitnesses prior to identifications that picture of robbery suspect was contained in photo display).

Even if the pretrial identification procedure in this case was suggestive, however, both the out-of-court and in-court identifications of Appellant were admissible. An in-court identification is admissible if it is found to be reliable and based solely upon the witness' independent recollection of the offender at the time of the crime, uninfluenced by the intervening illegal confrontation. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). As Appellant correctly points out, it is the likelihood of misidentification that violates due process and not the possibility of a suggestive line-up or show-up. Id. Likewise, a pretrial identification obtained from a suggestive procedure may be introduced into evidence if found to be reliable and based upon the witness' independent recall. Id. A suggestive confrontation alone is insufficient to exclude the out-of-court identification. Grant v. State, 390 So.2d 341, 343 (Fla. 1980), cert. denied, 451 U.S. 913, 1015 S.Ct. 1987, 68 L.Ed.2d 303 (1981). To be admissible, the out-of-court identification must be found to possess certain factors of reliability. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). These factors include:

> [the] opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.

Neil, 409 U.S. at 199, 93 S.Ct. at 382. These are essentially the same factors for determining the reliability of an in-court identification. United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

Application of the above factors to the circumstances of the instant case show beyond any doubt that there was no likelihood of misidentification. Patricia Spurlock, the manager of Colony Hills Mobile Home park, had an opportunity to view Appellant for at least five full minutes as he stood a few feet away from Ms. Spurlock, on the other side of her desk. (R 1624). Her view of Appellant was not interrupted, and she was paying attention to Mr. Boggs during all that time. The confrontation occurred in her office in the trailer park at approximately 1:00 PM on February 10, 1988.[7] (R 736). Ms. Spurlock's attention was drawn to the visitor because he was dressed like he just came out of the woods from hunting and he had not taken the address of the Rush trailer down in writing. These occurrences are unusual. (R 1595-96, 1626). Ms. Spurlock later gave police a fairly accurate description of the suspect: He was in his sixties; 5'8" to 5'9"; 160 to 170 pounds; dark hair with some gray in it, a little curly; he was wearing a dark blue or dark-colored parka just

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[7] The exact time is not clear. At the suppression hearing, Ms. Spurlock testified that Appellant came into her office at 11:00 AM. (R 1623).

below the waist and dark clothing. (R 1598). Ms. Spurlock apparently told police she was not sure if the man had a mustache, but that he did not have a beard; he was wearing a baseball cap, and the hair curled out from underneath. (R 1597). He was wearing prescription eyeglasses with rounded lenses. (R 1593).

When shown the photopack, Ms. Spurlock picked out Appellant's picture and said she was seventy-five per cent sure that was the man in her office. (R 1616). The witness could not be sure because the photo was blurry and the man did not have on glasses or a baseball cap. (R 1604). Ms. Spurlock testified that she picked Appellant's picture because he looked like the man in her office, and not because the photo was blurry. The detective did not indicate or hint that she should pick that particular photo. (R 1628). The photographic lineup took place on Saturday, February 13, 1988, only three days after Ms. Spurlock saw Appellant in her office. (R 1614). She identified John Boggs in court approximately eight months after her encounter with him. A few days after Ms. Spurlock viewed the photopack display, she saw a different photograph of Appellant in the newspaper at Ms. Spurlock's bank. She was 100% positive that the man in the newspaper photo was the man in her office. (R 745-46, 1629-30).

The trial court properly denied Appellant's motion to suppress, because the totality of circumstances indicated no likelihood or possibility of misidentification. Ms. Spurlock's ample opportunity for observing Appellant and her heightened

degree of attention remove any type of taint which a suggestive procedure may have produced. Compare Edwards v. State, 538 So.2d 440 (Fla. 1989), wherein the eyewitness saw the suspect during a passing glance and could only see an outline of his face. Id. at 443.

The State's argument also holds true for Pat Spurlock's second pretrial identification of Appellant in Ohio at the extradition hearing. That confrontation, even if suggestive, was still reliable due to the circumstances of the original meeting in the trailer office. As a final note, Appellee points out that any weaknesses in the eyewitness identification and photo display were argued to the jury. (R 1197-1202). Such weaknesses should go to the weight, not the admissibility, of the photographic identification. Perez v. State, 539 So.2d 600, 601 (Fla. 3d DCA 1989). Therefore, the trial court properly denied Appellant's motion to suppress identification.

ISSUE V

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED FROM A SEARCH BECAUSE THE SEARCH WARRANT WAS BASED ON AN AFFIDAVIT THAT LACKED PROBABLE CAUSE AND CONTAINED RECKLESSLY FALSE STATEMENTS AND CONCLUSIONS. (As Stated by Appellant).

On September 9, 1988, defense counsel filed a motion to suppress evidence seized in the search of Appellant's Ohio residence, claiming the affidavit in support of the warrant failed to state sufficient probable cause. (R 1766-68). A hearing was held before the Honorable Wayne L. Cobb on September 16, 1988. (R 1659-76). Deputy Roger Hoefs of the Pasco County Sheriff's Office testified on behalf of the State. Deputy Hoefs told the court that in the course of investigating the murders committed on February 11, 1988, he traveled to Vermilion, Ohio. There he met with the prosecuting agency and caused an affidavit to be created for the purpose of a search warrant for the residence of John Boggs. (R 1663-64). Deputy Hoefs reviewed the Affidavit and Journal Entry for Search Warrant (R 1769), Journal Entry (R 1770), and two-page Affidavit in Support of Complaint for Arrest Warrant or Summons (R 1771-72), and testified that these documents were created by Hoefs on February 15, 1988, signed by him, and reviewed by the Vermilion prosecuting agency. (R 1664-65). The affidavits were executed under oath by the deputy and signed before the judge. (R 1664, 1666). The Ohio judge put Hoefs under oath. (R 1667). Deputy Hoefs said that all the documents were handed to the Ohio judge as a complete package. (R 1665, 1668-69). The witness could not recall whether the documents were physically attached or stapled

together or just handed to the judge as a package. (R 1668). However, Hoefs was absolutely certain the judge handled the two-page affidavit. (R 1669). In fact, the judge commented that he liked the format of the affidavit. (R 1665). The deputy testified that the affidavits contained all the knowledge about the case at that time, and were accurate as far as he knew. (R 1666). There were no additional facts that he was aware of at the time he executed the affidavit. (R 1666). On cross-examination, Deputy Hoefs told defense counsel that he had personal knowledge about Pat Cantor calling Jerry Boggs. (R 1669-70). The deputy was not present at the crime scene, but received information that Harold Rush called the Zephyrhills Police Department to report the shooting through communications within the deputy's unit. (R 1670). Deputy Hoefs briefly interviewed Betsy Ritchie. She described the suspect as an "apparition, all in black." (R 1671). Apparently, the description of the suspect as wearing a black hood or mask came from Harold Rush when he made the emergency phone call to police. (R 771). The information about Pat Spurlock's identification of Appellant came from Sergeant Fairbanks in Florida. (R 1671). Sergeant Fairbanks learned the information from sources in Florida. (R 1672). It was reported to Deputy Hoefs that Patrolman Sooy had seen Appellant's vehicle coming off the Interstate in Vermilion on the 12th of February. (R 1672). After hearing evidence and argument of counsel, the judge stated, "Mr. Eble, I find no irregularity in the search warrant or find that it states probable cause for a search warrant. I'm going to have to deny

your motion." (R 1676). The two affidavits are reproduced below:

The Short Affidavit

> Investigation reveals that John Boggs was in Florida on 2-11-88 when three people were shot in their home with a 12 gauge shot gun and .22 caliber pistol. John Boggs had threatened to go to Florida anad blow Dean away.

The Two-Page Affidavit

> On or about 1/13/88 in the evening hours the defendant John E. Boggs in conversation with his son, Brandy Boggs, told Brandy Boggs that Dean being Gerald Dean Rush broke a promise and I'm going to Florida and blow him away.
>
> On 2-9-88 at 0700 Hours one Pat Canter of Vermilion, Ohio noticed the truck/camper belonging to the Defendant missing from the defendant residence located at 805 Vermilion Road, Vermilion, Ohio. Pat Canter then called the defendant's wife Jerry Boggs in Florida on 2-09-88. Jerry Boggs contacted the Pasco county Sheriff's Office and an information report #88-13585 was completed.
>
> On 2-11-88 the Zepherhills [sic] Police Department received a call from one Harold Frank Rush of 35053 McCulloughs Leep, Zepherhills [sic], Florida requesting assistance as he and other people in his residence had been shot. Units of the Pasco County Sheriff's Office responded to the residence to find that one Nigel Maeras d.o.b. 2-12-17 had been killed by being shot several times in the head.
>
> Harold Rush, white/male d.o.b. 8-2-19 was alive with shot gun wound to the side and chest. Mr. Rush at that time told deputies on the scene that a man wearing a mask, dressed all in black had broken into his residence and shot everyone. Deputies then found one Betsy Richey, white/female d.o.b. 7-21-37 hiding behind a dresser in the bedroom. Ms. Richey was alive and had bullet wounds to the back. She also described the defendant as having a black hood on and dressed all in black.

> During the course of the investigation it was learned that the defendant was at the office of trailer park where the victims lived on 2-10-88 in the morning hours asking for his wife Jerry Boggs or Gerald Rush. The park manager told the defendant that a Rush lived in the park (Park manager looked at the photo ID pack) and the manager did ID the defendant as the person who asked for Rush. The defendant, thinking he had located his ex-wife and her current boyfriend went to the residence and killed and shot the wrong people.
>
> The defendant then left Florida and returned to Ohio on 2-12-88 where he was seen entering Vermilion, Ohio by Patrolman Sooy of the Vermilion Police Department.

Appellant has attacked the affidavits in support of the search warrant on the basis that they did not supply sufficient facts to support a finding of probable cause and that the drafting deputies' false statements and reckless disregard for the truth prevent an application of the "good faith" exception of United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). However, Appellant's arguments seek to attack each fact contained in the affidavit in a vacuum without looking at the totality of the circumstances or the "four corners" of the information contained in the affidavits.

There is no doubt that the two affidavits were considered together by the issuing judge in Ohio. (R 1664-65) Accordingly, all of the information contained in both the long and short affidavits should be considered.

Appellant's line-by-line approach to analyzing the affidavits is contrary to the judicially recognized reality of the warrant process:

> [A]ffidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). The facts constituting probable cause need not meet the standard of conclusiveness and probability required of circumstantial facts upon which a conviction must be based. In New York v. P.J. Video, Inc., 475 U.S. 868, 876, 106 S.Ct. 1610, 1615, 89 L.Ed.2d 871, 881 (1986), the United States Supreme Court stated:

> Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the the magistrate's decision.
>
> . . .
>
> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, . . .there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Accordingly, a magistrate's determination of probable cause should be paid great deference by reviewing courts. After the fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. Massachusetts v. Upton, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984). The duty of the reviewing court is to insure that the magistrate who has issued

the search warrant had a substantial basis for concluding that probable cause existed. State v. Jacobs, 437 So.2d 166 (Fla. 5th DCA 1983).

Against this backdrop, even the "short affidavit" cannot be ridiculed for a lack of probable cause. Appellant attacks the affidavit because "[T]here is no way to know whether the source (of the information) was reliable". He must feel that because the affiant received the information from other law enforcement officers, that such does not constitute reliable facts upon which a finding of probable cause can be based. However, an officer can rely on the strength of information on a suspect where such information is derived from another investigating officer. The affiant or actual arresting officer in a non-warrant case is not required to have first hand knowledge of the facts offered in support of probable cause. Whitley v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971); Carrol v. State, 497 So.2d 253 (Fla. 3d DCA 1985) rev. denied, 511 So.2d 297 (Fla. 1987). In Crawford v. State, 334 So.2d 141 (Fla. 3d DCA 1976), the court held:

> It is sufficient if the police officer initiating the chain of communication either had first hand knowledge or received his information from some person, official source or eye witness, who is seemed reasonable to believe is telling the truth.

Id, at 142. This rule should be no less applicable to information gathered for an affidavit in support of a warrant.

This case is quite distinguishable from those cited by Appellant involving information received from confidential

informants in drug trafficking cases. Because the identity of undercover informants is often not revealed, and the informants may have a personal financial or penal interest in the outcome of their cases, it becomes particularly important to verify reliability and veracity. Here, however, the facts were garnered during the criminal investigation of a homicide case. The information came from the investigating officers, the victims, or disinterested witnesses.

Herein, the affiant received information during the course of the investigation that Appellant was going to Florida to blow Dean away. Police criminalistics investigation revealed the type of weapons and projectiles used in the killings. That Boggs was in Florida and within close proximity to the victims on 2/11/88 was established by Appellant's phone call to Jerry Boggs and his appearance at the Colony Hills Mobile Home Park on February 10, 1988.

When combined with the two page affidavit, probable cause comes into sharper focus. For example, that Pat Cantor of Vermilion, Ohio noticed that Appellant's vehicle was missing on 2/9/88 is not subject to disbelief merely because the source of such information may have been Jerry Boggs. Appellant's vehicle was observed by law enforcement re-entering Vermilion on 2/12/88, approximately 32 hours after the murders. That it was gone two or three days before the killings and was observed re-entering Vermilion just after the murders, when combined with other information contained in the affidavit, supports a finding of probable cause. Appellant's "stand alone" vacuum approach is inappropriate analysis for a search warrant.

Paragraphs three and four, contrary to Appellant's assertions, are not irrelevant. After all, the man who shot Harold Rush, Nigel Maeras and Betsy Ritchie was wearing a mask and was "dressed all in black". The warrant sought the seizure of a black long coat, a black ski mask, a black hat and firearms. (R 1769). The date and place were equally as significant inasmuch as Appellant was seen at the trailer park the day before the murders and had inquired about his wife and Gerald Rush.[8] Accordingly, within the four corners of the affidavit, paragraphs three and four do indeed supply relevant information, which Appellant concedes is reliable, that formed the basis of probable cause.

Though Appellant cites to Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and the phrase "reckless disregard for the truth", he fails to recognize that part of the decision that calls upon him to demonstrate "intentional falsification". Nowhere has such an allegation been made, at the suppression hearing or herein. As grounds for the argument that the affidavit was misleading and made with reckless disregard of the truth, Appellant points to the omission of the fact that Pat Spurlock's identity of Appellant was only 75% certain and that Patrolman Sooy did know where Appellant had been before he entered Vermilion.

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[8] Although the man who called Pat Spurlock apparently did not give first names, the call to Sandalwood Mobile Home Community mentioned a "Gerald Rush" and a "Jerry Rush" or "Jerry Boggs." (R 726).

First, Appellee asserts that the statements in the affidavit were truthful. Pat Spurlock did identify Appellant; she picked his photo out of the photographic display. That she was not 100% certain does not invalidate the identification. Also, the statement concerning Officer Sooy's observation of Appellant on February 12, 1988 was accurate. Offier Sooy had been instructed to watch for John Boggs. Boggs was seen driving off the Interstate toward his home and his vehicle appeared to have been on the highway for some time. Deputy Hoefs testified at the hearing that the affidavit contained all the information he had at the time and was accurate to the best of his knowledge. (R 1666). Appellant, like the petitioner in State v. Chapin, 486 So.2d 566 (Fla. 1986), appears to have misapprehended the limited nature of the Franks inquiry into search warrant affidavits:

> It is not the truth of the information in the affidavit which is critical but rather the affiant's belief that it is true. The fact that the police acted negligently, made an innocent mistake, or might have conducted an investigation in a different manner, does not prove, or even establish a presumption of, bad faith or reckless disregard of the truth. Id. at 568.

Even if these facts should have been included in the affidavit, their omission is not material so as to invalidate the warrant. See, People v. Aston, 39 Cal. 3d 481, 216 Cal. Rptr. 771, 780, 703 P.2d 111, 120 (1985), where the court held that in determining whether a material omitted fact should invalidate the search warrant, the reviewing court should view the affidavit as if it had included the omitted fact and then determine whether the affidavit provides sufficient probable cause. Under the

totality of the circumstances, the affidavit in the instant case would have supplied probable cause even if the omitted facts were included.

A finding of probable cause was made by a neutral and detached magistrate, based on a sufficient probability that John Boggs, and reasonably no one else, committed the murders in Zephyrhills. Thus, the trial court was correct in denying the motion to suppress evidence.

ISSUE VI

THE COURT ERRED BY DENYING DEFENSE COUNSEL'S REQUEST TO EXCUSE PROSPECTIVE JUROR SMITH FOR CAUSE; REFUSING TO EXCUSE PROSPECTIVE JUROR HARRISON FOR CAUSE OR TO GRANT COUNSEL'S REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES; AND REFUSING TO EITHER STRIKE ENTIRE PANEL OR PERMIT VOIR DIRE TO DETERMINE WHO HEARD PROSPECTIVE JUROR SWART DISCUSS HER KNOWLEDGE OF THE CASE IN THE JURY POOL ROOM. (As Stated by Appellant).

A. Excusal for Cause

In response to the judge's preliminary inquiry to the jury panel, prospective juror Ethel Smith told the court she had formed an opinion about this case as a result of reading recent newspaper articles. (R 16). The court later conducted an in camera examination to pursue this matter further. Ms. Smith related what she recalled from the newspaper articles. Assistant State Attorney Phillip Van Allen asked Ms. Smith about her ability to set aside or disregard the things she had read:

> MR. VAN ALLEN: Okay. That's quite a bit of evidence that you just recited. You previously indicated that you could set aside or disregard it for the purposes of this trial and render a verdict based upon the evidence as presented.[9]
>
> PROSPECTIVE JUROR SMITH: I think I can. I feel sure that I can because I know the newspapers don't always give you everything the way it should be given.

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[9] The prosecutor was referring to a response early in the voir dire. The Court asked the prospective panel, "...will each of you base your decision in this case completely on the evidence produced during this trial and on the law without being influenced by any outside factors?" Ms. Smith indicated affirmatively. (R 29).

MR. VAN ALLEN: So it's just another opinion, correct?

PROSPECTIVE JUROR SMITH: That's right.

MR. VAN ALLEN: You indicated to Judge Cobb that based upon what you had read, you felt you had formed some kind of an opinion.

PROSPECTIVE JUROR SMITH: Yes, sir.

MR. VAN ALLEN: Since that time, you've heard a lot of questions and a lot of answers, for that matter. Can you, for the purposes of determining a verdict in this case, set aside any opinion that you may have already formed?

PROSPECTIVE JUROR SMITH: Yes.

MR. VAN ALLEN: You don't think that would be any problem?

PROSPECTIVE JUROR SMITH: No, I don't think so. I think really and truly that I could.

MR. VAN ALLEN: Okay. I've stated several times now that the, that the sole function of the voir dire examination is to find jurors that can be fair, and you previously said that you felt that you can.

PROSPECTIVE JUROR SMITH: Uh-huh.

MR. VAN ALLEN: Am I correct in making this statement, that you can render a verdict based solely upon the evidence, regardless of things that you've heard outside and disregard any preconceived notions you may have about the guilt or innocence of Mr. Boggs?

PROSPECTIVE JUROR SMITH: Yes, I can. (R 167-69).

Defense counsel Mr. Eble also conducted voir dire of Ms. Smith. Counsel asked her, "And you feel at this time, even though what you read, you can set all of that aside and start with a clear slate and presume Mr. Boggs innocent as he sits here today?" Ms.

Smith answered, "I think so. I really -- I'm sure I can." (R 173).

The defense moved to excuse Ms. Smith for cause on the basis that she had initially rendered an opinion as to Appellant's guilt. The State aruged that Ms. Smith had indicated to the Court that she formed an opinion prior to any questioning regarding her ability to set aside any opinion. However, once that area of inquiry was opened, Ms. Smith "was almost adamant about the fact that she was sure she could set aside any opinion that she had and render a verdict solely upon the evidence as presented during the course of the trial..." (R 185). The court agreed with the prosecutor's position and stated, "I understand that. Equivocation is grounds for cause for excusal, but she wasn't equivocal about it, so I think I have to deny it." (R 185). The defense then used its third peremptory challenge to excuse Ms. Smith. (R 186). Counsel for Appellant also contends in her brief that Mrs. Lillian Harrison should have been excused for cause. Mrs. Harrison's husband read a recent newspaper article and told his wife that this case involved a man who intended to murder his wife and had murdered someone else; however, Mrs. Harrison intentionally did not read that newspaper because of her upcoming jury service. (R 520-521). She also said that she heard the girls in her office discuss the case back in February. (R 521). In spite of this limited information about the case, Mrs. Harrison clearly and unequivocally stated that she had not formed any opinion and could set aside or disregard anything she heard about the case. (R 520-21). Mrs.

Harrison told the court and counsel that she would base her decision completely on the evidence produced during the trial and on the law. (R 522, 535). Mrs. Harrison also stated she could presume at that time that Appellant was not guilty. (R 530, 535).

The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court. Lusk v. State, 446 So.2d 1038,1041 (Fla. 1984), cert. denied, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984). Determining a prospective juror's competency to serve is within a trial court's discretion. Pentecost v. State, 545 So.2d 861, 863 (Fla. 1989), citing Davis v. State, 461 So.2d 67 (Fla. 1984), cert. denied, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985).

First, the trial court's denial of defense counsel's motion to excuse Mrs. Harrison for cause was entirely proper. Mrs. Harrison heard the girls in her office talk about the case in February, 1988, and also heard her husband mention the case briefly after he read about it in the newspaper. (R 520). However, she maintained throughout voir dire that she had formed no opinions about the case and could set aside anything she heard and base her decision completely on the evidence produced at trial. (R 521-22, 523, 535). She unequivocally stated that she could presume John Boggs innocent at that time. (R 530). Defense counsel requested additional peremptory challenges and also moved to excuse Mrs. Harrison for cause because she had some

knowledge of the case. (R 540). The judge denied both requests and stated as to prospective juror Harrison, "I didn't see or hear anything equivocal in her responses about how she would treat what she knows." (R 540). The court reminded counsel that Mrs. Harrison had not read the newspaper. (R 521). In fact, the Harrisons do not subscribe to a newspaper and Mrs. Harrison does not put a lot of stock in what she reads in the paper. (R 533,535). A prospective juror is not objectionable just because the juror has some knowledge of the case. Defense counsel failed to point out any indication of bias or prejudice which would justify excusing Mrs. Harrison for cause.

The trial court's denial of the defense motion to excuse Ethel Smith for cause was also proper. Although Ms. Smith originally expressed an opinion that she thought Boggs might be guilty because of the newspaper articles, she reconsidered that viewpoint and strongly asserted that she could lay aside or disregard that opinion and apply the law to the evidence before her. Ms. Smith did not waffle or equivocate, and there was no indication in the record that it would take evidence put forth by Appellant to convince her he was not guilty. See, e.g., Hamilton v. State, 547 So.2d 630,632 (Fla. 1989). The totality of the questioning supports the trial court's conclusion that Ms. Smith met the Lusk test for juror competency. Thus, it was not error to refuse to excuse Ms. Smith for cause.

Finally, Appellee submits that Appellant has failed to demonstrate prejudice. To show reversible error, a defendant must show that all peremptories had been exhausted and that an

objectionable juror had to be accepted. Nibert v. State, 508 So.2d 1 (Fla. 1987); Rollins v. State, 148 So.2d 274 (Fla. 1963). Although the defense did exhaust all peremptories in this case, at least one prospective juror (Mr. Ross) was excused by the defense pursuant to Appellant's wishes. By advising aginst this decision, defense counsel was acknowledging that this juror was not objectionable, certainly not on the grounds that the prospective juror had been exposed to unfavorable news articles. (R 91; 184).

B. Peremptory Challenges

Each party in this case was allowed ten peremptory challenges pursuant to Rule 3.350(a), Florida Rules of Criminal Procedure. Defense counsel moved for more peremptory challenges, and indicated the basis:

> MR. EBLE: Your Honor, I would indicate to the Court that in light of the number of people who have indicated that they have read about this case and formed an opinion, I think my count is approximately ten to twelve, fourteen of these jurors who have had to come in here individually and question them, sir, I would be making a motion for additional preemptory [sic] challenges in light of the fact that on some of them, although they were not excused for cause, I have had to use my peremptories [sic] to get rid of people who know about this case.
>
> THE COURT: Oh, you didn't do that, Mr. Eble. You just used them for nothing. I am not going to give you any more. (R 514).

Counsel for Appellant stated in the brief that the "judge's impression that counsel used his challenges for nothing apparently resulted from counsel's excusal of various prospective jurors that Mr. Boggs wanted excused." (Initial Brief of

Appellant at p. 69). A review of the record shows that only two peremptory challenges were influenced by Appellant's own choice. The defense used its second peremptory challenge to excuse prospective juror Mr. Ross. Counsel informed the court that Mr. Boggs, against counsel's recommendation, wanted to excuse Mr. Ross. (R 184). Later, defense counsel announced that Mr. Boggs did not want Ms. Springman on the panel. (R 431). When counsel was informed that the challenge would constitute the tenth, he asked for an opportunity to explain this to Appellant. The Court allowed counsel a short time to confer with his client. Defense counsel then told the court he had nothing further and Ms. Springman was excused. (R 432).

Later, after the court denied defense counsel's motion to excuse Mrs. Harrison for cause (see argument in subsection A above), counsel again asked for additional peremptories:

> MR. EBLE: I, again, move the Court for additional preemptories [sic] in light of the fact that Mrs. Harrison has read the newspaper, in light of the number of jurors that have read the newspaper.
>
> THE COURT: She said she had not read the newspaper.
>
> MR. EBLE: Had heard about the case either through friends or whatever, Judge. She has got some knowledge of the case and particularly what she recalls hearing is that this man came down to shoot his wife and got the wrong person. I respectfully request the Court to grant me an additional preemptory [sic] challenge in this case. (R 540)

It is well settled that the trial court has discretion to grant or deny additional peremptory challenges. See Parker v. State, 456 So.2d 436, 442 (Fla. 1984), citing Johnson v. State,

222 So.2d 191 (Fla. 1969). The mere fact that some of the thirty-three prospective jurors questioned had heard about the case from the news media was insufficient to show that a fair panel could not be chosen. Although Zephyrhills is a comparatively small commuity, the news articles about the case were apparently factual, as opposed to sensational or inflammatory. Therefore, this case is distinguishable from Jordan v. Lippman, 763 F.2d 1265 (11th Cir. 1985), where the Eleventh Circuit held that the trial court's failure to conduct a voir dire concerning prospective jurors' involvement in weekend public demonstrations in addition to the barrage of inflammatory publicity violated the defendant's rights to an impartial jury and due process. Id. at 1281. Here, there is no indication that the prospective jurors were unduly influenced by any pretrial publicity, at least to the extent that Appellant was forced to exhaust his peremptory challenges.

C. Striking the Panel

On the second day of jury selection, September 20, 1988, Donna E. Swart was called as a prospective juror. During questioning, Mrs. Swart made statements indicating her bias toward the defendant as a result of reading articles about the case. (R 464-65). She ultimately told defense counsel that she could not presume John Boggs innocent of any crime at that time. (R 511). Mrs. Swart was excused for cause. (R 513).

Also during questioning, Mrs. Swart mentioned that she and three or four other prospective jurors in the pool had discussed the case while waiting to be called in. (R 494-95, 504). Mrs.

Swart said that the prospective jurors involved in the discussion had not yet been to the courtroom where the Boggs trial was held. (R 504). She could not remember if the case was discussed the previous day, but thought the conversation mostly occurred on that present day, prior to her being called in. (R 506). Mrs. Swart could not point out any of the prospective jurors who discussed the case. (R 506). However, Mrs. Swart said that no one was really expressing an opinion as to Appellant's guilt or innocence based upon what they had read in the paper. (R 505).

After questioning Mrs. Swart in chambers, defense counsel moved to excuse her for cause and also moved to strike the prospective panel. (R 512). The court granted the motion to excuse Mrs. Swart, but refused to consider the motion to strike the panel because there were no grounds. (R 512).

Prospective juror Annile Mayes was called next. She indicated she had formed an opinion as to Appellant's guilt because of newspaper reports and discussions with her friends in her trailer park. (R 517). Because she could not lay aside these opinions, Mrs. Mayer was excused for cause. (R 518). The court would not allow defense counsel to ask her if she "heard Mayor Swart mention some discussion in the jury pool." (R 517-18). However, the judge told counsel he could question the prospective jurors as they came in if they talked about the case in the jury room or overheard any discussions. (R 519). In order to avoid tainting the prospective jurors remaining in the courtroom at that time, the prosecutor suggested that the next jurors be voir dired one at a time in chambers. (R 513-14). The

court agreed, and proceeded in that manner. (R 514).Defense counsel was allowed to question the next prospective juror, Mrs. Harrison. (R 539). Mrs. Harrison replied that she heard no discussion whatsoever about Mr. Boggs or his case. (R 539). After the twelve-member panel was chosen, Mr. Williams was called as an alternate. Defense counsel questioned Mr. Williams about what he may havae overheard and learned that Mr. Williams heard some discussion of the case outside the jury room from persons who were not prospective jurors. (R 543, 551). The defense accepted Mr. Williams as an alternate. (R 560).

The judge's refusal to strike the panel was proper. The eleven prospective jurors already selected were called in on Monday, September 19, 1988. Therefore, it was not likely that they participated in or overheard the disussion in the jury pool room. Furthermore, defense counsel was permitted to question the next three prospective jurors generally as to whether they had themselves discussed the case or overheard persons who did. There was simply no basis in this case for striking the entire panel on the ground that the prospective jurors had been improperly influenced. See Leavine v. State, 109 Fla. 447, 147 So. 897, 901 (Fla. 1933) (court did not abuse its discretion in discharging panel before general examination of members after it was shown that improper attempts to influence some members had been made.) The record in the instant case is devoid of any evidence that the thirteen chosen jurors were improperly influenced by discussions outside the oourtroom. Thus, the trial court's refusal to strike the panel was proper.

PAGE(S) MISSING

ISSUE VII

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE THAT BOGGS EXERCISED HIS RIGHT TO AN EXTRADITION HEARING. (As Stated by Appellant).

During the testimony of the State's identification witness, Pat Spurlock, the Assistant State Attorney asked if Ms. Spurlock went to Vermilion, Ohio. (R 747). Defense counsel interposed an objection to the Ohio identification because it was made during the course of an extradition hearing. Counsel argued that the jury would be aware that Appellant fought extradition, and the probative value of such evidence was substantially outweighed by its prejudicial effect. (R 748). The court overruled the objection. Ms. Spurlock testified that she was in Ohio to attend a hearing; the word "extradition" was never mentioned by that witness. (R 748).

Later in the trial, Officer Kevin Sooy of the Vermilion Police Department testified that he last saw Appellant at his "extradition hearing" in February, 1988. (R 964). This testimony was presented without objection by defense counsel.

Appellant failed to properly preserve this issue for appeal. Although defense counsel did interpose an objection to Ms. Spurlock's testimony concerning the Ohio identification of Appellant on the ground that reference to an extradition hearing would be unduly prejudicial, counsel failed to renew the objection when Officer Sooy testified later. (R 964). Only Officer Sooy made a specific reference to extradition proceedings; thus, his testimony was more conducive to an objection based on prejudice.

Except in cases of fundamental error, this Court should not consider an issue unless it was presented to the lower court. Steinhorst v. State, 412 So.2d 332, 338, (Fla. 1982) (citations omitted); Tillman v. State, 471 So.2d 32,35 (Fla. 1985). Moreover, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below. Steinhorst, 412 So. 2d at 338. In this case, defense counsel failed to object to Officer Sooy's testimony on any ground. Therefore, the objection initially made during Pat Spurlock's testimony should be considered abandoned by the defense. Moreover, Appellant can not circumvent the contemporaneous objection rule in this instance by calling the error a fundamental one. State v. Henson, 221 Kan. 635, 562 P. 2d 51 (1977), cited by Appellant, is not persuasive. The exercise of a statutory right (adjudication of extradition) is markedly different than the exercise of the constitutional right to remain silent upon arrest. See, e.g., State v. Burwick, 442 So.2d 944,948 (Fla. 1983), cert. denied, 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984) (State may not lure defendant by implicit assurance of Miranda warnings that he has right to remain silent, then use that silence against him). It is the State's position that mention of an extradition hearing is not unduly prejudicial and that no error occurred in the judge's ruling. However, even if the admission of either witness's testimony was error, and even if such error was properly preserved, it was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Pat Spurlock told the jury

that she saw Appellant at a "hearing". This was an isolated remark made in passing, and no further elucidation was offered. In light of the totality of other incriminating evidence in this case, there is no possibility that the challenged testimony contributed to the verdict. DiGuilio.

ISSUE VIII

THE TRIAL COURT ERRED BY OVERRULING DEFENSE COUNSEL'S OBJECTION TO TESTIMONY ABOUT THREATS MADE BY BOGGS MORE THAN TWENTY YEARS EARLIER AS TO WHICH NO NOTICE OF WILLIAMS RULE EVIDENCE WAS PROVIDED AND BY REFUSING TO HOLD A RICHARDSON HEARING. (As Stated by Appellant).

Appellant's former wife, Jerry Boggs, testified concerning two incidents involving threats made by Appellant prior to the couple's divorce in January, 1988. First, she positively identified the sawed-off twelve gauge shotgun (State's Exhibit B for identification), as belonging to Appellant. She said just before Christmas 1987, Appellant took that weapon into his workshop, sawed it off, then brought it back to the house and threatened to kill her with it. (R 928-29).Defense counsel objected to the admission of this evidence, which he characterized as Williams Rule.[10] Counsel requested a Richardson[11] hearing. The trial court ruled that the evidence was clearly not Williams Rule and subsequently overruled the objection and denied the request for a hearing on the matter. (R 930).

Jerry Boggs also testified that the last time Appellant saw Dean Rush he told Rush never to come back to the house and never talk to Jerry Boggs or contact her. (R 930). Defense counsel objected at that point and argued at a bench conference that the

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[10] Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). The "Williams Rule" is codified in Florida as section 90.404(2)(a), Florida Statutes.

[11] Richardson v. State, 246 So.2d 771 (Fla. 1971).

incident concerned a prior act of assault on Dean Rush twenty years ago. The court overruled the objection. Counsel again requested a Richardson hearing which was denied. (R 931). When the prosecutor asked if defense counsel was alleging a discovery violation, Mr. Eble responded, "I am alleging that, yes, there is." (R 931). Counsel thereafter returned to open court and no further inquiry was made to Jerry Boggs regarding that prior incident.

Gerald Dean Rush testified next. He stated that he and Jerry Boggs had been childhood sweethearts beginning around 1952. In 1965, while Jerry Boggs was married to Appellant, Appellant caught Jerry Boggs and Dean Rush together in the Boggs house. Appellant made Dean Rush promise not to come back and see Jerry Boggs anymore. (R 952-53). Appellant told Dean Rush he would kill Rush if he broke that promise. (R 953). Defense counsel objected on the same Williams Rule grounds and moved for a Richardson hearing. The judge overruled the objection and denied the motion for a Richardson hearing. Dean Rush continued to describe the event. He said Appellant approached him in the kitchen of the Boggs residence, put a .22 caliber revolver between Rush's eyes, and told Rush he would kill him if Rush ever saw Jerry Boggs or came to his house again. (R 954). Defense counsel made the same objection and the court issued the same ruling. (R 954).

The trial court correctly ruled that the testimony concerning the 1965 incident in which Appellant threatened to kill Dean Rush and put a gun between Rush's eyes was not Williams

Rule evidence and was therefore not subject to the ten-day notice requirement of section 90.404 (2)(b), Florida Statutes.

The prior threat to kill Dean Rush was not similar fact evidence of a separate, collateral crime as encompassed in Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959) and its progeny. Rather, the 1965 event was inextricably interwoven with the murders at issue in the instant case. Appellant threatened to kill Dean Rush if he ever saw or contacted Jerry Boggs again. Several years later, prior to the Boggs' divorce, Jerry Boggs and Dean Rush rekindled their relationship and Appellant renewed his threat to kill Rush on several occasions just before the murders were committed. The evidence at trial showed that Appellant sought out Dean Rush and Jerry Boggs in Florida but intentionally gunned down Harold Rush and Nigel Maeras instead. Even though the challenged testimony indicated the commission of an assault or battery, the evidence regarding the earlier threat did not bring before the jury unrelated bad acts of Appellant. Rather it served to reveal Appellant's motive and intent and served to identify him as the perpetrator. Gorham v. State, 454 So.2d 556, 558 (Fla. 1984), cert. denied, 469 U.S. 1181, 105 S.Ct. 941, 83 L.Ed.2d 953 (1985); Tumulty v. State, 489 So.2d 150,153 (Fla. 4th DCA 1986), quoting Erhardt, Florida Evidence, §404.16 at 138 (2d ed. 1984). The testimony in this case, whether characterized as "res gestae" or inseparable crime evidence, is admissible because it is relevant. All relevant evidence is admissible unless its probative value is substantially outweighed by unfair prejudice.

Gorham, 454 So.2d at 558; sections 90.402 and 90.403, Florida Statutes (1987). There was no unfair prejudice in the case at bar. Evidence of prior fights or altercations between a defendant and the victim, if the relationship between the defendant and the victim is at issue, is admissible. King v. State 545 So.2d 375, 379 (Fla. 4th DCA 1989), rev. denied, 551 So.2d 462 (1989).

Moreover, "inseparable crime" evidence does not fall under the ten-day notice provision of section 90.404(2)(a). Platt v. State, 551 So.2d 1277 (Fla. 4th DCA 1989). Defense counsel's allegation that the State somehow committed a discovery violation, necessitating a hearing pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971), is not clear. Counsel did not elaborate on his reasons for the request. (R 931). The proper approach would have been for the defense to file a motion in limine seeking to exclude the objectionable testimony. In any event, it is evident from the record that counsel was well aware of Dean Rush's anticipated testimony from the defense's use of Rush's deposition in an attempt to impeach him. (R 958). The trial court properly allowed the evidence of Appellant's threat to kill Dean Rush in 1965.

ISSUE IX

> OVER DEFENSE OBJECTION, THE JUDGE PERMITTED THE STATE'S FIREARM EXPERT TO COMPARE THE SIZE OF A SHOTGUN BARREL TO THE SIZE OF THE HOLE IN HAROLD RUSH'S STOMACH BY LOOKING AT A PHOTOGRAPH OF THE VICTIM'S WOUND AFTER IT WAS MEDICALLY CLOSED. (As Stated by Appellant).

During the direct examination of the State's firearms expert, Joseph Michael Hall, the Assistant State Attorney showed the witness a photograph of the wound in Harold Rush's abdomen. (R 1080). Dr. Charles Albert Diggs, Deputy Associate Medical Examiner of Hillsborough County, who performed the autopsy on the body of Harold Rush, earlier testified that the cause of the victim's death was a shotgun wound of the chest. (R 708). The prosecutor asked Mr. Hall if he had seen wounds like that before, and on how many occasions. Mr. Hall answered:

> As I gave my qualifications earlier, I was employed with the Hamilton County Coroner's Office which is the morgue and I was able to see shotgun wounds on numerous occasions. The exact number of times, I do not have a record of, but I did in fact see shotgun wounds along with rifle and handgun wounds also. (R 1080).

Mr. Van Allen (Assistant State Attorney) then asked the witness if he had an opinion as to what implement or instrument would have caused the wound. Defense counsel objected on the basis that the witness was not competent or qualified to give such an opinion. The defense was permitted to voir dire the witness. (R 1081). In voir dire, Mr. Hall explained that as part of his field of discipline, he test-fires weapons to determine the spread patterning of firearms. (R 1082). Mr. Hall did admit,

however, that he did not perform any patterning tests with the double barrel shotgun that belonged to Appellant and was alleged to be one of the murder weapons. (R 1082-83). The court overruled defense counsel's objection to the witness's qualifications and the direct examination resumed:

> BY MR. VAN ALLEN [ASSISTANT STATE ATTORNEY]:
> Q. Mr. Hall, I believe the question was do you have an opinion as to what type of weapon caused that wound.
>
> A. I could not rule this wound as being inconsistent with being caused by a shotgun but obviously I could not say that positively.
>
> Q. You weren't there? You didn't see it happen? All you are looking at is a picture of a man who has got a hole in him?
>
> A. That's correct.
>
> Q. Let me ask something else to you. If the testimony were such that -- assume these facts, if you will, for this hypothetical question: At the time of this surgery on that individual, twenty-nine number six shot shells or pellets were removed from his abdominal cavity and Dr. Diggs of the medical examiner's office said that it appeared to him as though the injury was caused by a shotgun blast, now look at that picture, based upon that hypothetical, do you have an opinion as to what caused that wound?
>
> A. I would tend to agree with Dr. Diggs' reasoning or his answer with being caused by a shotgun, if nothing else, with a removing of the shotgun pellets, themselves, and of course the size of the hole.
>
> Q. Number 16, a shotgun, side by side shotgun in front of you, that weapon loaded with number six shot, loaded, fired into a person like that there, is that capable of making that kind of hole?
>
> A. This could cause this kind of wound, yes, it could. (R 1083-84).

Defense counsel voiced another objection at this point, claiming that the witness had no basis for making a spread pattern comparison or analysis. The objection was overruled. (R 1084-85). Questioning resumed:

> Q. (By Mr. Van Allen). Let's talk about Mr. Eble's area a moment. Why is the spread pattern -- what has -- what importance does the spread pattern have?
>
> A. In relation to what? The wound, itself?
>
> Q. Anything.
>
> A. As far as it has a bearing as far as the muzzle to garment distance. What I would base the muzzle to garment distance on in the case of shotguns is, first of all, the central defect and the hole and also does there appear to be any scattering of individual pellets. Now, once I develop a pattern, what I would try to duplicate would be that pattern, itself, using the submitted shotgun with the same type of ammunition involved.
>
> Q. Okay. Now, let's talk in this particular case, by looking at that shotgun and looking at that particular -- can you tell us how far that gun was from the person who was shot?
>
> A. No, sir, I can't.
>
> Q. No way, right?
>
> A. That's correct.
>
> Q. Can you say, though, taking into consideration the wounds on that man, that that shotgun could have caused it? Number 16, that shotgun right there.
>
> A. Yes, sir. It could have. (R 1085-86).

Whether or not a witness is a qualified expert permitted to give opinion testimony is generally within the discretion of the

trial judge. Myers v. Korbly, 103 So.2d 215 (Fla. 2d DCA 1958). The court has wide discretion concerning the admissibility of evidence and the subjects about which an expert can testify, and the ruling should not be disturbed in the absence of an abuse of discretion. Stano v. State, 473 So.2d 1282, 1287 (Fla. 1985), cert. denied, 474 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986). Furthermore, an expert's admissible testimony need not be a certainty. Benson v. State, 526 So.2d 948 (1988), rev. denied, 536 So.2d 243 (Fla. 1988), cert. denied, ___U.S.___, 109 S.Ct. 1349, 103 L.Ed.2d 817 (1989). Appellee contends that there was no abuse of discretion in this case in allowing Joseph Michael Hall, a senior crime laboratory analyst in the firearms and tool marks section of the Florida Department of Law Enforcement, to render an opinion that Appellant's shotgun could have caused the victim's fatal wound.

Section 90.702 of the Florida Evidence Code provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or eduction may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

It was clear in this case that Michael Hall's expert opinion, based on his knowledge and experience in the area of firearms and gunshot wounds, aided the jury in determining whether the sawed-off double barrel twelve gauge shotgun found in Appellant's attic in Ohio was the weapon that caused Harold Rush's fatal wound. In spite of th fact that Mr. Hall had not

performed any actual patterning tests on the shotgun in evidence, he did test-fire the weapon in order to check for proper functioning. (R 1051). Most importantly, Mr. Hall had the benefit of knowing that twenty-nine number six buckshot pellets were removed from the victim's abdominal area and that the medical examiner, Dr. Diggs, opined that Mr. Rush died from the shotgun blast. These underlying facts, combined with Mr. Hall's experience with various gunshot wounds, provided a sufficient factual basis for determining whether Appellant's shotgun could have caused the wound shown in the photograph of Harold Rush. Huff v. State, 495 So.2d 145 (Fla. 1986), cited by Appellant, is dissimilar. In Huff, this Court upheld the refusal of the trial court to allow the testimony of a retired police officer as to whether there had been a proper investigation of the crime scene because the witness had neither visited the crime scene nor read the testimony or reports of the investigating officer. Id. at 147-48.

Moreover, the subject of the expert's testimony in this case was beyond the common understanding of the average layman. Compare, Ortagus v. State, 500 So.2d 1367, 1371 (Fla. 1st DCA 1987) (Expert would only testify to close proximity of defendant to victim at time of shooting, a fact established by other evidence and not beyond common understanding of laymen). The witness in the instant case stated that knowledge of spread pattern was necessary to determine the distance of the gun from the victim when it was fired. (R 1085). Because Mr. Hall lacked information about the spread pattern of the particular shotgun at

issue, he was unable to give an opinion as to proximity. (R 1085-86). However, the expert was quite firm in his opinion that the Appellant's shotgun could have caused Mr. Rush's death. In view of Mr. Hall's qualifications, and the existence of a sufficient factual basis to support his opinion, the trial court did not abuse its discretion in allowing the testimony.

ISSUE X

THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTOR TO ARGUE TO THE JURY THE PENALTIES FOR THE LESSER INCLUDED OFFENSES. (As Stated by Appellant)

During the jury charge conference on September 23, 1988, the judge advised counsel of his intent to instruct on the maximum and minimum penalties for the first-degree murder charges in Counts One and Three:

> THE COURT: . . .And I intend to give maximum and minimum penalties only for the --
>
> ME. EBLE [DEFENSE COUNSEL]: Murders.
>
> THE COURT: -- murders.
>
> MR. EBLE: And their lessers?
>
> THE COURT: And the lessers, right. The State usually objects to the lessers.
>
> MR. VAN ALLEN [ASSISTANT STATE ATTORNEY]: Yes, sir. And since we usually do, we will in this case, too. (R 1180).

The Court did instruct the jury as anticipated:

> Let me now inform you of some of the maximum and minimum possible penalties in this case. The penalty is for the Court to decide. You are not responsible for the penalty in any way because of your verdict. The possible results of this case are to be disregarded by you as you discuss your verdict. Your duty is to discuss only the question of whether the State has proved the guilt of the Defendant in accordance with these instructions.
>
> The only penalties allowed for murder in the first degree are either life imprisonment without eligibility for parole for twenty-five years or death. The maximum penalty for the charge of murder in the second degree is life imprisonment. The maximum penalty for the crime of murder in the third degree is fifteen years imprisonment. The maximum penalty for the crime of manslaughter is fifteen years imprisonment.

> If you find the Defendant guilty of murder in the second degree, murder in the third degree or manslaughter, I have the discretion to sentence him to less than the maximum or to place him on probation. (R 1304-05).

In closing argument, the Assistant State Attorney informed the jury that they were not supposed to consider the penalties in arriving at a verdict, but explained that he was "going to use the penalties a little bit in order to explain to you the idea of lesser included offenses and murder." (R 1226). The prosecutor began by outlining the elements of manslaughter and gave an example for the jury's edification. He ended the manslaughter explanation by stating the penalty for that crime. (R 1226). Defense counsel, Mr. Eble, objected to this line of argument. Mr. Eble posited that the reference to penalties in that fashion was over emphasizing the penalties; it was an improper reference to punishment. (R 1227). The judge overruled the objection. Mr. Van Allen went on to discuss the elements of third-degree murder and second-degree murder, giving examples in each case. (R 1227-28). The prosecutor also briefly referred to the possible penalties for those two lesser crimes. (R 1228).

Appellant now claims that the court erred in allowing the prosecutor to refer to the penalties for the lesser included offenses of first-degree murder. Appellee does not necessarily agree, but will assume, arguendo, that the trial court should not have instructed on the penalties for the lesser-included crimes. See, Kocsis v. State, 467 So.2d 384,385 (Fla. 5th DCA 1985), rev. denied, 475 So.2d 695 (Fla. 1985) (Rule 3.390(a), Florida Rules of Criminal Procedure, as amended, prohibits jury instruction on

sentences for noncapital offenses). Be that as it may, a review of the record shows that defense counsel, by asking the judge if he was going to provide instructions on the penalties for the lesser included offenses, and thereafter failing to object, has at most invited the error and at least acquiesced in the court's decision. A defendant may not make or invite an improper comment or argue a position and later seek reversal based on that comment or on a contrary position. Clark v. State, 363 So.2d 331,335 (Fla. 1978); Sapp v. State, 411 So.2d 363, 364 (Fla. 4th DCA 1982). However, even if defense counsel's comment to the court in this case, "And their lessers?" is not fairly construed as invited error, counsel's failure to object or present argument to the court precludes review of this issue on appeal. Craig v. State, 510 So.2d, 857 (Fla. 1987), cert. denied, ___U.S. ____, 108 S.Ct. 732, 98 L.Ed.2d 680 (1988). This Court in Craig, citing to Rule 3.390(d), Florida Rules of Criminal Procedure, stated, "While defense counsel only requested penalty instructions on the charged offenses of first-degree murder, the charge conference transcript shows that he did not make the specific objection, stating grounds, and the argument of prejudice that Appellant makes now." 510 So.2d at 865. Consequently, the error alleged in Craig, like the case at bar, was not preserved for appeal.

Counsel for Appellant points out in the brief that the "basis of our argument in this issue, however, is not the judge's instruction but, rather, the prosecutor's use of the instruction to argue maximum and minimum penalties to the jury in conjunction

with his examples of the lesser included offenses." (Initial Brief of Appellant at p. 87). Appellant should not be heard to complain about the State's explanation to the jury of the lesser included offenses and their possible penalties after failing to challenge the court's jury instructions. The prosecutor, in closing argument, is allowed to comment upon the law of the case and the facts in evidence. The basis for the objection below was that Mr. Van Allen was over emphasizing the penalties and making an improper reference to punishment. (R 1227). This challenge was without merit. The prosecutor ended his discussion of each of the three lesser included offenses with a single sentence describing the possible penalty. (R 1226-28). The trial court committed no error in allowing the prosecutor's argument.

ISSUE XI

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTION TO ATTACK DEFENSE COUNSEL DURING CLOSING ARGUMENT. (As Stated by Appellant).

Appellant contends that the Assistant State Attorney attacked defense counsel three ways during closing argument. Specifically, he claims the prosecutor argued that the defense failed to produce witnesses and evidence that were available, accused defense counsel of misleading the jury and creating a smoke screen, and mimicked one of Boggs' lawyers. Appellee will address each of these contentions in order.

A. Failure to Produce Witnesses and Evidence

Co-counsel for the defense, Mr. John Carballo, made several references in the first part of closing argument to the State's failure to produce certain witnesses and evidence:

> MR. CARBALLO:. . .She looked at the four booking or jail photographs and then she ses the one from up north, the outdoor picture of the only person over forty years of age and she had comments to make about that, her observations, and she wrote them on the back of the picture or the photograph of John Boggs. At the time she looked at it, she wrote it down on the back. Well, you all don't have that, do you? Where is that photograph and where is that photo pack? That is not here in evidence.[12] (R 1199-1200).
>
> . . .
>
> . . .And then he [State's witness William Ferguson] tells you that the plaster casts weren't good for comparison or something to that effect. Mr. Oral Woods said that. Florida Department of Law Enforcement, crime

[12] Defense counsel was referring to the photopack display from which Pat Spurlock identified Appellant's picture and marked on the back that she was 75 per cent certain he was the man in her office. (R 1615-16).

> scene technician specializing in that sort of thing, Mr. Oral Wood wasn't here to tell us that. Mr. Oral Wood wasn't here to give us the opinion, the best he could on it. Do you think for a moment that if Mr. Oral Wood could have said possibly it was made by Mr. Boggs' truck, don't you think they would have had him here to say that? Keep in mind, they took tire truck standards from Mr. Boggs' vehicle up in Ohio. They paint the tires and roll them on a piece of paper. There you go. There's the tread pattern. You put one here and you put a photograph here and you look at them. Now, I am not an expert. Mr. Wood is an expert. But that wasn't brought in. There was no mention that, well, he couldn't use photographs. They were completely kept aside. (R 1204-05).
>
> . . .
>
> She [Jerry Boggs] made another or an allegation of another so-called threat by John referring to Dean and her testimony was that Brandy Boggs, her son, and Tina Boggs, his -- well, they are not really married, but I think she was in -- her name was read on the witness list as Tina Detrich Boggs, perhaps. But Brandy and Tina were both there. Well, where were they? They weren't in this chair telling you all about that. If John Boggs said that and there were witnesses that heard that, I submit they would have all been there. Their names were read but they didn't testify. (R 1212-13).

The Assistant State Attorney, Mr. Phillip Van Allen, responded to defense counsel's remarks in the State's closing argument:

> MR. VAN ALLEN: Now let me tell you something about the capability of that guy [MR. CARBALLO] over there. If he's so interested in you seeing this photo pack, all he has got to do is put it in evidence. It's right here. And if he wanted it, he could have laid it right here and said: Look how different they are. But you don't have it. You'll never see any more of it than this right here.
>
> Oral Woods. If they would have wanted Oral Woods, they could have put Oral Woods up here and let him say they didn't match. I

worked for the State Attorney's Office. I prosecuted cases. I have been prosecuting cases. I am an officer of this Court. I have subpoena power. I can bring anybody from this country to this courtroom any time I want to do it. Okay? That guy right there, he is an officaer of this Court. He's got the same subpoena power. He can bring the same people at the same time I do.

Now, if Oral Woods is going to come in here and say they didn't match, let him bring him. But let's do it even better. This is Oral Woods' report, bandied about all during this trial. We've asked Ferguson what were the results. He said there were insufficient points of comparison in order to make a determination. Here's a report. Let the jury see it. "Objection." If he wants you to see it, here it is. All he had to do was put it in evidence.

MR. EBLE [Co-counsel for Appellant]: Your Honor, may we approach the bench? That's an improper comment on an objection.

THE COURT: Objection is overruled.

MR. VAN ALLEN: Thank you very much. He wanted Brandy Boggs to come in and say these threats never happened, let him use a subpoena. He was here. Bring him in and testify. Tina was present, why didn't she come in and say they didn't occur, bring her in and let her say it didn't happen. It's not in evidence.

What does it mean? It's just not there. You can't consider it.

If he wants to insinuate that the -- that Mrs. Boggs or Amber Boggs or somebody would have said something different than what Mrs. Boggs said they would have, he had the same power to bring them in here and let them say that.

He talked about pictures of tire impressions. He walked around this courtroom waving them around. If he would have wanted you to see them, move to admit this into evidence so the jury can see it. But they are still stuck in a box someplace. It's not in evidence. (R 1245-46).

Appellant now contends that the trial court erred in allowing the Assistant State Attorney to comment in closing argument upon Appellant's failure to produce witnesses and evidence. This matter has clearly not been properly preserved for appeal. A review of the transcript shows that defense counsel objected only once during the prosecutor's discussion about evidence or witnesses that both parties failed to produce. (R 1245-46). The objection was not directed to the State's comment upon the ability of the defense to subpoena witnesses, but merely referred to the State's allegedly improper comment upon an earlier defense objection. (R 1245-46).

When alleged improper comments are made during closing arguments and where no objection or motion for mistrial is made, the issue is not preserved for appeal. State v. Cumbie, 380 So.2d 1031,1033 (Fla. 1985); Clark v. State, 363 So.2d 331, 335 (Fla. 1978). In Duest v. State, 462 So.2d 446, 448 (Fla. 1985), this Court held that the proper procedure to follow when the prosecutor makes allegedly objectionable comments is to object and request an instruction from the court that the jury disregard the remarks. In the case sub judice, defense counsel failed to state a specific objection on the grounds raised here, and he completely failed to request curative instructions or move for mistrial. Accordingly, this issue is not properly before this Court.

Had the matter been preserved, however, the State submits that Appellant's argument is without merit. The prosecutor's

reference to the defense's subpoena power and equal ability to present evidence or witnesses was not only an accurate statement, but was offered in fair rebuttal to defense counsel's repeated references to the evidence or witnesses that the State failed to produce. (R 1199-1200, 1204-05, 1212-13). See. e.g., Cook v. State 391 So.2d 362, 363 (Fla. 1st DCA 1980); Dixon v. State, 206 So.2d 55,58 (Fla. 4th DCA 1968); United States v. Ivey, 550 F.2d 243, 244 (5th Cir. 1977), cert. denied, 431 U.S. 943, 97 S.Ct. 2662, 53 L.Ed.2d 263 (1977). The prosecutor's comments here were invited by defense counsel and were not prejudicial to a fair trial. Dixon, 206 So.2d at 58. State v. Michaels, 454 So.2d 560, 562 (Fla. 1984) and Buckrem v. State, 355 So.2d 111, 112 (Fla. 1978), cited by Appellant, are inapposite. The Michaels/Buckrem line of cases involve situations where the State, without initial comment by the defense, refers in closing argument to the defendant's failure to produce a witness who could have provided relevant, material evidence to support the defendant's affirmative defense.

B. Attacks on Defense Counsel

Apparently in response to defense counsel's several references to missing evidence and witnesses, the Assistant State Attorney cautioned the jury that their "verdict has got to be based on the evidence not on misleading insinuation, not on a smoke screen. Don't be blinded by comments that are not based upon the evidence."[13] (R 1247). Mr. Van Allen continued:

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[13] Earlier, during the closing argument for the defense, Mr. Caraballo told the jury regarding the large quantity of ammunition found in Appellant's home, "So what? I have

If you find John Boggs not guilty because we haven't proven that he's guilty, then justice has been done. If you find him not guilty because you are misled, deceived or fooled by comments not supported by the evidence, then justice is not done.

MR. EBLE: Your Honor, it appears that Mr. Van Allen is trying to put Mr. Carballo on trial here.

MR. ALLWEISS: I would object to comments like this.

THE COURT: I'm going to ask you not to make any more comments. If you have something, ask to approach the bench, Mr. Eble.

MR. EBLE: May we approach the bench, judge?

THE COURT: Yes, sir.

(Bench conference.)

MR. ALLWEISS: We ask the comments be stricken and counsel be admonished from doing that, Judge.

MR. VAN ALLEN: I think that has been done.

MR. ALLWEISS: Judge, the reason, Mr. Eble has tried many cases in this Court, there has been a constant, constant pattern on their part to make improper comments before the jury and I think the Court --

THE COURT: I don't think any further admonishment would be necessary, appropriate.

MR. EBLE: I think the case law is legion on putting a defense lawyer on trial and suggesting to the jury that he's trying to

---

ammunition at home, too." Mr. Carballo also argued to the jury, "He [Appellant] had ammunition, yeah. He had shotguns. He used to hunt. So what?" (R 1208). The Court sustained the State's objection to defense counsel's reference to Mr. Boggs being a hunter and to defense counsel's ammunition at home because neither fact was in evidence. (R 1209)

> deceive them, trying to put up a smoke screen, trying to lie to them.
>
> For the last minute and a half, that's all Mr. Van Allen has done was to try to put Mr. Carballo on trial here and suggested to this jury that he's trying to deceive them and lie to them. Those comments are improper. They have no business in the courtroom and that's what the case law says.
>
> I would ask that he be admonished about those type of comments. I would also like the record to reflect that at times he walks around mimicking Mr. Carballo. Judge, I don't think that's appropriate and I don't think it's professional.
>
> THE COURT: I find nothing improper about Mr. Van Allen's comments, Mr. Eble.
>
> MR. EBLE: Is the Court ruling that smoke screen and lying --
>
> THE COURT: I'll ask him not to mimic Mr. Carballo any further.
>
> MR. VAN ALLEN: Yes, sir.
>
> MR. EBLE: Thank you, Judge.
>
> MR. ALLWEISS: Thank you, Your Honor. (R 1247-49).

In regard to the prosecutor "mimicking" defense counsel, Mr. Carballo, the State contends that no reversible or harmful error occurred. The record does not reflect the exact nature of the Assistant State Attorney's alleged actions. However, the court instructed Mr. Van Allen not to mimic Mr. Carballo any further, and Mr. Van Allen apparently complied. (R 1249).

The remarks directed to the jury about not being misled by defense counsel's insinuations and smoke screen were again made in response to defense counsel's reference to missing evidence and witnesses.

Defense counsel had insinuated to the jury that certain evidence not before them would have exculpated the defendant, that being the reason the State did not produce this evidence. In addition, defense counsel earlier referred to matters totally outside the evidence. (R 1209). The State countered these arguments by warning the jury that their "verdict has got to be based on the evidence . . . Don't be blinded by comments that are not based upon the evidence." (R 1247). The prosecutor's comments constituted a fair reply to defense arguments. Thus, the judge was correct in stating, "I find nothing improper about Mr. Van Allen's comments, Mr. Eble." (R 1249). In any event, the remarks at issue did not rise to the level of the egregious, inflammatory, and unfairly prejudicial comments that would merit a new trial. See, e.g., Garron v. State, 528 So.2d 353, 358-59 (Fla. 1988). Additionally, this issue has not been properly preserved for review. Defense counsel did object on specific grounds; however, he failed to request curative instructions or move for a mistrial. Duest, supra, at 448; Cumbie, supra, at 1033; Clark, supra, at 333.

C. Cumulative Error

Appellee asserts that no errors occurred as alleged by Appellant. Even if any error did exist, however, they were insufficient, even if considered cumulatively, to deprive Appellant of a fair trial. A defendant is entitled to a fair trial, not a perfect one. Lackos v. State, 339 So.2d 217, 219 (Fla. 1976).

ISSUE XII

THE TRIAL COURT ERRED BY FAILING TO USE GUIDELINES SCORESHEET TO SENTENCE BOGGS FOR THE NON-CAPITAL FELONIES. (As Stated by Appellant).

The State recognizes this Court's decision in Rutherford v. State, 545 So.2d 853, 857 (Fla. 1989), cert. denied, ___U.S.___, 110 S.Ct. 353, 107 L.Ed.2d 341, holding that the trial court should prepare a guidelines scoresheet when sentencing a defendant for noncapital felonies. However, Appellee respectfully suggests that this matter be revisited. In this and similar cases, remand for preparation of a scoresheet is unwarranted because the trial court could have, and undoubtedly would have, departed upward to the statutory maximum for the noncapital felonies on the basis of the two unscored convictions for first-degree murder. Id. Hansbrough v. State, 509 So.2d 1081 (Fla. 1987).

ISSUE XIII

THE TRIAL COURT ERRED BY FINDING THAT THE HOMICIDES WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION. (As Stated by Appellant).

As his next point on appeal, Appellant contends that the trial court erred by finding that the homicides were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. For the reasons expressed below, the murders committed in the instant case epitomized the aggravating circumstance at issue here and, therefore, Appellant's point must fail.

Appellant premises his argument on the notion that the trial court engaged in speculation regarding the defendant's motives for committing the twin homicides. The record of the instant case belies Appellant's contentions. To the contrary, the record reveals nothing but the heightened premeditation necessary to find the murder to have been committed in a cold, calculated, and premeditated manner. As was the case in this Court's recent decision of Brown v. State, 565/304 15 F.L.W. S165 (Fla. March 22, 1990), the instant killing was "nothing less than an execution." The day of the defendant's divorce from Jerry Boggs, the defendant threatened that he was going to "kill that bastard, Dean" (Dean Rush, Jerry Boggs' male friend). The defendant also threatened to kill Mrs. Boggs. (R 925) Subsequently, after Mrs. Boggs had moved to Florida, she conferred with the defendant via telephone and the defendant reiterated that he was going to "kill that bastard, Dean." (R 924) Shortly thereafter, the defendant

departed Ohio to come to Florida to search for Mrs. Boggs and Dean Rush. Appellant brought with him a .12 gauge shotgun which Appellant, just before Christmas in 1987, took into his workshop, sawed off, and then brought back to the house and threatened to kill Mrs. Boggs with it. (R 928 - 929) During the time Appellant was driving over one thousand miles in order to kill, Pat Cantor, a friend of Mrs. Boggs in Ohio, called Jerry Boggs to warn that Appellant's camper truck had been missing from his house for a period of time (R 895 - 896). This call was made because of prior arrangements between the two women so that Mrs. Boggs would be warned if Appellant was coming to kill her (R 914 - 916). Mrs. Boggs called the Pasco County Sheriff's Office to report that her ex-husband was on his way to kill her. (R 920) Thereafter, Mrs. Boggs got a phone call from Appellant who stated, "I seek. I seek. I seek." Mrs. Boggs hung up and called the Sheriff's Office again to advise that she believed her ex-husband was looking for her. (R 921 - 922)

Upon arriving in Florida, Appellant called Pat Spurlock at her offices at Oaks Royal and Colony Hills Mobile Home Parks asking for a resident by the name of "Boggs" or "Rush." Ms. Spurlock advised that they had someone named Rush at Colony Hills. (R 734 - 735) Other witnesses testified that they also received calls at other mobile home parks from a man looking for a "Boggs" or a "Rush." (R 718 - 719, 725 - 727) On the afternoon of February 10, 1988, Appellant came to Ms. Spurlock's office to get the address of "Rush." That evening, Appellant went to the "Rush" residence with a mask over his face (R 771) and killed Nigel Maeras and fatally wounded Harold Rush.

The brief recitation of the facts set forth above clearly shows that there is no speculation involved in this case as to whether Appellant coldly set out to kill. Contrary to Appellant's assertion in his brief, the cold, calculated and premeditated aggravating factor is not limited to execution or contract murders or witness-elimination murders. Rutherford v. State, 545 So.2d 853 (1989), cert. denied, ___U.S.___, 110 S.Ct. 353, 107 L.Ed.2d 341 (1989). In Rutherford, this Court indicated that when there is evidence of calculation (previously defined as consisting of a careful plan or prearranged design) the aggravating circumstance is sustained. In the instant case, Appellant left Ohio bearing a sawed-off shotgun, located his victims through conversation with Pat Spurlock, and thereafter proceeded to the trailer and executed his victims. Contrary to Appellant's speculation and conjecture argument in his brief at page 95, it is clear that Appellant located his victims and then executed the murders the same evening. As was the case in Middleton v. State, 426 So.2d 548, 553 (Fla. 1982), 463 U.S. 1230, 103 S.Ct. 3573, 77 L.Ed.2d 1413 (1983), "the cold-blooded, calculation of the murder went beyond mere premeditation."

Appellant also relies on Amoros v. State, 531 So.2d 1256 (Fla. 1988), for the purported notion that his previous threats to his wife and Dean Rush cannot be transferred to the victims of the instant homicide. Amoros is inapposite to the instant case. There, the defendant threatened to kill his girlfriend and was unaware that the victim, the girlfriend's present boyfriend, was in the girlfriend's house at the time. In the instant case,

however, Appellant obtained the name of "Rush" from Pat Spurlock and proceeded to the given address and commenced the execution-style slayings. The evidence reveals that Appellant intended to kill those who resided in the trailer and, therefore, there was no transferred intent.

This Honorable Court has refused to sustain the finding of the cold, calculated and premeditated aggravating factor in situations where, for example, a robber is startled into attacking a victim. Here, however, Appellant armed himself, drove over one thousand miles, methodically attempted and succeeded in locating the residence of a "Rush", and entered late at night to commit murder. Appellant did not, as suggested in his brief at page 95, seek out his ex-wife in an attempt to persuade her to return to him. Appellant did not confront Jerry Boggs or Dean Rush in the afternoon when he learned the address. Rather, he waited until the early morning hours, after the trailer residents had gone to sleep, to break into the targeted trailer. The record sub judice does not reflect uncontrolled action or rage, but rather reflects a cold, prearranged plan to commit murder.

As a final thought, Appellant contends that he had a "pretense of legal and moral justification" for killing where he was so distraught over the relationship which existed between his ex-wife and Dean Rush. Apparently, Appellant believes that emotional upset after a divorce prevents the finding of an aggravating circumstance. His reliance on Banda v. State, 536 So.2d 221 (Fla. 1988), is clearly misplaced. Compare Banda with

Williamson v. State, 511 So.2d 289 (Fla. 1987). In the instant case, there was no threat by Mrs. Boggs or by Dean Rush which would support at least a pretense of justification. Rather, the instant record reflects a jilted husband who coldly set about for revenge. These facts only justify the trial court's finding of the cold, calculated, and premeditated aggravating circumstance.

ISSUE XIV

THE TRIAL COURT ERRED BY BASING HIS WRITTEN FINDINGS IN SUPPORT OF THE DEATH PENALTY ON CONJECTURE AND SPECULATION AND FAILING TO CONSIDER AND DISCUSS ALL OF THE MITIGATION. (As Stated by Appellant)

Appellant contends that the trial court improperly engaged in speculation and conjecture in his written sentencing order to support the imposition of the death penalty in this case. Appellee submits, however, that the court's presentation of alternative theories was not speculation, but was solely based upon the evidence presented at both phases of the trial. The court's analysis was in response to the defense argument that the death sentence was not proportional. Defense counsel argued that the evidence shows that Appellant intended to kill his ex-wife and her lover and killed innocent people only by mistake and should not be held responsible for this mistake in the determination of his sentence. (R 1887). The State argued, on the other hand, that this was not a domestic dispute case entitling Appellant to the proportionally lesser sentence of life imprisonment because Appellant knew or should have known he was killing the wrong people after he was in the dwelling, but before he pulled the triggers on his two weapons. The physical differences between the innocent victims and the intended victims, the amount of light available in the trailer, and the presence of Harold Rush's automobile with Illinois license tags was brought out at trial and discussed in the sentencing order. (Also see Issue XV of this brief). The evidence clearly supports the finding that Appellant knew he was killing innocent people

and therefore vitiates the proportionality argument of the defense.

The trial court's analysis, which Appellant calls "speculation," actually addresses the question, "When did Appellant realize he was killing innocent people?" The court was inclined to believe that Appellant broke into the trailer with the intention of shooting the wrong people to intimidate his ex-wife. (R 1886). Of ocurse, the other alternative, as posited by the State, was that Appellant thought he had located the residence of Dean Rush and Jerry Boggs, but realized after he broke in and confronted Harold Rush and Betsy Ritchie that he was in the wrong trailer. Appellant gunned down three people anyway. This case is distinguishable from Hamilton v. State, 547 So.2d 630 (Fla. 1989), cited by Appellant on the speculation issue. In Hamilton, the trial court apparently based the aggravating factors of heinous, atrocious, or cruel and cold, calculated, and premeditated on a detailed description of events for which there was little or no evidence in the record. Id. at 633. In the instant case, the details of events are known. The only remaining issue, concerning the point in time when Appellant realized he was killing the wrong people, does not affect the cold, calculated and premeditated aggravating factor in this case. In any event, as the judge correctly stated, either scenario distinguishes this case from those cases supporting the proportionality argument of the defense. (R 1888).

The trial court found two mitigating factors in this case: (1) Appellant had no significant history of prior criminal

activity, and (2) Appellant was under the influence of some emotional disturbance at the time of the murders. As counsel for Appellant correctly notes, the trial court did not have the advantage of the guidelines established in Campbell v. State, 15 FLW S342 (Fla. June 14, 1990). The State submits that the procedure announced in Campbell requiring the court to "expressly evaluate in its written order each mitigating circumstance proposed by the defendant" does not apply in this case. 15 FLW at 5344. Even if these guidelines apply, however, Appellee contends that the failure of the trial court to discuss all the proposed mitigating factors is harmless, because the factors were not established by the evidence or, in the case of nonstatutory factors were not truly mitigating in nature. See Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). Moreover, even if the proposed mitigators had been found by the trial court, they would have been given little weight by the court in light of the circumstances of the crimes.

Appellant's age was never in evidence. (R 1479). However, Appellant was apparently 55 years old when the offenses were committed. (R 1480). In addition, this factor is not of a mitigating nature in this case. Because there was no evidence of infirmity caused by advanced age, the mere fact that Appellant was in his fifties does not mitigate his crimes. Agan v. State, 445 So.2d 326 (Fla. 1983), cert. denied, 469 U.S. 873, 105 S.Ct. 225, 83 L.Ed.2d 154 (1984).

There was also insufficient evidence to establish that Appellant lacked capacity to appreciate the criminality of his

conduct and to conform his conduct to the requirements of the law. Although Dr. Meadows did not give live testimony, the judge had the benefit of the doctor's written report in the court file. (R 1918). The court also heard the taped telephone conversation between Appellant and Jerry Boggs subsequent to the murders. Most importantly, the evidence at trial contradicted the existence of this mitigating factor. Appellant carefully mapped out his strategy, took pains to conceal his identity during the commission of the murders, and attempted to hide the murder weapons. Thus, he clearly understood the criminality of his conduct.

Finally, Appellant argues that the judge should have discussed other mitigating factors: Appellant was a good worker for the same company for 31 years; was a good provider; and brought up his children well. None of these factors rise to the level of mitigation. Whether Appellant had an exemplary work record or was a "good" provider for his family is not clear. The argument that he brought up his children well or was a good father figure is refuted by the record. Appellant not only beat his wife, Jerry, and threw hot grease on her in the presence of the children, Appellant hit his son Guy often and suggested ways his other son Brandy could kill a person. (R 1366, 1394, 1395, 1415, 1431, 1455). Appellant also implicitly threatened his daughter Brenda's life if she came to Florida to testify against him. (R 1402-03).

Judge Cobb had all the above evidence before him for review and consideration. His discussion of mitigating factors in the

sentencing order was in substantial compliance with this Court's holdings prior to Campbell. See, e.g., Lamb v. State, 532 So.2d 1051, 1054 (Fla. 1988). The judge's failure to discuss the factors not found to be mitigating (and which Appellee suggests were not arguably mitigating) does not violate the uniformity guidelines announced in Campbell. It is apparent that the trial court weighed the aggravating and mitigating circumstances and determined that in the "glare of [the] two aggravating circumstances, the mitigating circumstances of defendant's lack of significant prior record and emotionalism over the divorce appear very pale indeed." (emphasis added) (R 1889). The trial court properly weighed the factors in this case and arrived at appropriate sentences of death.

Should this Honorable Court find it necessary to reverse Appellant's death sentences and remand for resentencing, Appellee would note that an additional aggravating circumstance exists in this case pursuant to section 921.141(5)(b), Florida Statutes. Simultaneous convictions on two separate counts of first-degree murder constitute a previous conviction of "another capital felony" within the meaning of the above statutory section. When a defendant commits two separate murders as part of one incident, the second killing can be aggravated by the first. Cook v. State, 542 So.2d 964, 970 (Fla. 1989).

ISSUE XV

A SENTENCE OF DEATH IN THIS CASE IS DISPROPORTIONATE WHEN COMPARED TO OTHER CAPITAL CASES WHERE THE COURT HAS REDUCED THE PENALTY TO LIFE. (As Stated by Appellant).

Appellant argues that the sentence of death imposed in the instant case was not proportionate to other death cases because his moral culpability is simply not great enough to deserve a sentence of death. He contends the uncontrolled shootings show a distorted thought process rather than criminal intent and that this is not one of the unmitigated first-degree murders for which death is the proper penalty. Boggs contends that he was under a lot of stress at the time, having recently been divorced from his wife who had left him for an old highschool sweetheart. Appellant then points to several cases where this Honorable Court has reduced sentences of death to a life sentence where the murders were the result of a "passionate obsession". E.g. Garron v. State, 528 So.2d 353 (Fla. 1988); Wilson v. State, 493 So.2d 1019 (Fla. 1986); Irizarry v. State, 496 So.2d 822 (Fla. 1986).

Appellee contends that the sentence of death was properly imposed in the instant case as the aggravating factors established below set Boggs and these killings apart from the average defendant. The imposition of the death sentence was proportionate to other capital cases where the sentence has been upheld. Cf. Brown v. State, 473 So.2d 1260 (Fla. 1985).

The jury recommended in the instant case that Appellant receive the death sentence for the murder of Nigel Maeras by a

vote of nine to three and for the death of Harold Rush by an eight to four vote. The trial court found the existence of two valid, aggravating circumstances; (1) cold, calculated and premeditated and, (2) that the homicide was committed during the course of a burglary. In mitigation the court found that the defendant had no significant history of prior criminal activity and that he was under the influence of some emotional disturbance at the time of the murders. (R 1885) When considered in the context of the facts of this case, the aggravating circumstances clearly outweigh the existing mitigating circumstances. The sentence of death was proportionate to other death cases and the lower court did not err in entering both sentences of death.

Appellant's reliance on Garron, Wilson and Irizarry is misplaced. In each of those cases this Honorable Court found that the killings were the result of heated, domestic confrontations and, although premeditated, were most likely upon reflection of a short duration. The murders in the instant case were not the result of a sudden reflection, but rather the result of a cold, calculated and premeditated plan formulated over a period of time.

The evidence in the instant case shows that not only did John Boggs threaten to kill, but that on or before February 8, 1988, he took his shotgun, his pistol, his ammunition, a ski mask and dark clothing, and a map with the route to Zephyhills highlighted, put them in his truck and drove over 1,000 miles to Florida. Boggs arrived in Florida somewhere around the 9th of

February. (R 916-19). During the day on the 9th, he started hunting for Boggs or Rush. Of the 140 trailer parks in Zephyrhills, evidence showed that he called up at least four of them looking for Boggs or Rush. (R 719-26). At 1:00 PM on Wednesday, he discovered from Pat Spurlock where Harold Rush lived. (R 734-37). He then waited twelve and one half hours for the dark of night, while the lights were out and these people were lying asleep in their beds, and then broke into their home. (R 605). He coldly hunted down each of the people in the trailer, fatally shooting two of them and wounding the third. Thereupon, the defendant left Florida and returned to Ohio.

The evidence also showed that having entered the mobile home and realizing his mistake, he nevertheless planned to eliminate all of the residents of the home. He chased Betsy Ritchie into the bedroom and fired his shotgun at her. (R 617-18, 622). Then there was a struggle with Harold Rush. At that point, he had to realize he had the wrong person. Then upon discovering the third person when he knew that Dean and Jerry lived alone together, he nevertheless used his pistol to inflict a mortal wound. Harold Rush was five or six inches taller that Dean Rush. Nigel Maeras was 5'6" and Betsy Ritchie was 5'4", whereas Jerry Boggs was under 5'. (R 612-13, 1346-1348). Nigel Maeras and Ritchie were both blonds and Jerry Boggs had black hair. (R 1348). John Boggs knowingly took the lives of innocent people. The killings were not a result of a sudden reflection, but rather were the result of a cold, calculated and premeditated plan.

This evidence does not support any claim that these homicides were the result of a heat of passion. Rather, these killings were almost in the nature of "contract-style" execution killings. This Court has repeatedly recognized where there are aggravating circumstances making death the appropriate penalty that outweigh the existence of any mitigating factors, a sentence of death will be upheld.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, the State of Florida respectfully requests this Honorable Court to affirm Appellant's convictions and sentences of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Mail to A. Anne Owens, Assistant Public Defender, P.O. Box 9000--Drawer PD, Bartow, Florida 33830, this 10th day of September, 1990.

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