IN THE SUPREME COURT OF FLORIDA

JOHN EDWARD BOGGS, :

Appellant, :

v. : Case No. 73,499

STATE OF FLORIDA, :

Appellee. :

_____:

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

A. ANNE OWENS
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

On February 24, 1988, a Pasco County grand jury indicted the Appellant, JOHN EDWARD BOGGS, for (I) the first-degree murder of Nigel Maeras; (II) the attempted first-degree murder of Betsy Ritchie; (III) the attempted first-degree murder of Harold Rush; and (IV) burglary with a firearm. (R. 1738-39) An amended indictment was returned on April 4, 1988, upgrading Count III to first-degree murder because Harold Rush had died. (R. 1740-41)

John Boggs was arrested in Vermilion, Ohio, pursuant to a Pasco County arrest warrant. (R. 863) A search warrant was issued by an Ohio judge on February 15, 1988, upon the affidavit of a Pasco County detective, authorizing the search of Boggs' house and vehicles. (R. 1769-72) Boggs was extradited from Ohio pursuant to a Florida capias filed May 10, 1988. (R. 1742)

On September 9, 1988, defense counsel filed a motion to suppress evidence seized during the search. (R. 1766-68) The motion was denied on September 16, 1988, and again at trial. (R. 972-74, 1676) Defense counsel filed a motion to suppress the identification of John Boggs (R. 1773-81) It was denied at the September 16 hearing and again during trial. (R. 742, 1659)

On September 12, 1988, Dr. Richard L. Meadows, M.D., was appointed by the court as the defense psychological expert. (R. 1782-85) Defense counsel filed a motion to determine competency advising the court of Dr. Meadows' conclusion that Boggs did not meet the criteria for competence to stand trial. (R. 1787-89) At a hearing held September 15, 1988, the court found Boggs competent to stand trial and denied the motion. (R. 1553-74, 1791)

On September 16, 1988, the court heard and granted a defense motion to appoint an independent ballistics expert to examine the bullets, firearms, and shell casings marked for evidence by the state. (R. 1578-81) The defense was never able to have these items examined, however, because the judge refused to release the evidence for examination (R. 1581-82, 567, 1063, 1980) or to recess the trial for four to six hours to allow the evidence to be transported to the expert. (R. 1100-02, 1149-57, 1161)

On the morning of trial, September 19, 1988, defense counsel filed a motion for continuance, alleging that, despite diligent effort, counsel had not been able to depose 22 witnesses. (R. 1803-04) Although counsel advised the court that Dr. Meadows was sending a letter (which arrived the next day) stating

that Boggs was not competent to assist counsel, the court denied the motion because Boggs refused to sign it. (R. 2)

John Boggs was tried by jury September 19-24, 1988, the Honorable Wayne L. Cobb, circuit judge, presiding. (R. 1794-1801) The jury found Boggs guilty as charged on all four counts. (R. 1835-38) At penalty phase, the judge instructed on two aggravating factors: (1) the crime was committed while the defendant was engaged in a burglary; and (2) the crime was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification ("CCP"). (R. 1529-30) He instructed the jury to consider in mitigation (1) that the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance; (2) that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (3) the defendant's age; and (4) any other aspect of the defendant's character or record or other circumstance of the offense. (R. 1530) The jury recommended death by a vote of nine as to Count I and a vote of eight at to Count III. (R. 1833-34)

A motion for new trial was filed October 3, 1988 (R. 1845-46), and denied at a hearing held November 21, 1988. (R. 1736, 1900) Sentencing arguments were heard October 10, 1988. (R. 1687-1718) On October 26, 1988, the judge sentenced John Boggs to death by electrocution on Counts I and III; to a life sentence on Count IV and to 30 years in prison on Count II. (R. 1722-31, 1895-99)

Written findings supporting the death sentence were filed October 26, 1988. (R. 1884-89) The trial judge found the same two aggravating factors upon which he instructed the jury. In mitigation, he found that the defendant (1) had no significant history of prior criminal activity; and (2) was under the influence of some emotional disturbance at the time of the murders. (R. 1885)

On December 16, 1988, John Boggs filed an amended Notice of Appeal to this Court pursuant to Article V, Section 3(b)(1) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030 (a)(1)(A)(i). (R. 1901) The Public Defenders for the Sixth and Tenth Judicial Circuits were appointed to represent Boggs on October 26, 1988. (R. 1883)

STATEMENT OF THE FACTS

A. The Appellant's Background

Appellant's daughters, Brenda Hartle[1] and Amber Boggs, testified that their father was a "homebody." (R. 1381, 1451) Boggs stayed at home even more than usual the last couple years since he sued U.S. Steel, where he worked for thirty years, for damages from a head injury. (R. 1301, 1416) Brenda's husband, William James Hartle, said that he did not know whether the injury was legitimate but thought there must be something wrong. (R. 1367) Sometimes while eating a meal, Boggs would grab his head and go, "oh," like he had a needle sticking through his head. (R. 1361)

Mr. Hartle testified that, when he was first dating Brenda, he never went to the Boggs' house because Mrs. Boggs had told the neighbors what a bastard John Boggs was. When he finally did, however, Boggs seemed like an average person and they got along well. (R. 1358-60) He said that Mr. and Mrs. Boggs got along all right except that sometimes Mrs. Boggs would "fly off the handle." She used pretty severe language. (R. 1361-62)

Dean Rush testified that he had known Jerry Boggs since he was 15 years old in 1952. (R. 951-52) In 1965, he was seeing her while she was married to the Appellant, John Boggs. In 1965, Boggs discovered Dean Rush on the couch at the Boggs house with Mrs. Boggs. (R. 952, 956) At that time, Boggs made Rush promise not to come back to see his wife and threatened to kill him if he did. (R. 952) Rush testified that Boggs "put a gun to his eyes." (R. 954) He saw Boggs in a bar a couple months later but no words were exchanged. (R. 958-59) Dean Rush moved to Florida about 20 years prior to the homicide. (R. 962)

When John Boggs caught his wife with Dean Rush, the children thought that someone was breaking into the house. Mrs. Boggs told them that their father raped a girl on a motorcycle gang and the gang was there to get revenge. (R. 1375, 1384, 1430) Another time, Mrs. Boggs woke them up in the middle of the night. She left them in the car in front of a house, allegedly to catch their

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[1] Brenda Hartle testified that she was originally brought to Florida for the trial by the prosecution and told that she did not have to talk to the defense. (R. 1379) She said that the day prior to penalty phase, the prosecutor attempted to "rush them out of here." (R. 1381) They stayed and testified for the defense.

father with another woman. They learned years later that their mother was with another man that night. (R. 1385)

While the children were growing up, Mrs. Boggs tried to poison their minds by accusing their father of running around. (R. 1375, 1384) Because of the things her mother told her over the years, Brenda was never able to get close to her father. (R. 1384-85) The youngest daughter, Amber, age 23, got along well with her father. (R. 1434-35)

Amber lived at home until her parents were divorced. (R. 1434-36) She testified that her mother always believed her father was running around on her. She cited several instances when her mother tried to catch her father cheating on her when he was out-of-town but he was always alone. Her mother tried to commit suicide various times because she erroneously believed that Boggs was seeing other women. (R. 1437-38)

The Boggs children had recently learned that it was not their father but their mother who was cheating and that Mrs. Boggs had affairs with men other than Dean Rush. (R. 1374-75, 1385) Both Brenda and Brandy, Boggs' son, mentioned a man named Bill Swinger with whom their mother allegedly had a child. Brandy said this man took his mother into the bedroom when he was a small child. When he asked the man about his mother, the man beat him. Brandy never understood who the man was or what happened until his mother explained at the time of the divorce. (R. 1384-85, 1420-21)

Boggs used to hit his wife, primarily because of Dean or because she was running around. All of the children testified, however, that there had been no beatings for ten or fifteen years. (R. 1366-67, 1374, 1387, 1416, 1437) Mr. Hartle had heard Mrs. Boggs say that her husband had threatened to "blow their heads off" but he never saw Mr. Boggs hit his wife and never saw him drink. (R. 1369, 1372, 1376) Brandy said his father told him he should have killed Dean when he caught him in their house. (R. 1422)

In 1987, Mrs. Boggs received a phone call from Dean. (R. 1438-39) Thereafter, he traveled to Ohio to see her. (R. 1439) In September of 1987, Jerry Boggs and her then 21-year old daughter, Amber, went to Florida, allegedly to see the oldest son who was in prison at Union Correctional Institution. Jerry Boggs spent most of the three weeks seeing Dean Rush. (R. 945-46, 960)

When they arrived at the motel, Mrs. Boggs called Dean who was still married at the time. He came to the motel and they made love in the bathroom. Sometimes they asked Amber to leave the room late at night and she sat in the alleyway. When she returned they often made love in the bed next to her and she just went to sleep. (R. 1440-41) This went on the entire three weeks. (R. 1441) Amber said that her mother and Dean drank all the time and danced in bars. (R. 1374, 1451) During this time, her mother refused to tell her father where they were staying. She told him they didn't have a phone. (R. 1441)

During this time Jerry Boggs and Dean Rush decided to get back together again. (R. 948, 1451) Thus, Mrs. Boggs was very happy about her divorce from John Boggs. (R. 949) In October of 1987, Mr. and Mrs. Boggs assembled their daughters and Brenda's husband to discuss their pending divorce. Brenda said that her father was crying. (R. 1383)

Brandy testified that his mother told him she was leaving his father because she loved Dean Rush. He saw his father cry for the first time. Boggs told his son the divorce was due to the difference in "penis size. (R. 1418-19)

During the months before she left, Jerry Boggs would "fly off the handle for no reason at all." She would play country music which Dean liked and write letters to Dean. She carried a picture of her and Dean kissing which she showed at the grocery, telling everyone that he was her boyfriend and she was leaving her husband for him. (R. 1389) She talked about Dean all the time. She would sit at their pool with her daughters and granddaughter, "explaining the size of Dean's cock." (R. 1375-76, 1382)

Although she had slept on the floor in a separate bedroom for a year, the last months before the divorce was final Jerry Boggs slept in bed with her husband. She accepted gifts from him. (R. 1391) Boggs would listen to sad love songs and cry while his wife wrote letters to Dean. (R. 1448) Boggs started taking laxatives to lose weight so that his wife would stay with him. (R. 1449-50) He took her out to dinner and sent flowers. (R. 1459)

After the divorce, "[i]t seemed like [Boggs] was crying all the time." (R. 1388) He lost a lot of weight. (R. 1388) He kept asking Brenda for her mother's phone number so he could call her back when she hung up on him. He placed photographs taken at Christmas on the coffee table with candles, like a shrine, and saved some of his wife's hair. (R. 1390-91, 1424) He bought a bottle

of her perfume (unbeknownst to him, a gift from Dean) and sprayed it on his pillow and around the house. (R. 1446-47)

Amber didn't go to the house much after her mother left because her mother always told her that her father would kill her. Additionally, her father kept asking what went on when she and her mother were in Florida and Mrs. Boggs did not want her to tell him. When Amber went to see her father, he would cry and hug her for a long time. She couldn't handle seeing him that way. (R. 1452-53)

Jerry Boggs testified that she left Ohio on January 11, 1988, the day of her divorce from John Boggs, arriving in Riverview, Florida, the following day. Shortly thereafter, she moved to Zephyrhills where she lived with Dean Rush. She instructed her Ohio friend, Pat Canter, to call her if Boggs' camper was absent for any period of time because she feared for her life. (R. 914-16)

On February 9, 1988, she received a call from Pat Canter (R. 916-19) warning her that Boggs' camper truck had been missing from his house for twelve to fifteen hours.[2] (R. 895-96) Jerry Boggs called the Pasco County sheriff's office to report that "John was on his way to kill me." (R. 920) She received a phone call that she thought was from Boggs whom she believed was in Florida. The person said, "I seek. I seek. I seek."[3] She hung up. (R. 921) She called the sheriff's office again and told them she thought Boggs was looking for her. (R. 921-22) He previously threatened her with a sawed-off shotgun. (R. 925, 929)

B. The Homicide

Nigel Maeras, a 70 year old widow, and Harold Rush, age 69, had been "companions" for two or three years. (R. 594-97) They had resided together at Colony Hills Mobile Home Park in Zephyrhills, Florida, since January of 1988. (R.

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[2] Canter saw the truck back in Ohio about the 12th or 13th. (R. 897) Patrolman Sooy of the Vermilion Police saw Boggs in his black camper truck at about 10:00 a.m. on February 12th, heading into Vermilion from a road just off the interstate. (R. 963-66) Although the camper had snow on it and appeared to have been on the road for some time, Sooy admitted that it could have been for only ten minutes. (R. 969) Boggs owned property in southern Ohio and sometimes went there by himself for weeks at a time. (R. 902)

[3] Jerry Boggs testified on cross-examination that she first thought the caller said "I sic, I sic, I sic." (R. 936-37) During her taped telephone conversation with Boggs after the homicide, she accused him of calling and saying, "I'm sick, I'm sick, I'm sick." He denied the call. (R. 1928) Jerry Boggs testified that Boggs did not have her phone number. (R. 923) During the taped conversation after the homicides, Boggs constantly begged her to give him her phone number. (R. 1935-41)

597) Betsy Ritchie, daughter of Nigel Maeras, flew to Florida from Illinois on February 6, 1988, to take a cruise with her mother and Mr. Rush on February 12. (R. 597-98, 612-13) Maeras and Rush slept in separate bedrooms and Betsy Ritchie slept on the couch in their living room. (R. 605)

Harold Rush was a heavyset man, about 180 to 200 pounds, and about six feet tall with gray hair.[4] (R. 612) He drove a Lincoln Town Car with Illinois license tags, which he parked in the carport by the screened-in porch leading into the laundry room. The license tag had Rush's first two initials and last name on it. (R. 639-40, 798) Nigel Maeras was about 5'6" tall, weighed about 130, and had blondish-gray hair. (R. 613, 1348) Betsy Ritchie was 51 years old, about 5'4" tall, with blondish hair. (R. 612-13) She weighed about 130 pounds.[5] (R. 1346)

On the night of February 10, they all went to bed at about 11:00 or 11:30. (R. 605) Ms. Ritchie was awakened later by a loud crashing noise. She could see a person's shoulder outside the door. She ran to Harold's bedroom and said, "Harold, somebody is breaking in." (R. 610) Harold ran out of the bedroom, clapped his hands and said, "You don't belong in here. You get out of here." (R. 611) Ms. Ritchie said, "Bang, bang," and attempted to scare the man. (R. 614) By then the man was in the laundry room and was running at her. "He had a big black flowing coat, looked like the pockets were bulging, and something . . . in the right hand."[6] She could not tell what it was. (R. 615)

Ms. Ritchie ran into Harold's bedroom and hid on the floor in the corner behind a dresser. (R. 615-16) She heard her mother say, "What in the world is going on down here?" Right afterward, she heard five loud shotgun blasts aimed at her from across the dresser. (R. 617-18, 622) She then heard another loud blast "like an earthquake" which "seemed to rock the trailer." (R. 618) After that, someone shot at her with rapid fire. She felt the bullets go

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[4] According to Betsy Ritchie, Dean Rush, with whom Boggs allegedly confused Harold Rush, was about five or six inches shorter than Harold. Harold was also much bigger around than Dean. (R. 1346-47)

[5] Boggs allegedly confused Nigel Maeras or Betsy Ritchie with his ex-wife Jerry Boggs who was much shorter (apparently less than five feet tall) and had very black hair. (R. 1348)

[6] Betsy Ritchie earlier described the assailant as wearing a cape rather than a coat. (R. 995)

through her legs but never looked up. When a bullet entered her shoulder, she slumped over and didn't move. She had a total of five separate bullet wounds. (R. 625) She did not get up until the police arrived. (R. 616)

Ritchie heard the telephone hit the floor and heard Harold telephoning for help. (R. 621) Officer Bruce Milnes of the Zephyrhills Police Department received Rush's call at approximately 1:48 a.m. (R. 769) Rush told him the assailant was 5'10" tall, 170 pounds, with a mask over his face. (R. 771)

Barry Arnew, Pasco County Sheriff's Department, responded to the scene at about 2:00 a.m. on February 11, 1988. (R. 778) He testified that the officers entered through the carport where the door had been pried open. (R. 780) They found Harold Rush on the kitchen floor with a wound to his abdomen, still on the telephone. Nigel Maeras was found dead in the dining room area. (R. 780-81) Betsy Ritchie was in the bedroom and was alive. (R. 781-82)

When medical personnel arrived, they splinted Ritchie's leg and transported her to the hospital on a stretcher. (R. 628-29) The following day, Dr. Apte surgically removed a bullet from Betsy Ritchie's breast. (R. 632) She gave Detective Alland 29 pellets removed from Ritchie during surgery. (R. 857-61)

When detectives questioned Ms. Ritchie at the hospital, she suggested as possible suspects, Harold Rush's son, Jim Rush, and grandson, Jeff. (R. 651, 678) She said that Harold Rush and his son had had a business disagreement. Because of the disagreement, Rush had talked to his attorney about changing his will to leave everything to his grandchildren.[7] He had talked to his lawyer up north by phone the day before the shooting. (R. 646-50)

Harold Rush was taken to the hospital, questioned, and taken to surgery. (R. 630-31) He lived five or six weeks after the shooting incident. (R. 638) Dr. Diggs, the Hillsborough County medical examiner, performed an autopsy. Diggs testified that Rush received a shotgun wound at the junction of the chest and stomach which caused pellet wounds to other parts of the abdomen, the chest

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[7] James Franklin Rush of Tampa, Florida, testified that the suggestion that he or his son killed his father and Mrs. Maeras was "absurd" and "ridiculous." (R. 677-79) He said the disagreement with his father occurred at Christmas (R. 680) and he was not aware that his father planned to change his will. (R. 683) He admitted that Jeff and his father had some sort of misunderstanding prior to the shootings. (R. 682-83) Once John Boggs was arrested, the officers quit questioning them. (R. 684-85)

cavity, colon, and intestines.[8] (R. 700-02, 707) Over a period of time, the debilitation led to Rush developing pneumonia from which he died. (R. 708)

Dr. Corcoran, the medical examiner for Pasco and Pinellas counties, observed the body of Nigel Maeras at the scene where he saw a gunshot wound to the face and another in the left temporal region of the head. (R. 688-90) During the autopsy, he found another wound to the right temporal region, exiting in the back of the neck. (R. 691) He testified that either of the two bullets could have caused death and Maeras probably died from a combination of the two. She would have become unconscious instantly and died within a few minutes without suffering. (R. 694-96) He said the wounds were not caused by a shotgun but could have been caused by a standard rifle or a handgun. The assailant could have been no closer than two feet away. (R. 697)

C. The Investigation

Pat Spurlock testified that on the morning of February 10, 1988, a man called her offices at Oaks Royal and Colony Hills Mobile Home Parks asking for a resident by the name of "Boggs" or "Rush." She told him they had someone named "Rush" at Colony Hills.[9] (R. 734-35)

That afternoon the man came to her office to get the complete address. He was dressed like a hunter who had just come in from the woods and was wearing a baseball cap. He wore a navy blue parka and round rimmed glasses. His hair was dark with a little gray and curled up over the cap. He was about 5'8" tall and weighed about 160 pounds. (R. 736-37) Spurlock gave the man the address. (R. 738) She told the officers that he was about 60 to 65 years old. (R. 758, 870) She could not remember whether he had a mustache. (R. 870)

When Spurlock arrived at work the following morning, she saw numerous police officers at the scene of the homicide. (R. 739) She gave the officers the

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[8] Defense counsel moved to preclude testimony about the suffering of Mr. Rush. The court denied the motion. (R. 699) Defense counsel also objected to the admission of a photograph of Rush's stomach (Exhibit F) because it depicted fatty tissue protruding from the autopsy wound. The court overruled the objection and denied defense counsel's request that the portion of the photo showing the autopsy wound be blocked out. (R. 705-06)

[9] Two other witnesses testified concerning calls they received at other mobile home parks from a man looking for a "Rush" or a "Boggs." (R. 718-19, 725-27)

above information. They suggested that she come into the station on Friday morning to do a sketch of the man who was in her office. (R. 739)

Bill Ferguson, Pasco County Sheriff's Office, took photographs and collected evidence at the crime scene. (R. 785-86) He found shotgun pellets on the floor, in the carpeting, and in the walls. He found shotgun wadding and shell casings from a .22 long rifle. (R. 788-90, 802-05) Fingerprints found in the trailer did not match those of John Boggs. Some of them did not match those of Rush, Maeras or Ritchie either. (R. 834)

Ferguson said they found a pry bar on the bedroom floor which appeared to match the pry marks on the door. (R. 791) No usable fingerprints were found on the bar. (R. 799) Joseph Michael Hall, a crime lab analyst in the firearms and tool marks section of FDLE, examined the pry bar but was unable to determine whether it caused the mark found on the door frame. (R. 1044, 1047-49)

Bosco, a police dog, picked up a trail leading to tire tracks and shoe prints at the entrance to the trailer park. (R. 791, 826, 877-78) Casts were made from the tracks. (R. 791-92) Ferguson was not too familiar with this aspect of the case but knew there was no specific match of tire tracks. (R. 831-33)

Linda Johnson Alland, formerly a detective with the Pasco County Sheriff's office, testified that when Detective Fay Wilber told her about the man who asked Pat Spurlock about a "Rush" or a "Boggs," she remembered reading a police report concerning someone named "Boggs." (R. 840-41, 848) She looked up the report and found that Jerry Boggs had called the sheriff's office two days before the homicide to report that she believed her ex-husband, John Boggs, was en route to Florida to kill her. Alland went to see Jerry Boggs who lived about six to ten miles from the crime scene in Zephyrhills. (R. 848-52) Living with Mrs. Boggs was her old boyfriend, Dean Rush. At the interview, Alland learned about John Boggs, from whom Jerry Boggs was recently divorced. (R. 852, 901)

When Pat Spurlock went to the sheriff's office on Friday, as she had been instructed to do, Detective Wilber told her she did not need to do the sketch because they were getting a picture from "up north" and she would instead look at photographs. (R. 741) She was told they had a suspect and that it was a "case of mistaken identity." (R. 758)

Alland arranged to get a picture of John Boggs from his daughter in Vermilion, Ohio. (R. 853-54) It was a family picture of John and Jerry Boggs and

a child, taken out-of-doors. (R. 854) Alland arranged to have Boggs' face enlarged and made a photo display. (R. 855) She picked out four book-in photographs at the sheriff's office to put with it. (R. 875-77)

On Saturday, Detective Alland took the photographs to Spurlock's house.[10] (R. 840-41, 855) Spurlock picked the photograph of John Boggs. She said she was 75% sure it was him. The photograph she picked was blurry. (R. 743, 759-60, 856) The men depicted were in their twenties or thirties except for Boggs who appeared to be about sixty years old. (R. 757-58)

The following Monday, Detective Wilber told her they had the suspect in custody. When she asked if it was the man she picked, he told her to watch the news on television. She saw the photograph she picked on the news that night and videotaped the news. She started a scrapbook of news articles and photos. (R. 745) The following week, she saw a different picture of Boggs in the newspaper and was 100% sure he was the man who was in her office. (R. 746)

Witness Spurlock later went to Ohio to identify Boggs at the extradition hearing. (See R. 748, 863, 854) While she was sitting in a courtroom talking with Detective Alland, she saw Boggs handcuffed to a black man and recognized him as the man who was in her office. (R. 763) She thought there was only one handcuffed man who approached sixty years of age, however. (R. 764-66) She then identified Boggs in court.[11] (R. 750)

Detective Roger Hoefs, Pasco County Sheriff's Department, went to Vermilion, Ohio on February 13. (R. 970-72) While there, he obtained a search warrant.[12] (R. 975) Because they were outside their jurisdiction, they were

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[10] Defense counsel renewed his pretrial motion to suppress the identification because of the unnecessarily suggestive nature of the procedure. The court said the ruling would be the same (denied) and granted a continuing objection. (R. 742)

[11] Defense counsel objected to testimony concerning the Ohio identification because the jury would be made aware that Boggs fought extradition. The objection was overruled. (R. 748)

[12] Defense counsel renewed his motion to suppress the items seized and moved to strike any testimony about the search warrant. The motion to suppress was denied. (R. 972-73) Counsel objected to the admission of the warrant and evidence regarding what Hoefs did to get the warrant because it emphasized the prior judicial determination that probable cause existed. (R. 973) Although the judge sustained the objection to anything other than testimony that they got a warrant (R. 973-75), he later admitted into evidence the search warrant and affidavit. (R. 1014-15)

assisted in their search by local law enforcement. (R. 979) On the seat of Boggs' camper, they found a map of Florida. (R. 980-81) The map had a yellow route outline from Ohio to Tampa, somewhere near State Road 54. (R. 983-84) The map was also marked with routes to Jacksonville and various Ohio cities. (R. 1003) They found a Pasco County map inside a Florida road atlas in a cabinet in the back of the camper. (R. 986-88)

Detective Linda Alland testified that 102 items belonging to Boggs were seized in Vermilion, Ohio. (R. 862-66) They included soil, carpet, seat sweepings, a floor mat, steering wheel, tire track standards, and numerous other items from Boggs' black pickup truck and camper. (R. 1006-07) Also seized were shoes, pants, a coat, black ski mask, and other items of clothing. (R. 867-69, 878-886) Officer Mayer of the Vermilion Police Department identified a black ski mask found with other clothing in a bedroom during the search. (R. 1036-39)

Hoefs testified that he found a long dark coat in the bedroom closet.[13] The pockets contained shotgun shells. (R. 994) They found a loaded sixteen-gauge shotgun and a loaded .22 caliber automatic pistol behind the couch in the living room. (R. 1016) Five shotguns and rifles were found under the insulation in the attic. They also found ammunition in the attic.[14] (R. 1021)

Observing that the dust had been disturbed, the officers found two more guns under insulation behind the furnace pipes of the attic crawl space about ten feet from the entrance. One was an unloaded sawed-off shotgun and the other a loaded Colt .22 semiautomatic pistol. (R. 1022-25) They recovered a spent shotgun casing in the attic near these two weapons. (R. 1027-28, 1034) None of the items had blood on them. (R. 887)

Joseph Michael Hall, a crime lab analyst in the firearms and tool marks section of FDLE, examined three shotguns and a spent shotgun shell found in Boggs' attic. (R. 1064-66) He testified that the discharged shell from the

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[13] Hoefs said Betsy Ritchie described the gunman as wearing a long black garment like a cape. When he saw the coat in the closet it "jumped out at me because I didn't really know back here, in Florida, what she was talking about. When I saw that coat, I understood what she was trying to tell me. It was then that I knew that I was at the right place, just as sure as I could be." Defense counsel objected to Hoefs' "editorializing." The judge said he was sure the jury recognized that it was only his opinion. (R. 995)

[14] Mrs. Boggs testified that John kept guns under the insulation in the attic and also in the closet. (R. 935)

attic was fired from a double barrel 12-gauge shotgun[15] found in the attic.[16] (R. 1051-52, 1066-68) The pellets submitted could have come from shotgun shells fired from the 12-gauge shotgun.[17] (R. 1070-75)

Hall also examined a Colt .22 caliber long rifle autoloading pistol found with the shotgun in Boggs' attic. (R. 1086-87) He examined casings found at the crime scene and determined that they were fired from that pistol. He determined that a bullet taken from the body of Betsy Ritchie was fired from that pistol, to the exclusion of all others. (R. 1090-95,1103-04, 1111-17)

Hall made the comparisons through a microscope, comparing the markings on the shells and bullets submitted to shells and bullets fired from the firearms for testing. The comparison is made by "eyeballing" the shells or bullets rather than by any scientific testing or mathematical formula. (R. 1126-28, 1145-46) Hall admitted that the expended bullets had some deformation caused by striking an object and that the test bullets were fired into water to prevent deformities. (R. 1139-40) He did not take pictures of the microscopic comparisons because it is hard to get the entire bullet in the picture and because there may be markings that don't match. He was afraid that if he showed photographs, it might put doubt in the jurors' minds. (R. 1142-43) He admitted that this had happened to some examiners in the past.[18] (R. 1146-47)

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[15] Hall testified that the twelve-gauge shotgun was not an autoloading shotgun but, instead, was a "break open" where a latch or "breach" releases the barrels. An ejector ejects the discharged shells when the breach is opened for reloading. The ejectors were not working properly on this particular shotgun, however, and Hall had to reach in and pull out the expended shells. (R. 1056-60)

[16] Counsel objected to Hall's testimony because, once the firearms evidence was admitted, it could not leave the courthouse for examination by the defense expert. Defense counsel asked the judge whether he was going to let them transport the evidence to a different location. He said "not at this time," but that he would consider it. (R. 1062-63) Because the judge would never permit a recess for the bullet to be transported to an independent expert, it was never examined. (See Issue III.)

[17] Defense counsel objected to Hall's testimony comparing the size of the hole in Mr. Rush to the shotgun. (See Issue IX.) The objection was overruled. Hall testified that the wound was consistent with the shotgun but he couldn't tell whether the shotgun made the hole. (1079, 1083-85)

[18] Defense counsel's motion for judgment of acquittal was denied. (R. 1149) The defense presented no evidence. (R. 1161) When the jury found him guilty, Boggs jumped up and asked the judge if he instructed the jury on "reasonable doubt," but was subdued. (R. 1323-24)

SUMMARY OF THE ARGUMENT

I: Defense counsel filed a pretrial motion requesting a competency hearing pursuant to Florida Rule of Criminal Procedure 3.210. Dr. Meadows, appointed by the court to examine Mr. Boggs, determined that Boggs was not competent. The trial judge ignored this evidence and questioned Boggs at the hearing. His determination that Boggs was competent to stand trial did not comply with state procedural requirements and thus violated Boggs' constitutional right to due process. The court's refusal to re-examine competency when requested by counsel at various times throughout the trial further violated Boggs' due process rights. The conviction must be reversed and the state permitted to retry Boggs only if and when he is found competent to stand trial.

II: On the morning of trial, the judge denied Boggs' motion to continue because Boggs refused to sign it. Counsel had not deposed twenty-two witnesses and was not prepared for trial. He told the judge that Dr. Meadows, the expert appointed by the court, was sending a letter which would say that Boggs was not competent to assist counsel in making such decisions. Defense counsel must be afforded an adequate opportunity to investigate and prepare any applicable defense. Because he was not, the court erred in denying the motion.

III: Florida Rule of Criminal Procedure 3.220 requires that the defense be permitted to inspect and test the state`s tangible evidence. Although the trial judge granted defense counsel's motion to appoint an independent ballistics expert to examine the bullets, firearms, and shell casings marked for evidence by the state, he refused to release the evidence for examination. After defense counsel repeatedly renewed the motion during trial, the judge agreed to allow the evidence to be transported but refused to recess the trial for four to six hours to allow examination by the expert. It was fundamentally unfair for the court to preclude a defense examination of the state's most crucial evidence and to then permit the state to introduce essentially irrefutable damaging testimony. Boggs was denied his constitutional right to confrontation and due process.

IV: State witness Pat Spurlock, who worked in the office of the mobile home park where the homicide occurred, testified that a man called and came into her office on the day before the shooting looking for a "Boggs" or a "Rush." She later identified Boggs from a photo display which contained his picture, enlarged from a family photograph, and four book-in photos of much

younger men. Spurlock was only 75% certain Boggs was the man in her office. After seeing his picture on television and in the newspaper, she became 100% certain. Her identification at the Ohio extradition hearing (also suggestive) and at trial were tainted by the impermissibly suggestive pretrial procedure. The identification was unreliable under the "totality of the circumstances" test.

V: Under the Leon "good faith" exception, a search warrant must be suppressed if the magistrate was misled by information that the affiant knew was false or would have known was false except for his reckless disregard of the truth. The officer who executed the affidavits in this case failed to state the sources of his information and included various conclusions and conjecture. He omitted material information which might well have caused the magistrate to refuse to issue a warrant. Because the warrant was based on knowingly or recklessly false information, it must be suppressed.

VI: The trial court erred by refusing to excuse a prospective juror for cause because she had read extensive pretrial publicity and had already formed an opinion. Although she said she could disregard it, the defendant should not have to present evidence to overcome a preconceived opinion of guilt. When defense counsel requested more peremptory challenges, the judge refused to grant this request. The court also erred by refusing to allow defense counsel to voir dire the prospective jurors or to strike the panel because a prospective juror said she discussed what she had read about the case with other prospective jurors and that they believed Boggs to be guilty.

VII: Defense counsel objected to testimony showing that Boggs fought extradition from Ohio because the jury would know that probable cause had previously been found to bring him to Florida. A fundamental principal of constitutional law is that the state may not penalize a defendant for exercising a legal right by using his exercise of that right as evidence against him at trial. If it is error to use a defendant's exercise of his right to remain silent against him, it is error to use the exercise of his right not to waive extradition as evidence against him. Additionally, because exercise of the right not to waive extradition is not probative of guilt, it is irrelevant.

VIII: The trial court overruled defense counsel's objection to testimony concerning Boggs' threats against Dean Rush in 1965 and refused to hold a Richardson hearing. The testimony was Williams Rule evidence and the state

failed to provide notice as required in discovery. The evidence was too remote in time to be relevant and was prejudicial. The court erred in admitting it and, if it was relevant, in failing to hold a Richardson hearing.

IX: Over defense objection, the trial court allowed the state's ballistics expert to compare the size of the barrel of a shotgun to a wound in the abdomen of Harold Rush. The comparison was made by use of a photograph of the wound after it had been medically closed. Expert testimony is only permissible when the subject matter is beyond the understanding of a layman. In this case, the ballistics expert, who was not a forensic pathologist trained in wound ballistics, was in no better position to make such a comparison than were the jurors. No expertise was needed.

X: Over defense objection, the trial court permitted the prosecutor to argue to the jury in closing penalties for the lesser included offenses. The judge compounded the error by then instructing the jury on these penalties. Under the amended rule, the trial court may not instruct on penalties except for the crime charged in a capital case. Allowing the prosecutor to emphasize the penalties for lessers was error. It suggested to the jury that if Boggs were convicted of a lesser offense, the judge might sentence him only to probation.

XI: During his closing argument, the prosecutor argued that defense counsel did not present certain witnesses and introduce various physical evidence which was equally available to both parties and in some cases particularly available to the state. This was error because it led the jury to believe that defense counsel was hiding evidence when, in fact, the defense does not have to present any evidence; the burden of proof is on the state. Furthermore, the prosector argued that defense counsel created a "smoke screen" and attempted to mislead the jury. He mimicked defense counsel's argument. It is error for the prosecutor to attack defense counsel rather than basing his argument on the evidence in the case.

XII: The trial court erred by failing to have prepared and to consider a guidelines scoresheet in sentencing Boggs for the noncapital offenses.

XIII: The trial court erred by finding that the homicide was committed in a cold, calculated, and premeditated fashion, without pretense of legal or moral justification. Neither the state, the defense, nor the trial court presented any evidence of heightened premeditation. The theories espoused

by the judge were nothing more than speculation. An aggravating factor must be proved beyond a reasonable doubt. Speculation precludes such proof.

XIV: The trial court's written findings in support of the death penalty contained speculation as to the existence of aggravating factors. The judge based the death sentence on nonstatutory aggravation. Additionally, the trial court failed to adequately assess, discuss, and weigh the mitigating factors. Because his written findings do not support the death sentence, it must be vacated.

XV: The instant homicides resulted from a "passionate obsession." In such cases, the death penalty is not proportionally warranted. Additionally, the trial court erroneously found the CCP aggravating factor and failed to adequately weigh the aggravating and mitigating factors. Because this was not one of the "unmitigated" first degree murder cases for which death is the proper penalty, State v. Dixon, 283 So.2d 1, 7 (Fla. 1973), death is not proportionately warranted. The sentence must be vacated.

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.

"[F]ailure to observe procedures to protect a defendant's right not to be tried or convicted while incompetent deprives him of his due process right to a fair trial." Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); see also Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); Lane v. State, 388 So.2d 1022 (Fla. 1980). The test for determining competency under both Florida and federal law is (1) whether the defendant has 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 factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); Hill v. State, 473 So.2d 1253 (Fla. 1985). This constitutional standard, which contains both a substantive and procedural element, is implemented by Florida Rules of Criminal Procedure 3.210 and 3.211.

In the present case, the judge's refusal to grant the defense motion for a competency hearing in accordance with Florida Rule of Criminal Procedure 3.210 violated Boggs' constitutional due process rights. Even if the hearing on the defense motion were considered a competency hearing, the judge's determination that Boggs was competent to stand trial did not comply with procedural requirements. The court's refusal to order a competency determination when requested by counsel throughout the trial further violated Boggs' procedural and substantive due process rights.

A. The Pretrial Request for a Competency Hearing

Boggs' counsel initially filed a motion requesting that the court appoint a psychiatrist to assist in the preparation of Boggs' defense. See Fla. R. Crim. P. 3.216. The judge granted the motion on September 12, 1988, and appointed Dr. Richard L. Meadows. (R. 1282-85) Dr. Meadows advised counsel that Boggs did not meet the criteria for competence to stand trial and met the criteria for involuntary hospitalization. Meadows found that (1) Boggs' appreciation of the charges was impaired; (2) his ability to relate to counsel was

impaired; and (3) his ability to assist counsel in planning his defense was impaired. He concluded that Boggs' demeanor, appearance and statements prior to arrest as evidenced in depositions, indicated that Boggs suffered in all likelihood from an unspecific psychosis requiring further examination in a psychiatric facility. (R. 1787-89)

On September 14, 1988, Boggs' counsel filed a motion to determine competency pursuant to Rules 3.210 and 3.211. The motion set out Dr. Meadows' findings and other factors suggesting that Boggs might be incompetent. For example, Boggs' family members reported that he believed in out-of-body experiences and telekinetic transportion of his soul. His ex-wife believed Boggs was telekinetically transporting himself to her residence while he was incarcerated. (R. 1787-89)

A hearing on the motion was held September 15, 1988. (R. 1553-74) Dr. Meadows was out of the country until the following Monday and was unavailable to testify at the hearing. (R. 1502) Counsel asked the judge to appoint two to three experts as the rule required.[19] (R. 1558) The following proceedings occurred:

> MR. EBLE: The concern we have with Mr. Boggs, Your Honor, in light of this case, and this Court is aware in the past our request to waive speedy trial and Mr. Boggs' refusal to do so, and our explanation about problems getting depositions done before this trial date, and Mr. Boggs' refusal to allow us to continue the case.
>
> I have also requested Mr. Boggs to cooperate with this expert in the event of preparing possible penalty phase in light of the possibility that a penalty phase could occur in this trial. It does

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[19] Rule 3.210 then provided as follows:

> If before or during the trial 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 stand trial, 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.

Rules 3.210 and 3.211 were amended in 1988 to broaden the issue of competency. In re Amendments to Florida Rules, 536 So.2d 992, 995 (Fla. 1988). The amendment did not become effective until January 1, 1989, however, so is not applicable in the case at hand.

not appear Mr. Boggs has any appreciation of the fact of the possibility of a penalty phase and what I would have to do, or try to do at a penalty phase. I have had many conversations with Mr. Boggs. I don't want to waive any attorney/client privilege in light of our conversations, but all I can indicate to the Court is that it is difficult, at best, for Mr. Boggs and I to ever have any common understanding at the end of our conversations as to where things are going and what our abilities to prepare his case have been. In light of that, Your Honor, when we sent him to Dr. Meadows, I enclosed copies of newspaper articles and copies of depositions, and unbeknownst to me, when Mr. Carballo went up to Ohio, he found out in the depositions that there were neighbors who described rather bizarre behavior on Mr. Boggs' behalf, and communicated that to Dr. Meadows.

Mr. Carballo was also able to obtain a psychiatric evaluation from 1985, which recommended that Mr. Boggs be hospitalized in a psychiatric facility.

THE DEFENDANT: Who is this?

MR. EBLE: From a relative.

THE DEFENDANT: What relative?

THE COURT: Mr. Boggs, be quiet. Let Mr. Eble finish.

THE DEFENDANT: I should be allowed this information, don't you think?

THE COURT: Let Mr. Eble finish, Mr. Boggs.

MR. EBLE: As I have indicated in this motion, Mr. Boggs has refused to sign any medical records released [sic] for psychiatric or medical in general to us. We managed through another relative to obtain some records, through a relative of Mr. Boggs. We forwarded that report to Dr. Meadows.

I indicated to the Court Wednesday that Dr. Meadows represented to me that of course Mr. Boggs refused to answer his questions, but that he did have a chance to observe him, and during the course of asking him questions, Mr. Boggs, perhaps unbeknownst to him, did make a limited verbal and some nonverbal responses to those questions that Dr. Meadows felt indicated that this gentleman is suffering from a psychotic reaction to this divorce.

THE DEFENDANT: (Laughing)

MR. EBLE: Now, Judge, I'm at a standstill here. I'm in the position of trying to honor Mr. Boggs' communications to me and his expressions to me, but at the same time, I have an obligation under the constitution to provide him the best possible defense and to prepare his case in the manner best possible. And in a murder case with a possibility of the death sentence here, I also have an obligation to prepare for the possibility, I'm not saying probability, and I don't in any way mean to suggest that Mr. Boggs would be convicted of first-degree murder, but regardless of that fact, we don't have split proceedings where you do a guilt phase and then a month later come back and do something else. You have got to try and prepare both at the same time for the possibility of that. I'm not getting any cooperation from him.

(R. 1554-57)

The prosecutor cited the Fourth District case of Rolle v. State, 493 So.2d 1089 (Fla. 4th DCA 1986), in which the judge engaged in a colloquy with the defendant to determine competency. He represented that the appellate court in

Rolle found, because of the questions and answers, that the defendant was competent to stand trial.[20] (R. 1560) Thus, instead of appointing experts and setting a competency hearing, the judge adopted the prosecutor's suggestion and conducted his own examination of Boggs.

> THE COURT: 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 7:00.
>
> THE COURT: What did you do, Mr. Boggs?

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[20] In Rolle, the district court determined that the trial judge was justified in not ordering a competency hearing based on his colloquy with the defendant and a psychiatrist's testimony. Presumably, the psychiatrist's testimony did not provide reasonable grounds to believe the defendant might be incompetent. The Rolle court by no means approved the judge's questions.

The prosecutor also cited Muhammad v. State, 494 So.2d 989 (Fla. 1986), but grossly misrepresented the facts of the case. (R. 1562) Muhammad was first examined by a doctor appointed to aid the defense, after which his counsel filed a notice to claim the insanity defense. The judge then appointed two experts to examine Muhammad to determine his competency and sanity. The defendant first refused to even meet with these doctors and later met with them but refused to cooperate. A week before trial, the judge made a final effort to have Muhammad examined. He appointed Dr. Amin, who performed the defense examination, in addition to the other two experts. Although Muhammad again rebuffed the previous experts, he met with Dr. Amin who determined that he was competent to stand trial. 494 So.2d at 970-71. Unlike the instant case, the judge made numerous efforts to have Muhammad examined. The only expert who successfully examined Muhammad found him competent. In this case, the only expert who examined Boggs found him incompetent.

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: 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 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?[21]

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.

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[21] Defense counsel's motion indicated that the "odd and unusual" behavior observed by Mr. Boggs' neighbors involved the telekinetic transportation of his body and soul. (R. 1787-89)

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.

(R. 1563-66) Thereafter, Boggs identified his attorneys and agreed to cooperate with them during the trial. He said that he had done so all along but that he hadn't seen them for 35 days although he asked to see them each morning. Boggs said he had never seen a trial except "Divorce Court" but agreed to conduct himself properly and "remain silent" except "when something comes up that conflicts with what I know, and then I will tell him that." Although Boggs did not read and write well enough to write notes to his attorney during the trial, he said he would whisper in his attorney's ear. (R. 1566-68)

Boggs told the judge that he knew death was a possible penalty because he had seen it in the newspaper and that he was willing to risk it. He knew what year it was, his age, and his present location including city and state. He said he lived in Lorain or Vermilion, Ohio, and was retired from the steel mill. (R. 1568-69) The colloquy continued as follows:

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.

THE COURT: Does counsel have any other inquiry?

MR. EBLE: Only that the Court should be aware there was a lawsuit against the steel company for a fall Mr. Boggs had while working which left him out of work. That went on for a couple of years. That was due to be settled, and as a result of this, it has not been settled, but apparently, U.S. Steel was going to pay off a settlement in that case for an injury he received when he fell where he landed on his head.

MR. ALLWEISS [prosecutor]: I would ask him, because the information Mr. Eble has given to this court, in my opinion, and from what I know about the case, is totally incorrect. I would ask that the court ask him about whether he feels that he has any head injuries, whether he has ever seen a psychiatrist or whether he wants to see one, or whatever, or whether he intends to cooperate.

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 your attorney?

THE DEFENDANT: No.

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

THE DEFENDANT: No.

MR. ALLWEISS: 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 will 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.[22]

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.

THE COURT: Gentlemen, you know, I'm not a psychiatrist or a psychologist, but it appears clearly to me that Mr. Boggs is capable

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[22] In cases such as Muhammad, the court tried various times to have the defendant evaluated by three different experts. He finally talked to one of them who found him competent. Here, the court never tried. The colloquy suggests that if the judge had told Boggs that he planned to delay the trial until Boggs met with and was examined by two or three experts, Boggs would probably have agreed to do so to expedite his trial.

> 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 neuroses or even psychoses, but I don't see any indication that they affect his ability to cooperate with his attorney or understand the processes we are here for.

(R. 1569-72) The judge denied the motion. (R. 1572)

B. A Competency Hearing Was Required

The trial judge erred by failing to comply with the requirements of Rule 3.210. The rule is not discretionary. It mandates that the judge appoint at least two experts. D'Oleo-Valdez v. State, 531 So.2d 1347 (Fla. 1988). Nowhere does the rule provide that the trial judge may disregard psychiatric opinion and conduct his own on-the-spot investigation.

The above colloquy clearly indicated one thing -- not that Boggs was competent or that a Rule 3.210 hearing was unnecessary, but that Boggs did not want his trial delayed. He gave no coherent reason for wanting to rush into trial. He was hostile toward his attorneys and did not care whether they were prepared. He seemed to think that his attorneys would suffer the consequences of their alleged dalliance and he would be free; he did not like being in jail. If Boggs believed that an immediate trial would produce an acquittal even though his attorneys were not prepared and he had not agreed to any defense, his belief was unrealistic and evidenced incompetency. He had no appreciation of the seriousness of the charges and possible consequences and lacked a rational as well as factual understanding of the proceedings. Dusky, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824; Fla. R. Crim. P. 3.211(a).

Defense counsel's impression should be considered by the court. In Scott v. State, 420 So.2d 595, 597 (Fla. 1982), as in the case at hand, defense counsel had great difficulty communicating with his client and the defendant was unable to assist him in preparing the defense. Id. Quoting from Drope v. Mississippi, 420 U.S. at 177-78 n.13, 95 S.Ct. at 906 n.13, 43 L.Ed.2d 103, this Court stated:

> Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, an expressed doubt in that regard by one with "the closest contact with the defendant" is unquestionably a factor which should be considered.

Scott, 420 So.2d at 597-98. In the instant case, the judge gave little if any credence to counsel's impressions. He conducted his own "on-the-spot" investigation and found Boggs competent.

The test to determine whether to appoint two to three experts and to order a hearing pursuant to Rule 3.210 is "whether there is reasonable ground to believe that the defendant may be incompetent, not whether he is incompetent. The latter issue should be determined after a hearing." Scott, 420 So.2d at 597 (citation omitted). In Lane, 388 So.2d at 1025, this Court discussed what constitutes "reasonable ground" to believe that a defendant may not be mentally competent to stand trial. The Lane court observed that the judge is responsible for conducting a competency hearing whenever it reasonably appears necessary, whether requested or not, to ensure that a defendant meets the standard of competency set forth in Dusky. "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors standing alone may, in some circumstances, be sufficient." Drope, 420 U.S. at 180, 95 S.Ct. at 908.

> Once the judge is presented with reasonable grounds to believe a defendant may not have sufficient present ability to consult with his attorney and aid in the preparation of his defense with a reasonable degree of understanding . . . he must order a hearing and examination pursuant to Rule 3.210.

Kothman v. State, 442 So.2d 357, 359 (Fla. 1st DCA 1983); accord Tingle v. State, 536 So.2d 202 (Fla. 1988) (judge's independent investigation was not sufficient to ensure that Tingle was not deprived of his due process right not to be tried while incompetent); Scott, 420 So.2d at 597.

Here, the trial court conducted his own investigation, disregarding Dr. Meadows' psychiatric opinion, defense counsel's impression, and the procedural requirements of Rule 3.210. See W.S.L. v. State, 470 So.2d 828, 830 (Fla. 2d DCA 1985), rev'd on other grounds and aff'd as modified on competency issue, 485 So.2d 421 (Fla. 1986) (because psychologist reported that defendant did not understand adversary nature of criminal justice system and had no ability to assist in planning defense, trial court should have granted Rule 3.210 competency hearing). He clearly erred.

C. The Judge's Inquiry Was Inadequate

The trial judge may have believed that he was conducting a competency hearing when he questioned Boggs during the hearing on the motion to determine competency. Even if the proceeding were considered a competency hearing, however, it did not comply with Rules 3.210 and 3.211 and was, therefore, invalid. First, Rule 3.210 does not permit inquiry by the court with no consideration of expert opinion. Secondly, although the judge determined that Boggs had a "factual" understanding of the proceedings, he failed to determine that he had a "rational" understanding. Although he determined that Boggs had the ability to consult with his lawyer, he did not determine that he could do so "with a reasonable degree of rational understanding." Thus, the judge failed to determine whether Boggs met either prong of the test set out in Rule 3.211.

Although Boggs promised that he would communicate and cooperate with his attorneys, his history suggested otherwise. He refused to agree to a psychiatric examination or continuance. (R. 1571) He refused to talk about his medical problems, to release medical records, or to cooperate with Dr. Meadows and counsel in preparing for a possible penalty phase. (R. 1556, 1570) He and his attorneys were unable to agree as to how to prepare or defend the case.[23] (R. 1555) See Fla. R. Crim. P. 3.211(a)(1)(vi). Moreover, Boggs lacked motivation to help himself in the legal process. See Fla. R. Crim. P. 3.211(a)(1)(x).

The standard is not whether the defendant thinks he is competent, or whether he is oriented to time and place and knows his attorneys' names. Nor is it whether he remembers where he worked and lived for the past thirty years. The Dusky Court held that it is not enough to find that the defendant is oriented to time and place and has some recollection of events. 362 U.S. at 402; 80 S.Ct.at 789, 4 L.Ed.2d at 825; see also Pate v. Robinson, 383 U.S. at 385, 86 S.Ct. at 842 (mental alertness and understanding displayed in defendant's "colloquies" with judge insufficient to show competency); Tingle, 536 So.2d 202 (judge's independent investigation insufficient). Instead of applying the standard set out in Dusky, the judge questioned Boggs and made a swift decision that Boggs seemed okay to him. Had he taken time to analyze Boggs' responses, the judge might have realized that Boggs' further examination was required.

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[23] Apparently, Boggs insisted throughout the proceedings that he never left Ohio. (See R. 1563, 1920-49)

D. The Ongoing Duty to Examine

The trial court's duty to assure that the defendant is competent to stand trial is an ongoing duty. Pridgen v. State, 531 So.2d 951, 954 (Fla. 1988);Scott, 420 So.2d 595; Holmes v. State, 494 So.2d 230 (Fla. 3d DCA 1986).

> Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.

Drope, 420 U.S. at 180-81, 95 S.Ct. at 908.

Events during Boggs' trial provided further evidence that a competency examination and hearing were necessary. On the morning of trial, the judge denied a defense motion for continuance because Boggs refused to sign the motion as required by the rules of judicial administration. (See Issue II.) Defense counsel argued that, although Mr. Boggs "wants his trial and he wants it now," the defense team believed that a continuance was in his best interest. Because of conversations with Boggs prior to and during the past weekend, they did not believe Boggs was competent to make tactical decisions concerning his defense. Dr. Meadows agreed to provide a letter stating that Boggs was not competent to stand trial. (R. 2-3) Counsel argued further, as follows:

> MR. EBLE: I just want the record clearly to reflect [that] our defense counsel position in this case is contrary to Mr. Boggs' position in this case, Judge, and I don't want to have it anywhere on this record that I'm saying I'm ready to proceed at this time. As a matter of fact, Judge, the conversation I had with him this morning, the man is rejecting our strategy, trial strategy, that Mr. Carballo and I have presented, and is instructing us and insisting that we are doing things contrary to what he thinks we should do. I have got somebody researching ethical considerations at this point in time.

(R. 7)

When the letter from Dr. Meadows arrived during voir dire, defense counsel asked if he could present it to the court. The judge told him the only way to present it to the court was to file it with the clerk. The prosecutor noted that the state did not object to defense counsel's presentation of the document. (R. 186-87) Thus, counsel incorporated it in a supplemental motion to determine competency. (R. 561, 1805, 1913) Although the judge filed the motion,

he did not rule on it. (R. 561) Thus, he ignored the written opinion from the only expert who examined Boggs.[24]

During voir dire, Boggs' counsel complained that he and Boggs could not agree on jurors to challenge because Boggs was incompetent. (R. 318) This was harmful to Boggs' defense because, by excusing jurors Boggs disliked as well as those counsel thought should be challenged, Boggs' counsel exhausted his peremptory challenges. When he moved for more challenges, arguing that many prospective jurors knew about the case, the judge denied his motion, commenting that he just used his challenges for nothing. (R. 514) Boggs' lack of agreement as to which jurors should be excused evidenced his inability to relate to his attorneys, Fla. R. Crim. P. 3.211(a)(1)(v), and to help himself in the legal process. Fla. R. Crim. P. 3.211(a)(1)(x).

Boggs remained quiet until the guilty verdict was read when the following outburst occurred:

> THE DEFENDANT: Has the jury been instructed --
>
> THE BAILIFF: Order in the court.
>
> THE DEFENDANT: If there's reasonable doubt, the Defendant --
>
> THE BAILIFF: Order in the court.
>
> THE DEFENDANT: Alleged crime, it is your duty to find the Defendant not guilty --
>
> THE COURT: Mr. Boggs.
>
> THE DEFENDANT: Seven fifty --
>
> THE COURT: Mr. Boggs, please sit down. Mr. Bailiff, will you please sit him down.
>
> MR. EBLE: Mr. Boggs, stop. Stop.

(R. 1324) After the jury was polled, defense counsel said, "Your Honor, the Court has heard me ask this many times this week and last week I again requested the Court to permit my client to be examined for his competency to stand trial, Judge. . . . That outburst, Judge, I -- " The judge ignored him. (R. 1326-27)

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[24] It appears that Dr. Meadows' report was erroneously put in the court file with the motion for continuance rather than with the supplemental motion to determine competency. Although the supplemental competency motion incorporates the letter by reference (R. 1805), when undersigned counsel obtained the letter by supplementing the record on appeal, the letter was attached to the motion for continuance. (R. 1911-13) This error may have caused the omission of the letter in the original record.

The outburst confirmed that Boggs had little appreciation of the possibility of a penalty phase. (R. 1554-55; Fla. R. Crim. P. 3.211(a)(1)(ii)) He believed a trial would exonerate him. (R. 1563-64) He had no appreciation of the charges, Fla. R. Crim. P. 3.211(a)(1)(i), and no rational understanding of the proceedings against him, Fla. R. Crim. P. 3.211(a). The outburst also showed Boggs' inability to manifest appropriate courtroom behavior. Fla. R. Crim. P. 3.211(a)(1)(viii). Although he promised the judge that he would "remain silent" during trial, his laughter and interruptions during the motion hearing should have forewarned the judge that this was unlikely. (R. 1555-60)

In Pate v. Robinson, the Court found that, "[w]hile Robinson's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue." Robinson cooperated with his attorney "with some reservations," displayed mental alertness and understanding during "colloquies" with the judge, and was tentatively found competent by a psychiatrist two or three months before trial. 383 U.S. at 383-386 & n.8, 15 L.Ed.2d at 821-22 & n.8. Conversely, Boggs did not cooperate with his attorneys, displayed only limited understanding during his "colloquy" with the judge, and was not found mentally competent by the psychiatrist.

Defense counsel persisted in requesting a competency hearing. Immediately before penalty phase, the following ensued:

> MR. EBLE: Yes, Sir. I would just submit to the court in all good conscience that I believe my client is incompetent at this time, Judge. I firmly believe that. I wouldn't bring it to the Court's attention --
>
> THE COURT: Thank you, Mr. Eble. Mr. Eble, are you telling me now that you think he is not competent to be sentenced?
>
> MR. EBLE: I have to even go through sentencing phase, Judge. Dr. Meadows cautioned me, he said: I'm telling you -- Dr. Meadows said: I guarantee you if that verdict comes back guilty, he is going to explode.
>
> THE COURT: That doesn't mean he's guilty or incompetent.
>
> MR. VAN ALLEN [PROSECUTOR]: A lot of people do that.
>
> THE COURT: I find he knows what he's doing, so he is able to help you. We will continue.

(R. 1328-29) Further evidence of incompetence is suggested by the following dialogue among counsel and the court, during penalty phase charge conference, concerning the "age" mitigator:

MR. EBLE: Fifty-five. His fifty sixth birthday is next month.

MR. ALLWEISS: He's had a good life, looks terrific.

MR. EBLE: If you read Jerry's deposition, you understand why he probably wouldn't waive speedy trial, if you believe her.

THE COURT: He is not going to live long enough to get a real trial?

MR. EBLE: No, sir. What it says in her deposition is that he has consulted a Ouija Board in the past and the Ouija Board says that his brother and sister would die at the age of forty. They both died at the age of forty. That his parents would die before him and that he would be dead before his fifty-sixth birthday, which is October 23rd of next month.

MR. VAN ALLEN: We'll --

MR. ALLWEISS: We'll see.

MR. VAN ALLEN: -- if he dies.

MR. EBLE: At one time, I thought I had him talked into a waiver of speedy trial. I had mentioned a trial in November because I figured that's where it would fall and he found November unacceptable and I never recognized or ever had a clue as to why.

(R. 1480-81) If Boggs wanted his trial expedited because he consulted a Ouija Board, he did not appreciate the possibility that he would be convicted and was out of touch with reality.[25]

E. In Conclusion

The test to determine whether to order a competency hearing pursuant to Rule 3.210 is whether there is reasonable ground to believe that the defendant may be incompetent. There was substantial evidence that Boggs' lacked a rational understanding of the proceedings and that his ability to assist counsel was questionable. The court erred by ignoring the evidence and Dr. Meadows' opinion and finding Boggs competent without a Rule 3.210 hearing.

It is uniformly recognized that, due to the difficulty of retrospectively determining competency, a hearing after the fact will not suffice. Drope v. Missouri, 420 U.S. at 183, 43 L.Ed.2d at 119; Pate v. Robinson, 383 U.S. at 386, 15 L.Ed.2d at 823; Dusky v. United States, 362 U.S. at 403, 4 L.Ed.2d at 825. Thus, the conviction must be reversed and the state permitted to retry Boggs only if he is found competent to stand trial.

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[25] At sentencing and the motion for new trial hearing, defense counsel renewed his competency motion, based on the information provided by Dr. Meadows. (R. 1236, 1726)

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.

Reversing the conviction in Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed. 2d 815 (1966), the Court of Appeals for the Seventh Circuit held:

> Robinson was convicted in an unduly hurried trial without a fair opportunity to obtain expert psychiatric testimony, and without sufficient development of the facts on the issues of Robinson's insanity when he committed the homicide and his present incompetence.

383 U.S. at 377, 15 L.Ed.2d at 817. The court made this holding because the trial judge denied defense counsel's request for a continuance of several hours to secure the appearance of a psychiatrist. 383 U.S. at 385 n.7, 15 L.Ed.2d at 822 n.7. The United States Supreme Court affirmed the reversal, making only one change. Instead of allowing the district court to conduct a retrospective competency hearing, the Court vacated Robinson's conviction, holding that the state could elect to retry him assuming he was found competent to stand trial. 383 U.S. at 387, 15 L.Ed.2d at 823.

The case at hand is similar. John Boggs was convicted in an unduly hurried trial. The judge first denied the pretrial defense motion for a competency hearing. (See Issue I.) He then refused to grant defense counsel's motion for a continuance because Boggs refused to sign the motion as required by a local rule of judicial administration. (R. 2) Thus, Boggs was denied his due process right to a fair trial.[26]

Defense counsel's motion for continuance alleged that despite diligent effort the defense had not yet been able to depose twenty-two witnesses listed by the state. The prosecutor needed to furnish updated addresses for thirteen of these witnesses. (R. 1803-04) Although this motion was made the morning of trial, it was not the first attempt made by the defense to continue the trial. During a pretrial hearing on counsel's motion for a competency determination, defense counsel told the court:

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[26] The trial court also refused to grant a four to six hour recess for an independent firearms examination. (See Issue III.)

> The concern we have with Mr. Boggs, Your Honor, in light of this case, and this Court is aware in the past our request to waive speedy trial and Mr. Boggs' refusal to do so, and our explanation about problems getting depositions done before this trial date, and Mr. Boggs' refusal to allow us to continue the case.

(R. 1554) (emphasis added). Thus, the trial court was aware that defense counsel needed more time to prepare for trial.[27]

On the morning of trial, when the judge denied the motion to continue because Boggs refused to sign it (R. 2), defense counsel told the judge that Dr. Meadows, the expert appointed by the court pursuant to Rule 3.216, was sending a letter which would say that Boggs was not competent to assist counsel. After the judge denied the motion, defense counsel reargued his intertwined motions to determine competency and for a continuance:

> MR. EBLE: I just want the record clearly to reflect [that] our defense counsel position in this case is contrary to Mr. Boggs' position in this case, Judge, and I don't want to have it anywhere on this record that I'm saying I'm ready to proceed at this time. As a matter of fact, Judge, the conversation I had with him this morning, the man is rejecting our strategy, trial strategy, that Mr. Carballo and I have presented, and is instructing us and insisting that we are doing things contrary to what he thinks we should do. I have got somebody researching ethical considerations at this point in time.

(R. 7) The judge did not respond.[28]

Mr. Boggs' failure to sign the motion for continuance was no reason to deny the motion for several reasons. First, the rule was only a local procedural rule. It was not a requirement under Florida Rule of Criminal Procedure 3.190(g). A local procedural rule should not be used to deny a defendant's due process right to a fair trial.

Citing Dr. Meadows' opinion, defense counsel argued that Boggs was incompetent to decide whether a continuance was needed. (R. 2) In Robinson, the Court held that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." 383 U.S. at 384, 15 L.Ed.2d at 821.

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[27] Defense counsel complained during trial that they had only three hours discovery at the sheriff's office. (R. 828-29) Although the prosecutor disputed his assertion, counsel said that he never got to look at the contents of a box allegedly found in Boggs' camper because his appointment to look at the evidence was canceled by the sheriff's office. (R. 986-88)

[28] Defense counsel filed a supplemental motion for competency hearing when the letter from Dr. Meadows arrived. (R. 561, 1913)

Similarly, it is contradictory and a due process violation to allow an incompetent defendant to waive his right to be tried with effective counsel by refusing to sign a motion.

A second reason that Boggs' failure to sign the motion was not reason to deny the continuance was that the speedy trial period had not yet run.[29] Florida Rule of Criminal Procedure 3.191 provides that a defendant must be tried within 175 days if the crime is a felony. The time does not commence to run, however, until the accused is returned to the jurisdiction of the Florida court. Fla. R. Crim. P. 3.191 (b)(1). Boggs was not extradited from Ohio until May 10, 1988. (R. 1742) The trial could have commenced as late as November 1, 1988, without exceeding the speedy trial limit. Instead, it began September 19, nearly six weeks earlier.

Moreover, Rule 3.191(d)(2)(iv) allows the speedy trial period to be extended "(iv) by written order of the court for a period of reasonable and necessary delay resulting from proceedings including but not limited to an examination and hearing to determine the mental competency or physical ability of the defendant to stand trial . . . ." Thus, because Boggs' refusal to sign the motion for continuance was based on his alleged incompetency to stand trial, the trial court could easily have granted the motion for a competency examination, as requested by defense counsel, and tolled the running of the speedy trial period until after the hearing, or when Boggs was found competent to stand trial.

Allowing Boggs to refuse a continuance and go to trial over the objection of his lawyers is analogous to permitting a defendant to represent himself without first determining his competency to make such a decision. In Johnson v. State, 497 So.2d 863, 868 (Fla. 1986), this Court recognized that Florida Rule of Criminal Procedure 3.111(d) "contemplates that a criminal defendant will not be allowed to waive assistance of counsel if he is unable to make an intelligent and understanding choice because of, inter alia, his mental condition." The Johnson court implicitly recognized that a defendant may be mentally competent to stand trial but not mentally competent to conduct his own

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[29] Presumably, the rule that a defendant must sign the motion for continuance is to assure his understanding waiver of his right to speedy trial. (See R. 1554)

defense. See also Massey v. Moore, 348 U.S. 105 (1954) (although one may not be insane in sense of being incapable of standing trial, he may lack capacity to stand trial without counsel); Westbrook v. Arizona, 384 U.S. 150 (1966) (higher degree of competency required to waive counsel than to stand trial requires inquiry into competence to waive counsel).

Although Boggs did not seek to represent himself, he insisted on making the major trial strategy decisions and was permitted to do so over defense counsel's strenuous objections. Boggs precluded an insanity defense by refusing an examination to determine his sanity and refusing to release medical records. He convinced the judge to find him competent despite the opinion of Dr. Meadows and defense counsel to the contrary. Boggs then refused to sign the defense motion for a much needed continuance, thus forcing his lawyers to go to trial unprepared. Although counsel assured the judge that Dr. Meadows was sending a letter confirming that Boggs was incompetent, the trial judge refused to consider the motion for continuance.

Even after the trial began, Boggs controlled his counsel. He insisted upon peremptorily excusing jurors against counsel's advice, causing counsel to run out of peremptory challenges. (R. 318, 514) Boggs took control of the trial with no determination that he was competent to do so, resulting in ineffective counsel.

As discussed in Issue I, there was abundant evidence that Boggs may have been incompetent to stand trial. It makes no sense to refuse a continuance when your attorneys are unprepared and the penalty is death. Boggs never indicated that he wanted the death penalty. Instead, he seemed convinced that he would be acquitted. (R. 1563) A possible explanation for his demand for immediate trial despite the possible consequences was suggested by counsel.

> MR. EBLE: If you read Jerry's deposition, you understand why he probably wouldn't waive speedy trial, if you believe her.
>
> THE COURT: He is not going to live long enough to get a real trial?
>
> MR. EBLE: No, sir. What it says in her deposition is that he has consulted a Ouija Board in the past and the Ouija Board says that his brother and sisters would die at the age of forty. They both died at the age of forty. That his parents would die before him and that he would be dead before his fifty-sixth birthday, which is October 23rd of next month. . . .
>
> MR. EBLE: At one time, I thought I had him talked into a waiver of speedy trial. I had mentioned a trial in November because

I figured that's where it would fall and he found November unacceptable and I never recognized or ever had a clue as to why.

(R. 1480-81)

The general rule in Florida is that the granting of a motion for continuance is within the sound discretion of the trial court. Jent v. State, 408 So.2d 146 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed. 2d 1322 (1982). A denial thereof will be reviewed, however, when there has been a showing that the trial judge abused his discretion. Id. When the court's denial of a motion for continuance results in denial of due process or effective assistance of counsel, reversal is mandated. See Palmer v. State, 380 So.2d 476 (Fla. 2d DCA 1980) (defendant not adequately represented); Sumbry v. State, 310 So.2d 445 (Fla. 2d DCA 1975) (due process violation).

The trial court has inherent authority to grant a continuance when, through no fault of the defense, counsel has been unable to depose the state's witnesses prior to trial. State Ex. Rel. Gerstein v. Durant, 348 So.2d 405, 406 (Fla. 3d DCA 1977). In Sumbry v. State, 310 So.2d 445 (Fla. 2d DCA 1975), the court found that the judge abused his discretion in denying a motion for continuance because the state delayed in filing an information until 171 days from the date of arrest and the defendant had no time to procure or depose two potential state witnesses or the fingerprint expert. Accord Lightsey v. State, 364 So.2d 72, 73 (Fla. 2d DCA 1978) (reversed because defense counsel was denied continuance and was unable to depose five witnesses).

Although the prosecution did not delay in indicting Boggs, it took three months to extradite him to Florida. Many of the witnesses lived in Ohio. Boggs' counsel had to travel to Ohio to depose them. Counsel had not yet deposed twenty-two witnesses when the trial started. The state had not yet provided current addresses for thirteen of them. Counsel had not procured a defense firearms expert to examine the evidence. (See Issue III.)

"The common thread running through those cases in which a palpable abuse of discretion has been found, is that defense counsel must be afforded an adequate opportunity to investigate and prepare any applicable defense." Smith v. State, 525 So.2d 477, 479 (Fla. 1st DCA 1988) (citations omitted); accord Beachum v. State, 547 So.2d 288, 289 (Fla. 1st DCA 1989) (continuance should have been granted to obtain necessary defense witness). "Adequate time to prepare a defense is a right that is inherent in the right to counsel." Smith, 525 So.2d

at 479. The right to prepare a defense is founded on constitutional principles of due process and the right to a fair trial. Brown v. State, 426 So.2d 76 (Fla. 1st DCA 1983).

The Smith court set out seven factors to consider to determine whether denial of a continuance was error: (1) time actually available for preparation of defense; (2) likelihood of prejudice from the denial; (3) defendant's role in shortening preparation time; (4) complexity of the case; (5) availability of discovery; (6) adequacy of counsel actually provided; and (7) skill and experience of chosen counsel and his pre-retention experience with the defendant or the alleged crime. 525 So.2d at 479.

As discussed above, preparation time was shortened because Boggs was not extradited until three months after his arrest. The case was extremely complex and necessitated out-of-state depositions and preparation for a possible penalty phase. The Sheriff's Department seized 102 items from Boggs' Ohio home and camper (R. 862-66), making the examination of evidence a lengthy procedure. Discovery was hampered by state custody of the evidence, and its examination by FDLE experts. (R. 828-29, 986-88)

The defense lawyers had no pre-retention experience with the defendant or that particular homicide although they were assistant public defenders experienced in capital cases. Their trial performance was inadequate because of lack of preparation time and inability to depose witnesses beforehand. On the second day of trial, they were still taking depositions when the prosecution arranged to have witnesses available. (R. 3-4) Presumably, since twenty-two witnesses had not been deposed by the trial date, some were never deposed.

There were other things that defense counsel did not have time to do. Photographs of the tire tracks found near the gate to the trailer park did not match the tires on Boggs' van. Although the prosecutor had the photos, the judge would not allow counsel to go through them during trial. Defense counsel had to submit unclear xerox copies to the jury. (R. 830) The prosecutor argued in closing that, although Boggs could have produced tire tracks casts, they were still in a box somewhere. (R. 1247)

The prosecutor took further advantage of the time constraints by attempting to make counsel look bad in front of the judge. At the suppression hearing, one of the prosecutors played games with defense counsel and the court:

MR. EBLE [defense counsel]: Is Linda here?

MR. ALLWEISS [prosecutor]: Did you subpoena her?

MR. EBLE: I spoke to Mr. Van Allen [the other prosecutor] about that yesterday. We were advised that she would be here this afternoon.

MR. ALLWEISS: Did you subpoena her?

MR. EBLE: We spoke to her today, and she advised that she would be here.

MR. ALLWEISS: Did you subpoena her?

MR. EBLE: I don't have her under subpoena.

MR. ALLWEISS: Why not?

MR. EBLE: Because I just managed to get this motion dictated Monday for today.

MR. ALLWEISS: Did you try to subpoena her?

MR. EBLE: My investigator went out to her residence yesterday. We also tried to subpoena Ms. Spurlock, and we also tried to subpoena Michael Coates. Mr. Coates advised us he would be here, he did not need a subpoena. When we reached Ms. Spurlock at her business today, she advised us she had been told to be here at 1:00 by the State for this motion. And also --

THE COURT: Call your first witness then.

MR. EBLE: I would call Linda Alland -- Linda Johnson Alland. (PAUSE)

THE BAILIFF: Linda Johnson Alland fails to answer the call of the Court, Your Honor.

MR. EBLE: Your Honor, I also asked Mr. Van Allen if he knew if she would be here. Again, we were told that she was going to be here at 1:30 this afternoon.

MR. ALLWEISS: Judge, I really have to object to that. For him to put the burden on us to get his witnesses for his motions -- this is not grade-school law school. He's a very experienced lawyer that should know what he's doing -- hopefully. And I think he has an obligation when he sets a motion to have the people here present before the Court and not rely on us to [do] it.

MR. EBLE: Judge, I advised --

MR. ALLWEISS: This is a constant thing, Your Honor.

MR. EBLE: -- the Court weeks ago -- this is not a constant thing that's going on. I advised the Court weeks ago that I was not going to be able to be prepared for a trial date on this date. I have asked the State to cooperate with me. I object to Mr. Allweiss' caricature of my proceeding in this case.

I have indicated to the court previously that we are not prepared to go to trial; yet, the court has found Mr. Boggs competent and is honoring his insistence that he have his trial on --

THE COURT: Mr. Eble, I'm not going to rehash this. Is Linda Alland here in the courthouse, Mr. Van Allen-

MR. VAN ALLEN: Yes.

THE COURT: -- or Mr. Allweiss?

MR. ALLWEISS: Yes, Judge. We can get her down here.

THE COURT: Would you please ask her to come down?

MR. ALLWEISS: Yes, sir.

(THEREUPON, Mr. Van Allen left Chambers)

MR. EBLE: Your Honor, if the other witnesses are also upstairs in the State Attorney's Office, I would ask that they be brought down. . . .

MR. ALLWEISS: Judge, we're bringing down everybody. Mr. Allweiss knows what to do in a case.

(R. 1584-87)

Perhaps most damaging was defense counsel's inability to obtain an independent ballistics expert. (See Issue III.) Had counsel had time to transport the firearms evidence to an expert, the verdict might have been different. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). For these reasons, a continuance should have been granted. Because it was not, a new trial is required.

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 INDEPENDENT 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.

Florida Rule of Criminal Procedure 3.220(a)(1)(xi) provides that the defense is entitled to inspect and test any tangible objects which the prosecutor intends to use at trial. This includes the right to have an expert examine and test the evidence. Johnson v. State, 249 So.2d 470, 472 (3d DCA 1971), writ discharged, 280 So.2d 673 (Fla. 1973).[30] The Appellant was denied that right.

On September 16, 1988 (Friday prior to trial), the trial court granted a defense motion to appoint an independent firearms expert. (R. 1578-88) Defense counsel told the judge that he had tried several experts before finding one available. (R. 1582) Mr. Whittaker had agreed to fly from Miami to Tampa on Monday to examine the evidence if he could use FDLE's equipment. Whittaker wanted to use the FDLE equipment so there would be no question of whether his equipment was different from that used by the state expert, Joseph Hall of FDLE. (R. 1578-79) Defense counsel requested that the expert's findings be confidential unless the defense introduced them at trial. (R. 1579) The judge granted the motion but ruled that the opinion would not be confidential. (R. 1581)

The prosecutor told the judge that he had marked the evidence to file with the clerk and would prefer that it not leave the courthouse.[31] Although defense counsel explained that they had not found an expert who could bring his equipment to the courthouse to make the examination, the judge said that the evidence could not be transported. (R. 1581-82) When counsel asked if the clerk could accompany the evidence to the FDLE lab for examination, he said "I don't know. We'll have to see what it is." (R. 1582)

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[30] The Johnson case interprets Florida Rule of Criminal Procedure 1.220(b), which was the predecessor of Rule 3.220(a)(1) but contained the same provisions for inspecting and testing tangible evidence. 249 So.2d at 472.

[31] The firearms evidence consisted of ten casings, three bullets, wadding from two shotguns, a shotgun and a pistol. (R. 1582)

On the morning of trial, defense counsel asked permission to arrange to take the bullet to Tampa to the expert. The judge deferred ruling on the matter until later. (R. 567) Later, when the state's firearms expert was discussing the spent shotgun shell found in Mr. Boggs' attic in Ohio, defense counsel again brought up the matter. He advised that they were still unable to find an expert who could microscopically analyze the .22 bullet at the trial location.[32] They had someone in Tampa who could make an independent analysis if the judge would permit them to transport the evidence to Tampa. (R. 1062)

The judge said, "Do you have a motion?" Defense counsel said that he was objecting to the witness's testimony because, once the state put the firearms and ammunition into evidence, it could not leave the courthouse. Because he had not been able to find a local expert to make the examination, Boggs would be denied independent examination of the evidence. The court overruled the objection. Defense counsel then asked the judge whether he was going to let them transport the evidence. The judge responded, "Not at this time," but said he would consider it. (R. 1062-63)

Shortly thereafter, the following discussion ensued:

> MR. EBLE: I would renew my request for a ballistics expert and request --
>
> THE COURT: I already granted your request for ballistics expert. You haven't done anything with it. That is not my fault.
>
> MR EBLE: I have asked you three times.
>
> THE COURT: And I have granted it every time.
>
> MR. EBLE: You never let me take the bullet out of here.
>
> THE COURT: Sit down, Mr. Eble.

(R. 1079-80) Later that day, defense counsel advised the court that he had received permission to use the FDLE equipment in Tampa:

> MR. EBLE: We have been in touch with FDLE. They advised us they would permit their equipment, their microscope to be used by our expert with the Court order, if the Court will so order. Then, that's what they tell us. And then, my secretary would be -- we can arrange for a firearms expert to be over here tomorrow morning in Tampa by 8:00 or 9:00 o'clock. Will the Court authorize the bullets to be taken by someone from the Clerk's office or the sheriff's office down for our expert to make an independent determination?

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[32] Defense counsel generally referred to the firearms and ammunition evidence as the "bullet," presumably because the .22 bullet taken from Betsy Ritchie's body was the state's most damaging evidence. Their expert testified that it was fired from a pistol found in Boggs' attic. (R. 1003-04)

THE COURT: I don't know. I have to find out whether it is going to interfere with this trial or not. That is what I told you all along.

MR. EBLE: Yes, sir. I understand what you have told me all along. That's the problem I have been trying to explain to the Court. I can't find an expert that has his own comparison microscope that can bring it up here.

THE COURT: I don't remember you saying that, Mr. Eble.

MR. EBLE: We have made arrangements now. FDLE will allow us to use their equipment. However, they require a Court order. . . .

THE COURT: I don't care. I don't mind ordering them. I don't think I have the authority to do it, actually. If they don't care, I don't mind doing that, but we have to determine whether or not we can do without these tomorrow, for that period of time, and whether there is somebody from the Clerk's office that can go down there with you. I don't know. You will have to work those logistics out, Mr. Eble.

MR. EBLE: Your Honor, do you want me to go ahead and -- go ahead and cancel this expert, cancel his appointment tomorrow morning, tomorrow morning in Tampa, anticipating that we can work this out or not?

THE COURT: I have no desire about that.

MR. EBLE: I don't want to -- if he cancels that appointment, there is going to be expenses incurred to the county if we don't send anything down to him. I am asking some direction from the court as to what to tell our expert to do.

THE COURT: You will have to decide that, Mr. Eble.

MR. EBLE: Would it be reasonable for me to assume that we will maybe have a recess for me to arrange to make this stuff transported down there in the morning? It will take them a couple of hours to make the comparison. They will bring it right back from Tampa.

MR. ALLWEISS (prosecutor): Judge, I have an objection. I haven't heard anything from this witness that warrants anybody looking at this. At this time, I haven't heard the first question about his abilities, his credentials, his qualifications that would necessitate that same evidence being examined at the same lab that he examined it at.

THE COURT: I have already decided that issue, Mr. Allweiss.

MR. ALLWEISS: All right, sir.

MR. EBLE: Is there some point in time when I could expect to know whether I can arrange to have this bullet taken down there?

THE COURT: I would assume, Mr. Eble, but right now, I am going to get this case tried.

(R. 1100-02)

Although the record does not indicate why the plan was abandoned, at the end of the day and of the state's case, defense counsel presented a second plan to the court. Because neither the state nor the court inquired about the prior arrangements in Tampa, apparently they all knew what had happened.

MR. EBLE: Your Honor, I would request we have determined that our expert in Vero Beach has a laboratory in Vero Beach. We would make a motion at this time to permit the Court -- I can have my investigator transport a deputy clerk with the firearm, the bullets that were fired by this gentleman and send them over to Vero Beach with our investigator driving them in the trust of a deputy clerk, where they can be examined by our expert tomorrow and returned here. We can arrange for the person to be available at his office as early as 8:00 o'clock in the morning to conduct the examination.

THE COURT: Have you talked with the Clerk's office to see if there is anybody that can go?

MR. EBLE: No, sir. Not yet. But I think we can make that inquiry, though.

THE COURT: I think you are going to have to do that first.

MR. EBLE: But if I can get a different clerk to take the ride --

THE COURT: I don't know what evidence you intend to present tomorrow, either. it is about three hours down to Vero Beach.

MR. EBLE: Yes, sir.

THE COURT: I don't know what evidence you intend to present. I don't know what that would do to this case.

MR. ALLWEISS (prosecutor): Also, another consideration, Judge, we haven't even received the name of the individual. I guess at some time we have the right to take whatever deposition we feel appropriate of that individual and I would guarantee the court that we are not going to be able to get started tomorrow, again, if we are going to have that right.

THE COURT: Well, you wouldn't want to take his deposition until after he made the examination.

MR. ALLWEISS: Yes, sir. I agree. I am just saying that would delay the whole day tomorrow.

THE COURT: I am going to deny that request, Mr. Eble.

(R. 1149-52) Shortly thereafter, the following discussion ensued:

MR. EBLE: Is the Court indicating, at this time, that even if I make the arrangements with the deputy clerk, that the Court would not recess that trial until I can get that back, those results back?

THE COURT: That's right. That should have been done a long time ago.

MR. EBLE: I understand. So, the Court, then, therefore, is denying me the evidence that I would need to have transported, to be evaluated by an independent expert?

THE COURT: No, sir. I will accommodate you on the transportation but I am not going to grant a continuance and you are going [to] have to tell me that's not going to interfere with the process of the trial.

MR. EBLE: Well, what we are talking about, Your Honor, is perhaps a four to six hour recess in the case where a man's life is at stake.

THE COURT: I understand that, Mr. Eble. I am fully aware of what this case is all about, what the penalties are.

MR. EBLE: And the Court is indicating it believes the recess I am requesting is unreasonable?

THE COURT: Yes, sir. I certainly do.

MR. EBLE: Yes, sir.

(R. 1154-55) Before recessing, the judge brought up the subject:

THE COURT: Mr. Eble, you know my home phone number. If you need some help, I will be around here for a few minutes. I am not sure what you are intending to do.

MR. EBLE: Yes, sir. My problem is if the fellows in Vero Beach -- I acknowledge it is approximately a three-hour drive. If they left early in the morning and the gentleman began his examination at approximately 8:00 a.m. it would take him a couple of hours to do that.

THE COURT: I am not going to grant a continuance. I have already told you that.

MR. EBLE: So what the court is indicating, unless I could take up all of that time with other evidence, then we wouldn't have to recess to get that done?

THE COURT: No, sir. I am not. I am not indicating that unless you take up that time. I am indicating unless it will not delay this trial.

MR. EBLE: Which means there has to be something else during the morning to do, Judge.

THE COURT: You know what I am indicating, Mr. Eble.

MR. EBLE: Yes, sir.

(R. 1154-57)

First thing on the last morning of trial, defense counsel renewed his request for a recess for an independent ballistics examination. He said that the defense would not present any evidence. The judge ignored defense counsel's request for a recess and proceeded to charge conference. (R. 1161)

Although the factual scenario in the instant case is unusual, cases which apply by analogy are those in which the state lost or destroyed evidence before the defense had it examined. There are two theories for reversal when tangible evidence is unavailable for examination by a defense expert. One theory was espoused by the Third District and upheld by this Court in Johnson v. State, 249 So.2d 470 (3d DCA 1971), cert. discharged, 280 So.2d 673 (Fla. 1973). The Johnson court held that the error violated the defendant's constitutional right to confrontation.

A different theory supported the district court decisions in Stipp v. State, 371 So.2d 712 (4th DCA 1979), cert. denied, 383 So.2d 1203 (Fla. 1980); State v. Ritter, 448 So.2d 512 (Fla. 5th DCA 1984); and Lancaster v. State, 457

So.2d 507 (Fla. 2d DCA 1984). In an apparent effort to avoid holding that the right to confrontation applies to tangible evidence, those courts instead found a violation of due process or fundamental fairness.

In Johnson, the bullet which allegedly killed the victim was examined by the state's ballistics expert but was lost by the state prior to trial. Because the state did not introduce ballistics testimony during the first trial, which ended in mistrial, defense counsel was not apprised of the loss. State v. Johnson, 280 So.2d at 673. Before the second trial, however, defense counsel filed a motion requesting any physical evidence related to the gun with which the state charged that the defendant was armed. Although the court granted the motion, the state could not produce the bullet. Over defense objection, the state's expert was permitted to testify that the markings on the bullet corresponded to markings on a pistol with which the state charged that the defendant was armed. Johnson v. State, 249 So.2d at 471.

The district court reversed the conviction because the trial court did not exclude the testimony of the state's ballistics expert and, thus, denied the defendant his right to examine the tangible evidence. It held that this right was a part of the defendant's right to confrontation and his right to a full and complete cross-examination of the witnesses. 249 So.2d at 472.

This Court later discharged the writ of certiorari for lack of conflict, State v. Johnson, 280 So.2d 673 (Fla. 1973), reconciling Johnson with its earlier decision in Roberts v. State, 164 So.2d 817 (Fla. 1964) (holding that state need not produce bullet for jury examination because bullet markings cannot be identified by naked eye and can only be interpreted by expert).

> [I]n Roberts, unlike [Johnson], no question of defendant's right to confrontation was raised. Defendant simply objected to the failure of the state to offer a test bullet into evidence. He did not argue and it does not appear that he was deprived of an opportunity to have the bullet examined by his own expert. Sub judice, respondent was effectively prevented from rebutting the State's conclusions concerning the fatal bullet when the bullet disappeared before it could be examined by his ballistics expert.

State v. Johnson, 280 So.2d at 675.

The case at hand is clearly like Johnson. The Appellant was deprived of the opportunity to have the bullet and other firearms evidence examined by his own expert. The bullet was not lost by the state but instead was admitted into evidence where it remained throughout the trial. The trial judge refused to allow the defense access to the ballistics evidence because he did not want the

evidence to leave the courthouse and he did not want to recess the trial long enough for the examination. Because Boggs was denied an independent firearms examination, his counsel was unable to effectively cross-examine the state's expert. This violated Boggs' constitutional right to confront the witnesses against him.

The second theory -- that denial of a defense examination of the evidence violates due process -- is equally applicable to the case at hand and also requires reversal. In State v. Ritter, 448 So.2d 512 (Fla. 5th DCA 1984), the court reversed a conviction because, after testing the cocaine, the state returned it to the D.E.A. in Miami and was therefore unable to respond to the defense discovery motion. The Ritter court stated as follows:

> It would be fundamentally unfair, as well as a violation of rule 3.220, to allow the state to negligently dispose of critical evidence and then offer an expert witness whose testimony cannot be refused by the defendant.

448 So.2d at 514 (citations omitted); accord Lancaster v. State, 457 So.2d 507 (Fla. 2d DCA 1984) (defendant's due process rights were violated because state released burned truck to owner after examination by state's fire investigator who suspected arson, thus precluding defense examination); Colon v. State, 453 So.2d 880 (Fla. 3d DCA 1984) (conviction reversed because law enforcement agency negligently lost drug seized from defendant after analyzing it, thus depriving defendant of opportunity to chemically analyze suspect drug); Stipp v. State, 371 So.2d 712 (4th DCA 1979), cert. denied, 383 So.2d 1203 (Fla. 1980) (conviction reversed because state's chemist unnecessarily destroyed entire drug sample during testing, precluding testing by defense expert). The Stipp court held that it violated the most fundamental due process rights for the state to unnecessarily destroy the most critical inculpatory evidence in its case and then be permitted to introduce essentially irrefutable testimony of the most damaging nature against the accused. 371 So.2d at 713.

Although frequently citing the Johnson reasoning, the above courts hesitated to hold that the right to confrontation was violated. Their hesitation was apparently based on federal court holdings that the right to confrontation does not apply to tangible evidence. See Stipp, 371 So.2d at 714 (citing United States v. Herndon, 536 F.2d 1027 (5th Cir. 1976)).

The two holdings can actually be reconciled. Even if the right to confrontation does not apply to the tangible evidence itself, denial of access

to the tangible evidence for inspection and testing can result in denial of the right to cross-examination. If the defendant is denied an independent expert to examine the evidence, defense counsel has less ammunition to use in cross-examining the state's expert. A defense expert would advise counsel if other experts might disagree with the state expert's opinion and might suggest questions to ask the state's expert. It is even possible that an independent expert might discover a serious mistake made during the first examination such as confusion between the fatal bullet and a test bullet. Had defense counsel been afforded an independent expert opinion, he could have effectively cross-examined the state's expert and might have cast doubt on his findings. Because he was not afforded this right, Boggs' right to confrontation was violated.

In cases in which the evidence was lost, destroyed, or unavailable, the proper procedure is for the trial court to exclude the testimony of the state's experts. See Ritter, 448 So.2d at 514; Johnson, 249 So.2d at 473. In this case such a dire remedy would not have been necessary. The judge needed only to allow the firearms evidence to be transported from the clerk's office to the expert. He was unwilling to do so.

It would have been better, of course, if defense counsel had made arrangements for a defense expert to examine the evidence earlier, rather than waiting until the Friday before the trial was set to begin. This may not have been feasible, however. Boggs was extradited to Florida from Ohio in May of 1988, about three months after the homicides. Discovery motions were filed and answered in July of 1988. (R. 1751-59) The trial commenced in mid-September.

The state's discovery response did not specify what tangible evidence the state intended to use at trial, or a time or place for defense counsel to inspect the items. (R. 1752-59) 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.

The case was complex and required counsel to travel to Ohio to take depositions. The trial began only nine weeks after the demand for discovery. Part of that time the firearms evidence was at FDLE for the state firearms expert's examination and, thus, unavailable for examination by a defense expert. The record does not indicate when defense counsel learned the results of the state firearms expert's examination. Although he told the judge during the

motion hearing that he had been trying to find a firearms expert to examine the bullet, the record does not indicate how long this had taken. Thus, counsel's late motion apparently resulted from inadequate time for trial preparation.

Despite the timing, the trial judge granted the motion, thus precluding argument in this appeal that he erred by refusing to grant the defense motion for independent expert. At the same time, he effectively precluded the examination by denying counsel access to the firearms evidence. If the judge did not intend to allow defense counsel sufficient time for the examination, he should not have granted the motion.

The judge precluded the examination by failing to make a decision. Had he permitted Whittaker, defense counsel's first expert, to examine the evidence in Tampa on Monday morning, the first day of trial, the trial would not have been delayed because the examination would have been completed during voir dire. Had the expert been permitted to examine the evidence in Tampa on Tuesday, only a half day recess would have been necessary. Transportation of the evidence to the second expert in Vero Beach would have required a four to six hour recess. The judge told counsel that he did not object to transporting the evidence for an examination but found a four to six hour recess unreasonable.[33]

Even if the examination had required as much as a one-day recess, this would not seem unreasonable when the Appellant's life was at stake. The ballistics evidence in this case was extremely important. The state's expert, Joseph Hall of FDLE, gave very damaging testimony against Mr. Boggs. It was the only physical evidence linking Boggs to the homicides. The judge relied on the testimony in his written findings supporting imposition of the death penalty to reject the "residual doubt" sentencing argument made by Boggs. (R. 1725, 1886)

It was fundamentally unfair for the court to deny Boggs a defense examination of the state's most crucial evidence and to then permit the state to introduce essentially irrefutable testimony of the most damaging nature. See Stipp, 371 So.2d at 713. Because the Appellant was denied his constitutional rights to confrontation and due process, the conviction must be vacated and the case reversed for a new trial.

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[33] Originally, the judge objected only to transporting the evidence from the courthouse. Only after it was too late to do so without a trial recess did the judge agree to allow the evidence to be transported; he then refused to recess the trial to allow the examination to take place. (R. 1581-82, 1154-55)

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.

Pretrial identification procedures become "impermissibly suggestive" when the "totality of the circumstances" indicate that the identification resulting from the procedure is unreliable. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); accord Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); Edwards v. State, 538 So.2d 440 (Fla. 1989); Johnson v. State, 438 So.2d 774, 777 (Fla. 1983). A pretrial photographic identification will be set aside if the photographic identification procedure is so impermissibly suggestive that it presents a substantial likelihood of irreparable misidentification. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); accord Edwards, 538 So.2d at 442.

Once the court determines that a pretrial identification procedure was impermissibly suggestive, it is assumed that any in-court identification will be tainted. State v. Sepulvado, 362 So.2d 324, 326 (Fla. 1978); see e.g., M.J.S. v. State, 386 So.2d 323 (Fla. 2d DCA 1980); Baxter v. State, 355 So.2d 1234, 1237 (Fla. 2d DCA 1978) (impermissibly suggestive identification procedure presents such danger of misidentification that it violates due process). Before the in-court identification is excluded, however, the state must have an opportunity to show that the identification is reliable. Manson v. Brathwaite, 432 U.S. at 112-13; Neil v. Biggers, 409 U.S. at 199. "[R]eliability is the linchpin in determining the admissibility of identification testimony." Manson v. Brathwaite, 432 U.S. at 114. Accordingly, in-court identification is only 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." Edwards, 538 So.2d at 442 (citations omitted). Thus, the test for determining the legality of an out-of-court identification procedure is a two-prong test. We will discuss each prong below:

(1) Did the police employ any unnecessarily suggestive procedure in obtaining the out-of-court identification?

Witness Pat Spurlock, who worked in the office of Colony Hills Mobile Home Park, testified that a man called looking for a resident named "Boggs" or

"Rush." She told the man that someone named "Rush" lived at Lot 11. (R. 731-35) That afternoon, a man came into her office to get the address. (R. 736) Spurlock described the man as about 5'8" or 5'9" tall, 160-170 pounds, and about 60 to 65 years old. She could not remember whether he had a mustache. He was dressed like a hunter who had just come from the woods and wore a baseball cap. He wore a navy blue parka and prescription glasses with round lenses. (R. 736, 758, 870)

When Spurlock gave the officers the information, they suggested she do a sketch of the man who was in her office. (R. 739) When she went to the sheriff's office, however, Detective Wilber told her she did not have to do the sketch because they had a suspect and were getting a picture from "up north." (R. 741) He said it was "a case of mistaken identity" and that they would show her a picture. (R. 1612, see also 758, 1592-93)

A. The First Suggestive Procedure

The first unnecessarily suggestive procedure was the photographic display prepared by Detective Linda Alland. She received a photograph from "up north" depicting Boggs, his wife, and grandchild. (R. 1599) She removed the other people from the picture and had Boggs' face enlarged. The resulting photo was fuzzy, showing trees in the background.[34] (R. 1600-03)

Although Alland testified that she "did her best" to match photographs with the one of the Appellant, she wasted little energy, looking no further than the sheriff's office. (R. 855, 1803) The men she found pictured were all in their twenties and thirties while Boggs appeared to be sixty to sixty-five years of age.[35] These booking photographs had white backgrounds while Boggs' photograph had trees in the background. Unlike the other men pictured, Boggs was wearing a jacket over his shirt.

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[34] In M.J.S. v. State, 386 So.2d 323 (Fla. 2d DCA 1980), the police first showed the witness a three person photo pack in which the defendant was the only man depicted with long hair. The police then cut out the defendant's head from a photograph, enlarged it, and pasted it onto a different background leaving a sort of corona effect around the head. This photograph was shown to the witness in a photo display. The appellate court reversed the conviction because of the suggestive pretrial procedure. In the instant case, Detective Alland made the same alterations except that she left the original background with trees, making the photograph dissimilar to all the other photographs.

[35] It is important for this Court to look at the original photographs in the photographic display because the xeroxed copy attached to the Appellant's Motion to Suppress is not clear enough to show the ages reliably.

These facts were particularly important because Spurlock described the man in her office as sixty to sixty-five years old. She said he was wearing a jacket and looked like he had been out hunting. The photograph of Boggs was the only one depicting an older man wearing a jacket in a hunting-type setting.

The procedure was even more suggestive because Spurlock knew that the suspect was one of the five men in the photo display. Detective Wilber told her they had a suspect and were getting a picture from "up north." (R. 741, 758, 1592-93) She knew the officers thought they had apprehended the criminal.

Pre-display statements by the police to the identifying witness that they have persons under suspicion hazard the integrity of the process. United States v. Allen, 497 F.2d 160, 163 (5th Cir.), cert. denied, 419 U.S. 1035, 1038, 95 S.Ct. 520. 42 L.Ed.2d 311 (1974). In State v. Classen, 285 Or. 221, 590 P.2d 1198, 1205 (1978), the Supreme Court of Oregon reversed for a new trial based on two factors, one of which was the officer's statement to the witness that the suspect was depicted in the photographic display. The court quoted the Supreme Court of Indiana as follows:

> A witness may thus be lead to feel that he has an obligation to choose one of the participants in the display since the police evidently are satisfied that they have apprehended the criminal. The result may be that the witness strains to pick someone with familiar characteristics or someone who most resembles the actual criminal or the result may be that the witness will choose the one least dissimilar by the process of elimination. . . .

590 P.2d at 1205 (quoting from Sawyer v. State, 260 Ind. 597, 602, 298 N.E.2d 440, 443 (1973).

In Sepulvado, the court found that Sepulvado's photo was presented to the victim in such a way as to draw attention to it. The appellate court upheld the trial judge's decision that the out-of-court identification was impermissibly suggestive, thus tainting the in-court identification and making it inadmissible. 326 So.2d at 327. Although Boggs' photograph was not given to Spurlock after the others, as in Sepulvado, it was so different from the other pictures that it had the same effect -- immediately drawing the witness' attention. Because the photograph of Boggs was different, it was clearly the one from "up north" or Alland would not have included it. By the process of elimination Spurlock could easily pick out Boggs because the other subjects were much younger men. Even then, Spurlock was only 75% certain that Boggs was the

man she saw in her office. She could not be 100% sure unless she saw him with a baseball cap and glasses. (R. 1604, 1616)

The man identified as Number 1 in the photo lineup looked about 25 years old. His hair was medium in length, waved back at the forehead, and was not curly. Number 2 appeared to be about 30-35 years old, also with medium length hair, waved back at the forehead and curled slightly at the sides. The third man was also about 30-35 years old. His hair was considerably fuller and shaggier and his complexion much darker than the others. In fact, he appeared to be Mexican or some other nationality. Number 4 was the oldest man depicted, except for Boggs. He was perhaps 35 to 38 years old. His hair was much shorter and curly on top.

The picture of Boggs depicted him as a man about 55 to 65 years of age with relatively short curly hair. The hair style somewhat resembled an "afro" and was considerably different from any of the others. He wore a dark jacket over his shirt. His eyebrows were full and bushy, unlike any of the others except for number 3, the man with the dark complexion. He had a mustache as did all of the men pictured.[36]

In Reaves v. State, 649 P.2d 777 (Okla. Ct. Crim. App. 1982), the court reversed because, inter alia, the other men depicted in the nine person photo display did not even remotely resemble the defendant. As in the case at hand, most of the men depicted had medium or long hair, unlike the accused. Even more significantly, the accused looked markedly older than most of the other persons pictured. 649 P.2d at 779.

Because Boggs was easily identifiable as the "suspect," the photographic lineup was no different from a showup. Showing only a single suspect to the witness is "the most suggestive and, therefore, the most objectionable method of pretrial identification." Simmons, 390 U.S. at 383; United States v. Dailey, 524 F.2d 911, 914 (8th Cir. 1975). Spurlock knew that the person she had identified was the suspect. Thus, "the danger was great that the witness would remember the person in the photograph more readily than the appearance of the person who committed the crime." Id. (citing United States

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[36] These descriptions are observations of undersigned counsel, made while observing the original photographic display at the records department of the circuit court in Pasco County.

v. Cook, 464 F.2d 251, 254 (8th Cir.), cert. denied, 409 U.S. 1011, 93 S.Ct. 457, 34 L.Ed.2d 305 (1972).

Even though Spurlock could easily pick out the suspect, she was still only 75% certain that he was the man in her office. Uncertainty is an indicator that a witness has not retained the image of the person. United States v. Cueto, 611 F.2d 1056, 1064 (5th Cir. 1980). With the help of the sheriff's department which obviously provided the picture to the press, and Detective Wilber who told her they had the suspect in custody and she should watch the news to see if she picked the right man, the media confirmed Spurlock's suspicions. She saw the photograph she picked on the television news. She videotaped the news and watched it again to get a better look. She started a scrapbook of newspaper articles and photographs. (R. 745)

A few days later, Spurlock's identification was further aided by the news media. This time, she saw a different picture of Boggs in the newspaper, identifying him as the suspect. Although she claimed that she was then 100% sure he was the man in her office, this identification was tainted by her previous viewing of Boggs' picture. He may have looked familiar because she had seen his photograph in the photo display and on television. Her certainty was probably heightened by the knowledge that she had tentatively identified the correct suspect and that he had now been arrested, indicating that the officers believed him to be guilty.

By the time Spurlock was taken to Ohio to identify Boggs at the extradition hearing, her ability to distinguish between the man in her office and the man depicted in the photograph, the newspaper, and on television was negligible at best. Needless to say, when an identification is based upon a newspaper photograph rather than the witness' own perception, it should be excluded. People v. Barnett, 163 Mich. App. 331, 414 N.W.2d 378, 381 (Mich. App. 1986); People v. Prast, 319 N.W.2d 627, 635 (Mich. App. 1982).[37] The same is true of photographs supplied by detectives.

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[37] In Prast, the court noted that the objectionable identifications were based on a newspaper photograph and there was no police or prosecutorial misconduct. 319 N.W.2d at 636. In the instant case, defense counsel pointed out that the sheriff's office must have given the original photograph to the news media. (R. 1657) Detective Wilber told Spurlock to watch the news to see whether her identification was correct. (R. 745)

B. The Second Suggestive Procedure

The second unnecessarily suggestive procedure was Pat Spurlock's identification of Boggs at the extradition hearing. While waiting for the hearing to commence, Spurlock sat with Detectives Linda Alland and Michael Coates from the Pasco County Sheriff's Office. According to Coates, Alland had a picture of Boggs which she was showing the others. Boggs was brought into the courtroom handcuffed to a black man and either Spurlock or Alland said "That's him." (R. 1644-45) Spurlock thought there were two females and another male handcuffed but was not sure. (R. 764-66, 1619-20) She said Boggs' appearance was different -- he wore no glasses, his hair was straightened and lighter, and his mustache shaved off.[38] (R. 749-50)

The procedure was suggestive because there was no one else in custody who resembled John Boggs. His photograph was in front of Spurlock and in her mind. Coates recognized Boggs from the photograph that Detective Alland had. Although Spurlock was taken from the court room and brought back later to testify (R. 1635-36), her identification of Boggs was irreparably tainted.[39]

(2) Considering all of the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification?

The Neil Court set out five factors to determine whether an identification procedure is reliable. Neil v. Biggers, 409 U.S. at 199:

(A) The opportunity of the witness to view the criminal at the time of the crime: Spurlock testified that the man came into her office about 1:00 in the afternoon. Apparently, then, she had a good opportunity to see him. She observed the man in her office for two to five minutes. (R. 738, 1593)

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[38] Detective Michael Coates who also went to the extradition hearing testified that the man handcuffed to Boggs was black and that there were several other people brought in. He thought there were a couple females and a male but couldn't remember their ages. (R. 1648) Coates recognized Boggs from a photograph and because someone said, "That's him. That's him." (R. 1644) He thought it was Linda Alland who said it but it could have been Spurlock. At his deposition he said Linda Alland had a photograph and said "Yeah, that's him." (R. 1645) Linda Alland also commented that Boggs had lost a lot of weight. (R. 1651)

[39] At the suppression hearing, the judge "found nothing about this identification procedure to be suggestive," and denied the motion. (R. 1659) He also denied the motion at trial. (R. 742)

(B) The witness' degree of attention: Although the witness has a better opportunity to view someone while not under the strain of a criminal act, the witness has no reason to look closely at the person. The stress of the criminal act may impress the defendant's picture upon the witness' memory. See Classen, 590 P.2d 1206 n.11. Thus, although Spurlock's opportunity to view the man was good, she had no reason to remember what he looked like.

(C) The witness' prior description of the criminal: Pat Spurlock described the man in her office as sixty to sixty-five years old which would be the age of many mobile home park residents. He was 5'8" or 5'9" tall and weighed about 160-170 pounds -- a very average height and weight. His hair was dark with a little gray and curled up over the cap. He wore a baseball cap, a navy blue parka and prescription glasses with round lenses. (R. 736-37, 758, 870, 1593) The parka and cap would be appropriate in mid-February.

During her original descriptions, Pat Spurlock did not remember whether the man in her office had a mustache. (R. 870) All of the men depicted in the photographic display, including Boggs, had mustaches. (R. 757) When Boggs did not have a mustache at the extradition hearing, Spurlock commented that he shaved it off. At trial, despite her failure to recall this feature earlier, Spurlock testified that the man had a mustache. (R. 753)

In Dailey, 524 F.2d at 914, the photograph taken of the defendant on the day of the crime depicted him with a mustache. Although the witness signed a statement after the crime that the gunman did not have a mustache, he "inexplicably" changed his story at trial, recalling that the gunman had a mustache. This was one factor leading the court to reverse for a new trial.

In the case at hand, it is apparent that the witness' "inexplicable" trial "recollection" of the mustache was based on the photograph of the defendant rather than her recollection of the man in her office prior to the murder. This is not an indication of bad faith. As the Court noted in Simmons,

> the witness [after misidentification due to an impermissibly suggestive photographic display] is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent . . . courtroom identification.

390 U.S. 377, 383-84, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968).

(D) The level of certainty demonstrated by the witness at the identification procedure: Although Spurlock was only 75% certain of her original

identification, she became 100% certain when she saw a second photograph of Boggs in the newspaper. By this time, however, her identification was tainted by having seen the first photograph which the detectives and media identified as the suspect. Additionally, the most positive witness is not always the most reliable. See United States v. Johnson, 452 F.2d 1363 (D.C. Cir. 1971); A.D. Yarmey, The Psychology of Eyewitness Testimony 180 (1979) (research indicates no relationship between confidence of eyewitness and accuracy of identification).

(E) The length of time between the crime and the identification procedure: The length of time between Spurlock's view of the man in her office and her first identification of the photograph was three days (February 10 to 13). She did not identify him in person, however, until the May 9, 1988, extradition hearing, three months after she saw the man in her office and after she had viewed various pictures of John Boggs in the newspaper and on television. The trial identification was four months after that, and seven months after Spurlock saw the man in her office.

* * * * *

The prosecutor compounded the error in his closing argument after defense counsel told the jury that if it was a good photo display, the state would have introduced it. (R. 1200)

> Let me tell you something about the capability of that guy over there [defense counsel]. 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.

(R. 1245) Because the defense had no duty to prove that Boggs was innocent or to introduce evidence, the prosecutor's comment was unfair and misleading.

Had Pat Spurlock not been aided by the suggestive photo display, it is unlikely that she would have identified Boggs. That she changed her testimony at trial, remembering that the man in her office had a mustache, suggests that the image in her mind was of the photograph of Boggs. Thus, there was a substantial likelihood of irreparable mistaken identification.

The identification was crucial. Without it, Boggs could not have been arrested and his house could not have been searched. Had Spurlock not identified Boggs, the state would have had no case. Thus, the error was not harmless. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

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.

Defense counsel filed a motion to suppress the evidence seized in the search of Boggs' house on September 9, 1988. (R. 1766-68) The motion alleged, inter alia, that the affidavit did not state sufficient probable cause to believe Boggs was engaged in criminal activity as alleged; the affidavit did not state sufficient probable cause to believe Boggs owned or possessed any evidence sought to be seized; the affidavit did not state sufficient probable cause to believe that the evidence to be seized could be found within Boggs' motor vehicle, boats, or residence; and the affidavit did not state where and how some of the information was obtained. The motion requested that all fruits be suppressed and ruled inadmissible. (R. 1768) The judge found "no irregularities" in the search warrant and found probable cause and so denied the motion.[40] (R. 1676, 1844)

Resolution of this issue requires a two prong inquiry. Before considering the "good faith" exception in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), this Court must determine whether probable cause existed for issuance of the search warrant. 468 U.S. at 925, 82 L.Ed.2d at 700. Thus, the two issues for review are (1) does the affidavit submitted in support of the search warrant contain sufficient probable cause to support the magistrate's issuance of the warrant under the "totality of the circumstances" test adopted in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); and (2) if not, should the evidence obtained as a result of the search be admissible under the "good faith exception" to the exclusionary rule set forth in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)?

(1) Probable Cause

Under the "totality of the circumstances test," the magistrate must make a "practical, common-sense decision whether, given all the circumstances set

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[40] At trial, defense counsel renewed his motion to suppress the items seized and to strike testimony about the search warrant. The motion was denied. (R. 972-73) When defense counsel renewed his previous objections to testimony regarding the search, the court granted him a standing objection. (R. 993)

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." Illinois v. Gates, 462 U.S. at 233. As defense counsel argued at the suppression hearing, "the four corners of the affidavit and warrant" showed no probable cause.[41] (R. 1662) Thus, the evidence should have been suppressed.

The search warrant in this case (entitled "Journal Entry") was issued by a judge in Vermilion, Ohio, on February 15, 1988, upon the affidavit of Detective Roger Hoefs of the Pasco County Sheriff's Office. (R. 1769-72) It specified, as items to be seized in the search, "shotguns, pistols, personal clothing, black hat, ski mask, black long coat, green short coat, at 805 Vermilion Road, out buildings, 1977 Ford pickup camper, 1982 Ford Mustang, and boat in yard." (R. 1770) The attached supporting affidavit (entitled "Affidavit and Journal Entry for Search Warrant") stated as probable cause the following:

> 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 and blow Dean away.

(R. 1769)

Another affidavit was attached to the above documents in the record on appeal. It was a two-page affidavit also signed by Roger Hoefs. It was entitled, "Affidavit in Support of Complaint for Arrest Warrant or Summons." This affidavit has a penned notation at the top that it was received from the State Attorney's Office on August 3, 1988. (R. 1771) Thus, it would appear that the Clerk of Court in Erie County, Ohio, obtained this longer affidavit from the state attorney's office prior to sending the copies to Pasco County, Florida.

Copies of both affidavits are stamped as received by the clerk's office in Pasco County and filed on September 9, 1988. (R. 1769-72) The search warrant or "Journal Entry" attached to the "Affidavit and Journal Entry for Search Warrant" (hereafter, "short affidavit") was not date stamped in Pasco County, indicating that it was stapled to the short affidavit. (R. 1769) Similarly, the second page of Hoefs' two-page affidavit was not date stamped by Pasco County, indicating that these two pages were stapled together. (R. 1772) This suggests that the documents were received as two separate items and only the

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[41] An appellate court's review is generally limited to facts alleged within the "four corners" of the affidavit. Whiteley v. Warden, 401 U.S. 560, 565 n.8, 91 S.Ct. 1031, 1035 n.8, 28 L.Ed.2d 306 (1971).

top page of each was date stamped. Defense counsel noted at trial that the two documents were stapled separately. (R. 1014)

Whether the longer affidavit was submitted to the judge is uncertain. Defense counsel argued at the suppression hearing on September 16, 1988, that no notation showed that the longer affidavit was part of the application for the warrant. It was not date stamped in Ohio nor did the Ohio certification state that the longer affidavit was incorporated although both affidavits were sent from Ohio with the search warrant. (R. 1674)

Detective Roger Hoefs testified that he went to Ohio, met with the prosecutor there, and created the affidavit for the search warrant. (R. 1662-65) He said that they handed the judge all of the documents including the two-page affidavit.[42] (R. 1669) The judge liked the way the affidavit was written and executed the search warrant. (R. 1665) Although defense counsel pointed out that the two page affidavit was entitled "Affidavit in Support of Complaint for Arrest Warrant or Summons," Hoefs adamantly denied that he prepared the longer affidavit for the possible issuance of an Ohio arrest warrant. (R. 1661, 1668)

It is clear that the short affidavit attached to the search warrant lacks probable cause. Even if the longer form was considered, it is insufficient. Facts were omitted. The alleged "facts" were based on unconfirmed information, speculation, and conjecture. A statement of "fact" is only as credible as its source. Although Hoefs evidently believed his statements to be correct, the judge must know the basis of his belief. See United States v. Ventresca, 380 U.S. 102, 118, 85 S.Ct. 741, 751, 13 L.Ed.2d 684 (1965) (Douglas, J., dissenting).

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 and blow Dean away.

(R. 1673) "Investigation reveals" is not enough. The judge must know the source of the information. Even if "investigation reveals" were sufficient, that Boggs was in Florida when three people were shot is hardly enough to suggest that he

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[42] Although Hoefs testified that he executed the affidavits in front of the judge, they are not signed by the judge as required by Ohio Criminal Rule 41(C). See State v. OK Sun Bean, 13 Ohio App.3d 69, 468 N.E.2d 146, 150 (Ct. App. 1983).

committed the murder. Lots of people were in Florida on that date. The second line, that Boggs had threatened to go to Florida and "blow Dean away" says little more. It does not tell who "Dean" is, when Boggs allegedly made the threat, or to whom he made the threat. Many persons make threats they never intend to carry out. This is hardly probable cause for a search.

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.

(R. 1772)

In the first sentence and paragraph of the above affidavit, Hoefs recited that about a month before the homicide, Boggs allegedly told his son that he was going to Florida to "blow away" Gerald Dean Rush. It does not specify the source of Hoefs' information or any particular time when this threat would be carried out. There is no way to know whether the source was reliable. If it was Jerry Boggs, the Appellant's ex-wife, she would certainly not be a reliable

source of information concerning Boggs. She just divorced him for another man and obviously wanted to get rid of him. Even if the source were known and reliable, this threat alone was insufficient to constitute probable cause.

The second paragraph is no better. With no source of information listed, Hoefs recited that Pat Canter observed that Boggs' camper truck was missing from his home two days before the homicide. She called Boggs' ex-wife in Florida to warn her. Because Mrs. Boggs feared the Appellant, she called the Pasco County Sheriff's Office. This information may also have been obtained from Jerry Boggs although the affidavit does not say so. That Boggs' camper trailer was missing from his house does not mean that he was in Florida or provide probable cause for a search.

The third and fourth paragraphs describe the homicide. Although it is necessary to tell with what the accused is charged under Ohio law, see Cleveland Heights v. Spellman, 7 Ohio Misc. 149, 34 Ohio Op.2d 405, 213 N.E.2d 206 (Cuyahoga Mun. Ct. 1965), the description of the homicide in no way links Boggs to the crime. Thus, although reliable, it is irrelevant to probable cause.

The fifth paragraph is the only one that even arguably shows any cause for the search and this paragraph contains various false statements made, if not knowingly, at least with reckless disregard for the truth. Again, it only says that the information was learned "[d]uring the course of the investigation." The affidavit then states 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."

Spurlock testified that Boggs was there in the afternoon, not the morning, and asked earlier on the phone for a "Boggs" or "Rush" without specifying first names. (R. 734-35) Although these errors are not material, they show that Hoefs knew little about the investigation or that he was extremely careless and had little regard for the truth. Furthermore, Hoefs did not "know" that Boggs was at the trailer park. Pat Spurlock was only 75% certain that Boggs was the man in her office. (R. 759-60)

Hoefs stated in the affidavit that the park manager looked at the photo ID pack and identified the defendant as the person who asked for a "Rush." He failed to mention that she was only 75% certain. Spurlock said that Boggs

might have been the man in her office -- then again he might not have been. This error was very material because no one else saw Boggs in Florida.

Hoefs' last sentence in that paragraph is total conjecture. He stated that "[t]he defendant, thinking he had located his ex-wife and her current boyfriend went to the residence and killed and shot the wrong people." Obviously, there is no basis for this conclusion nor does it help provide probable cause.

The final paragraph of the affidavit states that Boggs "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." The first part of this sentence is again conjecture. No one saw Boggs leave Florida or return to Ohio. Although Patrolman Sooy saw Boggs driving into Vermilion, Sooy testified that Boggs could have been only ten minutes on the road. He did not know whether he came from Florida or Ohio. (R. 969)

(2) The Good Faith Exception

The Leon Court created the "good faith" exception to the exclusionary rule in 1984. The exception permits the use of evidence obtained when officers acted in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause. Leon. The Court's reasoning was that the purpose of the exclusionary rule was to deter police misconduct rather than to punish errors of magistrates and judges. 468 U.S. at 916, 82 L.Ed.2d at 694.

Although "great deference" is accorded to the magistrate, this deference is not boundless. The warrant cannot be based on an affidavit that does not provide the magistrate with a substantial basis to determine the existence of probable cause. Leon, 468 U.S. at 914, 82 L.Ed.2d at 693. Additionally, suppression is appropriate if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief that probable cause existed. 468 U.S. at 926, 82 L.Ed.2d at 701; see also Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) (inquiry required when false statement knowingly and intentionally, or with reckless disregard for the truth, included in warrant affidavit).

Although most of Hoefs' two-page affidavit contains only conjecture and unsupported conclusions, the alleged facts concerning the identification

arguably provide probable cause for issuance of the search warrant because of the evidence that Boggs was in Florida. These facts, however, were distorted and misleading. If Hoefs did not intentionally provide misleading information, he was careless and recklessly disregarded the truth.

Under the Leon "good faith" exception, a warrant must be suppressed if the magistrate was misled by information that the affiant knew was false or would have known was false except for his reckless disregard of the truth. Leon, 468 U.S. at 923, 82 L.Ed.2d at 699; see also Griffith v. State, 532 So.2d 80 (Fla. 3d DCA 1988) (good faith exception inapplicable because affiant misled judge by including false information in warrant). As noted above, several discrepancies were not very material but indicated recklessness at best. The most distressing problem was an omission. Hoefs either intentionally or negligently failed to mention that Pat Spurlock was only 75% certain that Boggs was the man who came into her office looking for a "Rush."[43] It seems more likely that he intentionally omitted this fact to avoid the possibility that the judge would not find probable cause to issue the warrant.

"The problem is not what the affidavit said, but what it didn't say." Sotolongo v. State, 530 So.2d 514, 515 (Fla. 2d DCA 1988). In Sotolongo, testimony revealed that the officer who executed the affidavit, on which basis the warrant was issued, omitted relevant information -- that he had returned to the house after a controlled buy, again attempting to buy drugs, and was unsuccessful. Thus, he waited until enough time had elapsed for the occupants to obtain a new supply before applying for the warrant.

The Sotolongo court found no Florida case dealing with a situation where relevant information was omitted from a facially sufficient search warrant affidavit but noted that courts in other jurisdictions recognized that the reasoning of Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), logically extends to material omissions from the affidavit. Id.; 2 W. LaFave, Search & Seizure § 4.4(b), at 194 (2d ed. 1978). Thus, the reviewing court should consider the affidavit as though the omitted facts were included. The Sotolongo court found that if the omitted facts had been included, there

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[43] Of course, as would be expected, he also failed to mention that the photographic display was suggestive because Boggs' picture was taken from a family snapshot, enlarged, and placed with four book-in photographs of much younger men. (See Issue IV, supra.)

would have been no probable cause. The search warrant was voided and the fruits of the search excluded.

The case at hand is the same. If the Ohio judge had known that the witness was not sure Boggs was the man she saw in Florida, and that Patrolman Sooy really had no idea where Boggs had been before he saw him entering Vermilion, he might not have issued the warrant. If there were no evidence that Boggs had been in Florida and returned to Ohio, there would have been no reason to suspect that the items listed on the warrant would be found in his home. Thus, the facts that Hoefs distorted, misrepresented and omitted were the facts upon which the warrant hinged.

A law enforcement officer does not manifest objective good faith by relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Leon, 468 U.S. at 923, 82 L.Ed.2d at 899. Hoefs knew or should have known that what he put in the affidavit was not a true representation of the facts. If he was falsely informed by other law enforcement officers, this was no excuse. Just as law enforcement officers may act on their collective knowledge, they are restrained by their collective ignorance. See United States v. Hensley, 469 U.S. 221, 106 S.Ct. 675, 83 L.Ed.2d 604 (1985).

There was no reliable evidence that Boggs ever went to Florida. A threat and a homicide in Florida do not establish probable cause. Suspicion and conjecture provide an insufficient basis upon which to issue a search warrant. Because Hoefs either knowingly or recklessly misled the judge who issued the warrant, the warrant should be found void and the evidence suppressed.

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.

An accused has a constitutional right to a fair and impartial jury. "The purpose of voir dire is to remove prospective jurors who will not be able to impartially evaluate the evidence." Connors v. United States, 158 U.S. 408, 413, 15 S.Ct. 951, 953, 39 L.Ed. 1033 (1895). The traditional rule applied by this Court was set out in Singer v. State, 109 So.2d 7, 23-24 (Fla. 1959):

> [I]f there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused on motion of a party, or by the court on its own motion.

Accord Hamilton v. State, 547 So.2d 630, 632 (Fla. 1989); Moore v. State, 525 So.2d 870, 872 (Fla. 1988); Hill v. State, 477 So.2d 553, 555 (Fla. 1985). This Court noted in Hamilton that the Singer rule must be read together with the test set out in Lusk v. State, 446 So.2d 1038, 1040 (Fla.), cert. denied, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984):

> The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely on the evidence presented and the instructions on the law given to him by the court.

This does not mean that if a prospective juror who has a preconceived opinion agrees to follow the law, the juror is automatically qualified to serve. If the juror requires that the defendant present evidence to overcome the preconceived opinion, he or she is requiring that the defendant prove his or her innocence rather than that the state prove guilt. A juror is not impartial when one side must overcome a preconceived opinion to prevail. Hill, 477 So.2d at 556.

A. The Facts

Prospective juror Smith testified that she recalled details of the murder from reading the newspaper. Although she already had an opinion that Boggs was guilty, she said that she could disregard it.

MR. VAN ALLEN [prosecutor]: Ms. Smith, I believe you indicated that you had read articles about this case both recently and more remotely in time.

PROSPECTIVE JUROR SMITH: Yes.

MR. VAN ALLEN: What paper did you read it in? The Tribune?

. . . .

PROSPECTIVE JUROR SMITH: I read it from the beginning until up to date in the Tampa Tribune. I read the paper quite a lot.

. . . .

PROSPECTIVE JUROR SMITH: As far as the facts, I've read that he did come into the home in the early hours of the morning, and that he did shoot, and by his shooting, two people died, the lady immediately and I think the man, gentleman lived several days. And that he was looking for his wife. He thought he had found his wife.

MR. VAN ALLEN: Uh-huh.

PROSPECTIVE JUROR SMITH: And then he went back to Ohio.

MR. VAN ALLEN: Okay. That's quite a bit of evidence that you just recited. You previously indicated that you could set that aside or disregard it for the purposes of this trial and render a verdict based upon the evidence as presented.

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.

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.[44]

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.

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[44] During the judge's initial questioning of the jury, prospective juror Smith said that "I feel that I have formed an opinion." (R. 16)

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.

THE COURT: Mr. Eble?

MR. EBLE: May it please the Court. Briefly. Ms. Smith, a lot of what you told us seemed to have been in an article over the weekend. I think you mentioned inside an article that was in yesterday's paper.

PROSPECTIVE JUROR SMITH: Yes. It was yesterday's paper. It sort of reviewed what had been in the paper previously.

. . . .

MR. EBLE: Okay. Anything about -- anything, do you recall reading anything about Mr. Boggs or what happened?

. . . .

PROSPECTIVE JUROR SMITH: It seems to me I remember that Mr. Boggs had been in trouble before. He has a temper.

MR. EBLE: Do you remember how? Do you remember reading about that?

PROSPECTIVE JUROR SMITH: I don't remember. Really and truly, I couldn't say for sure that even that is true, but that's in my mind.

. . . .

MR. EBLE: Anything about Mrs. Boggs?

PROSPECTIVE JUROR SMITH: No. Well, other than she was supposedly in the Zephyrhills area with a Mr. Rush. Now, I don't know whether she was married to him or not.

. . . .

MR. EBLE: You indicated when Judge Cobb first asked the question in court -- and please understand, Ms. Smith, there's no right or wrong answers here, okay. As a matter of fact, the only right answers are truthful answers. Okay? You indicated in answer to Judge Cobb when he asked you if anybody had an opinion about Mr. Boggs' guilt or innocence, you volunteered and honestly said that you did. Can you tell me what that opinion was when you answered his question?

. . . .

PROSPECTIVE JUROR SMITH: I meant that I, that I really thought that he did commit the crime --

MR. EBLE: Okay.

PROSPECTIVE JUROR SMITH: -- from what I read in the paper.

MR. EBLE: So from reading it in the paper and this morning at the time you sat there and Judge Cobb asked that question, you're of the opinion that Mr. Boggs was guilty of this crime?

PROSPECTIVE JUROR SMITH: This morning I was. Right now, I feel like I can listen to the evidence.

(R. 166-73) Prospective Juror Smith assured defense counsel that although she earlier had an opinion as to guilt, she never had an opinion as to what the penalty should be. She said she thought she could set aside all that she had read and presume Mr. Boggs innocent. She promised that she would not tell other jurors anything she read in the paper. (R. 172-74)

When defense counsel moved to excuse Mrs. Smith for cause, the court denied his request. Although defense counsel disagreed, the judge determined that Mrs. Smith was not equivocal about her ability to disregard her opinion. (R. 184-86) Thus, Boggs' counsel had to use a peremptory challenge to excuse Mrs. Smith. (R. 186)

Prospective juror Swart was the mayor of San Antonio, Florida. (R. 481) She said that she had read about the case in the Tampa Tribune and had formed an opinion "somewhat." She was not sure whether she could disregard what she had read. (R. 464-65, 499) She said that she and other prospective jurors had discussed the case in the jury pool room. (R. 494)

In chambers, Mrs. Swart said that in February she read about the shooting and that "he" came from up north and thought he shot his ex-wife and her boyfriend. (R. 502) She believed that she could set aside what she read. (R. 503) She was among three or four prospective jurors who discussed what was in the newspaper while waiting to be called into court for voir dire. They were talking about who "he" had shot and who he intended to shoot without really expressing an opinion as to guilt or innocence. She agreed, however, that it appeared that they had already decided that Mr. Boggs shot someone. (R. 504-06)

Mrs. Swart said that she talked to these other prospective jurors about what she had read in the paper and voiced concern over the fact that "he" had intended to kill someone. She did not remember which jurors were involved in the conversation. (R. 506-08) Mrs. Swart could not honestly say that she could presume John Boggs innocent. (R. 511)

Defense counsel moved to challenge Mayor Swart for cause and to strike the entire prospective panel. The trial judge twice said that he would not even listen to argument on the motion to strike the panel because counsel had no grounds for the motion. He did grant defense counsel's challenge for cause as to Mrs. Swart. Defense counsel had no peremptory challenges left. (R. 512-13)

Defense counsel moved for more peremptory challenges,[45] citing the large number of jurors who had heard about the case as reason for using all of his challenges. The judge said, "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)

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. During voir dire, Boggs' counsel complained to the judge that he and Boggs could not agree on jurors to challenge because Boggs was incompetent. (R. 318) By excusing jurors Boggs wanted to excuse as well as those that defense counsel thought should be excused, counsel exhausted his peremptory challenges. (See Issue I)

When defense counsel attempted to question the next prospective juror, in chambers, as to whether she overheard anyone discussing the case in the jury pool room as related by Mrs. Swart, the judge sustained the state's objection. (R. 516-17) The juror was excused for cause. (R. 518) The judge told defense counsel he could question prospective jurors as to whether they talked about the case but said he would sustain any objections to questions about who heard the discussion Mrs. Swart related. (R. 519)

The judge denied a requested challenge for cause as to the next prospective juror, Mrs. Harrison. (R. 540) Mrs. Harrison said that she had heard some of the girls in her office talking about the case and that her husband read it in the Sunday paper and told her the case would be tried on Monday. (R. 520) Her husband told her only that it was a case where a man intended to murder his wife and murdered someone else. The girls at the office, one of which lived in Zephyrhills, told her basically the same thing. She said she had no opinion about the case and believed she could set aside anything she had heard. (R. 521-22)

On examination by defense counsel, Mrs. Harrison remembered that the homicide occurred in a trailer and that the person intended to murder his wife but shot other people instead. She could not remember exactly where she heard these details. She said she could presume Boggs innocent. (R. 533-34)

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[45] Fla. R. Crim. P. 3.350(e) gives the trial court discretion to grant additional peremptory challenges when the information or indictment contains two or more counts, as is the case here.

Defense counsel renewed his request for additional peremptory challenges so that he could excuse Mrs. Harrison. He again pointed out that a number of the jurors had read the newspaper. The court denied his request for extra challenges and said he would also deny his challenge for cause as to Mrs. Harrison. (R. 540) Thus, Mrs. Harrison served as a juror in the case.

The next prospective juror who was voir dired for service as an alternate, Mr. Williams, said he had heard "outside" that "he" came down from up north and killed someone accidentally. (R. 543) He did not remember who he heard talking about the case. (R. 551) He was accepted as an alternate. (R. 560)

B. Excusal for Cause

The trial court should have excused Mrs. Smith for cause. When there is any reasonable doubt as to a juror's possessing the requisite state of mind to render an impartial verdict, the juror should be excused. Smith v. State, 463 So.2d 542, 545 (Fla. 5th DCA 1985) (citing Singer, 109 So.2d 7). During individual voir dire in the afternoon, Mrs. Smith said that, although she had an opinion of guilt that morning, she could now listen to the evidence.[46]

In Hamilton, this Court reversed a conviction because a juror had a preconceived opinion of Hamilton's guilt and indicated that it would take evidence put forth by Hamilton to convince her he was not guilty. Although she eventually stated that she could base her verdict on the evidence at trial and the law, her responses viewed together showed that she did not presume Hamilton was innocent. 547 So.2d at 632. "A juror is not impartial when one side must overcome a preconceived opinion in order to prevail." Hill, 477 So.2d at 556.

This case is similar. Although Mrs. Smith decided in chambers that she could put aside what she had read, she admitted that she earlier had an opinion that Boggs was guilty. Even though a juror may claim he or she can follow the law and consider the evidence impartially, such claims should be viewed with suspicion when other statements show otherwise. Hill, 477 So.2d at 555-56; Price v. State, 538 So.2d 486, 489 (Fla. 3d DCA 1989); Club West v. Tropigas of Florida, 514 So.2d 426, 428 (Fla. 3d DCA 1987). Jurors should be not only impartial, but beyond even the suspicion of partiality. If there is any doubt as to the juror's sense of fairness, he should be excused. Hill, 477 So.2d

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[46] The colloquy took place in chambers. (R. 166)

at 556; Johnson v. Reynolds, 97 Fla. 591, 598, 121 So. 793, 796 (1929); O'Connor v. State, 9 Fla. 215, 222 (1860).

In Smith v. State, 463 So.2d 542 (Fla. 5th DCA 1985), the court reversed, holding that the trial judge should have excused for cause a prospective juror who had read extensive pretrial publicity. She had previously expressed an opinion on the case but after extensive questioning, said she would try to be fair and impartial. Quoting from Singer, 109 So.2d at 24, the court noted that "[i]t is not enough that an opinion will readily yield to the evidence, for evidence of innocence is not required to be presented by the accused." Smith, 463 So.2d at 545. As in Smith, prospective juror Smith, in the case at hand, had an opinion which she believed she could discard if necessary. In reality, she was willing to listen to the evidence but would require something from Boggs to overcome her opinion. Boggs presented no defense case.

An additional reason Smith should have been excused was the false impression she had in her mind that Boggs had been in trouble before. She said that she could not recall for certain but thought she remembered reading that he had been in trouble and that he had a temper. Boggs had no criminal record of any consequence so in fact had not been in trouble before. If Mrs. Smith thought that he had a temper and had past criminal convictions, this would most certainly affect her verdict in the case.

The trial court's failure to excuse Mrs. Smith for cause reduced the number of peremptory challenges available to Boggs. He was, thus, unable to excuse Mrs. Harrison who had also been exposed to pretrial publicity.[47] Such error cannot be harmless because it "abridged appellant's right to peremptory challenges by reducing the number of those challenges available to him." Hill, 477 So.2d at 556. This Court stated in Hill that

> it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges, and an additional challenge is sought and denied.

477 So.2d at 556 (citations omitted); see also Moore, 525 So.2d at 873 (reversing because judge erred by not excusing prospective juror for cause and then denying request for additional challenge). In this case, defense counsel

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[47] Defense counsel may have wanted to excuse Mrs. Harrison for other reasons too.

twice requested additional challenges after exhausting his challenges. His requests were denied. Thus, because the court erred in failing to excuse Mrs. Smith for cause and then denying Boggs' counsel's request for an additional challenge to excuse Mrs. Harrison, and refusing to excuse her for cause, Boggs was denied his right to a fair trial. The case must be reversed for a new trial.

C. Striking the Panel

A meaningful voir dire is critical to effectuate an accused's constitutionally guaranteed right to a fair and impartial jury. What is a meaningful voir dire depends on the issues in the case. The scope of voir dire "should be so varied and elaborated as the circumstances surrounding the juror under examination in relation to the case on trial would seem to require . . . ." Lavado v. State, 469 So.2d 917, 919 (Fla. 3d DCA 1985) (Pearson, J., dissenting) (quoting from Pinder v. State, 27 Fla. 370, 375, 8 So. 837, 839 (1891)). Judge Pearson's dissenting opinion in Lavado, quoted above, was adopted by this Court in Lavado v. State, 492 So.2d 1322 (Fla. 1986).

Although the trial court allowed individual voir dire in this case to determine what prospective jurors had read about the case, he refused to allow defense counsel to ask prospective jurors if they had overheard the conversation Mrs. Swart referred to and whether they knew which jurors were involved. The judge adamantly refused to entertain counsel's motion to strike the entire panel. Without listening to argument, he said that counsel had no grounds to strike the entire panel.

When defense counsel attempted to ask the next prospective juror if he knew who had been involved in the conversation, the judge sustained the state's objection although he said that defense counsel could ask jurors if they had talked about the case. Thus, defense counsel was prevented from ascertaining which jurors might have been tainted by the discussion. Because the judge excused Mrs. Swart for cause, he obviously agreed that she had been influenced by her knowledge of the case and was not an unbiased juror. She said that those involved in the discussion apparently were of the opinion that Boggs killed someone. Thus, the other panel members who were exposed to the same information were not unbiased. The judge could have cured the problem by striking the panel or allowing counsel to individually question all of the potential jurors to determine which ones heard the discussion. He refused to do either. Because we

do not know if potentially biased jurors were seated, a new trial is required.

The case of Jordan v. Lippman, 763 F.2d 1265 (11th Cir. 1985), is somewhat instructive on this point. In that case, the jury was picked on Friday but not sworn until Monday morning. Over the weekend, there were various racial demonstrations in the town because of the prison riots which were the subject of the trial. On Monday, defense counsel submitted evidence that two of the jurors were in town during the demonstration and that one was a participant. Nevertheless, the judge refused to allow additional individualized voir dire to determine whether other jurors were involved or influenced by the weekend activities. Id. at 1271.

The Eleventh Circuit reversed, holding that the trial judge erred in denying renewed voir dire. Relying extensively on Davis v. State, 583 F.2d 190 (5th Cir. 1978), the court recognized that where pretrial publicity is a factor, a juror's conclusory statement of impartiality is insufficient. It is necessary to determine whether the juror can lay aside any impression or opinion due to the exposure. Furthermore, the juror is in a poor position to make a determination as to his own impartiality. The judge should make that decision. Jordon, 763 F.2d at 1274 (citing and quoting from Davis). The Jordon court cited numerous cases evidencing the continued validity of the principle that relief is required where there is a significant possibility of prejudice plus inadequate voir dire.

The publicity in the instant case was probably much less than that in Jordon (prison riots) or Davis (raid to free Americans from Mexican jails). Nevertheless, Zephyrhills is a much smaller community. A shooting of three innocent persons in a small community attracts much attention because it is uncommon. Thus, the publicity in this case may have been as pervasive as was the publicity in Jordon and Davis. Many of the jurors read or heard about the case and, as is evidenced by Mrs. Swart's comments, believed that Boggs was guilty. Boggs' defense was that he never left Ohio and did not commit the crime. It would be difficult for jurors who believed all along that he was the guilty party to be convinced by the evidence or lack thereof that he did not commit the crime.

Accordingly, because the trial court erred by failing to excuse prospective juror Smith and in refusing to strike the panel or to allow voir dire of individual jurors to determine which ones heard the discussion of the case in the jury pool room, the case must be reversed for a new trial.

ISSUE VII

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE THAT BOGGS EXERCISED HIS RIGHT TO AN EXTRADITION HEARING.

John Boggs was extradited from Ohio about May 10, 1988. (R. 1742) When Pat Spurlock testified about her trip to Ohio and identification of Boggs at the extradition hearing (see Issue IV), defense counsel objected. He argued that testimony about the Ohio identification would make the jurors aware that Boggs fought extradition and would make them aware of the judicial determination that he was "the person to be sent down to Florida." Counsel urged that without some instruction about extradition proceedings, the probative value would be outweighed by prejudice. The trial court overruled his objection. (R. 747-49)

Detective Linda Alland testified that she went to Ohio with Detective Coates and Pat Spurlock to bring Boggs to Florida after he was arrested. (R. 862-63) She testified that Spurlock identified Boggs in Ohio. (R. 863) Boggs' counsel objected again on the grounds that the testimony was cumulative, hearsay, and called attention to the extradition proceeding. (R. 863-64) The court denied his motion to strike and overruled his objection. (R. 854)

If the jurors were not aware by then that the identification proceeding in Ohio was an extradition hearing, Patrolman Kevin Sooy of Ohio clarified the matter. He reminded the jury that Boggs unsuccessfully fought extradition by testifying that the last time he saw Boggs was "at his extradition hearing." (R. 964)

The issue would seem to be a case of first impression in Florida. In State v. Henson, 221 Kan. 635, 562 P.2d 51 (1977), the Supreme Court of Kansas considered the issue. That court found no Kansas case which dealt with the issue, noting that other states differed in their treatment of it. 562 P.2d at 63. The Henson court determined that the better view was that such evidence was inadmissible because "waiver of extradition is no evidence of innocence, and resistance is no evidence of guilt." 562 P.2d at 64 (citing Commonwealth v. Woong Knee New, 354 Pa. 188, 47 A.2d 450, 467 (1946)); State v. Martin, 229 Mo. 620, 129 S.W. 881 (1910)). The court reasoned that under the Uniform Extradition Act,

> every accused person is afforded the right to have extradition adjudicated. . . . [T]he defendant was merely exercising his statutory rights . . . in refusing to execute a waiver of extradition. Refusal to waive statutory rights in connection with extradition is to be distinguished from an accused's refusal to

> furnish handwriting exemplars or voice samples where no statutory rights are involved.

562 P.2d at 64 (citation omitted).

It seems that Florida would agree with the Kansas Supreme Court for several reasons. A fundamental principal of constitutional law is that the state may not penalize a defendant for exercising a legal right by using his exercise of that right as evidence against him at trial. See Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). In Wainwright v. Greenfield, 474 U.S. 284, 295, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986), the Court found that the Doyle holding barred the state from using evidence that the defendant exercised his right to remain silent to rebut an insanity defense because Miranda warnings carry an implied promise that "silence will carry no penalty." If it is error to use a defendant's exercise of his right to remain silent against him, it is error to use the exercise of his right not to waive extradition as evidence against him.

In State v. Burwick, 442 So.2d 944 (Fla. 1983), cert. denied, 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984), this Court noted that the defendant was implicitly assured that he would not be penalized if he chose to exercise his Miranda rights.

> It is fundamentally unfair for the state to lure Burwick into remaining silent then impeach the man with this very same silence. To permit the state to benefit from the fruits of its own deceptions violates the due process clause of the fourteenth amendment and article I, section 9 of the Florida Constitution.

Burwick, 442 So.2d at 948 (citations omitted); see also Garron v. State, 528 So.2d 353 (Fla. 1988)(following Greenfield and Burwick). This Court explained and thereby expanded the scope of its Burwick decision in Brannin v. State, 496 So.2d 124 (Fla. 1986). "Burwick stands for the proposition that testimony about an accused's exercise of constitutional rights, regardless of the nature of the defense raised, is error." Brannin, 496 So.2d at 125.

Secondly, as the Henson court noted, waiver of extradition does not evidence innocence nor does resistance evidence guilt. See Woong Knee New, 47 A.2d at 467 (many persons whose guilt is later established waive extradition). Just as there are many possible motives for remaining silent upon arrest, United States v. Hale, 422 U.S. 171, 180, 95 S.Ct. 2136, 45 L.Ed.2d 99 (1975), there are many possible motives for refusing to waive extradition. Boggs would not voluntarily go to Florida to face criminal charges if he believed that he was innocent

of any crime. Thus, evidence that Boggs fought extradition was irrelevant. Only relevant evidence is admissible. § 90.402, Fla. Stat. (1987).

The issue in Herring v. State, 501 So.2d 19 (Fla. 3d DCA 1986), is clearly analogous to the issue at hand. The defendant was asked if he would submit to a "hand swab test for gunshot residue" but was not told that he was required to take the test or that his refusal could be used against him. When the officer arrived with the equipment, Herring declined to take the test. The prosecutor introduced this evidence at trial, arguing that the refusal proved consciousness of guilt. 501 So.2d at 20.

The Third District Court of Appeal reversed the trial court's admission of this testimony. Citing State v. Esperti, 220 So.2d 416, 418 (Fla. 2d DCA 1969), the court noted that a defendant's behavior is circumstantial evidence of consciousness of guilt only when the behavior is "susceptible of no prima facie explanation except consciousness of guilt." 501 So.2d at 20. In Esperti, the court approved the admission of similar evidence because the defendant was told that he had no right to refuse the test. Thus, there were no circumstances other than consciousness of guilt to explain his behavior. The Esperti court noted, however, that, had the defendant been told he had the right to refuse, it would have been unfair to admit the evidence of his refusal.

> The unfairness, of course, is that a defendant who is told he may refuse and is told of no consequences which would attach to his refusal may quite plausibly refuse so as to disengage himself from further interaction with the police or simply decide not to volunteer to do anything he is not compelled to do. In contrast, if a defendant knows that his refusal carries with it adverse consequences, the hypothesis that the refusal was an innocent act is far less plausible.

Herring, 501 So.2d at 20. Examples of refusals that do carry consequences are failure to take a blood alcohol test or a breathalyzer. Refusal to take these tests may result in the loss of one's driver's license. South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983); Herring, 501 So.2d at 21, n.2; § 316.1932(1)(a), Fla. Stat. (1987).

Boggs' exercise of his right to fight extradition is analogous to the exercise of the right to remain silent -- which carries no penalty. It is not like refusing a mandatory procedure such as fingerprinting, or like refusal to take a breathalyzer test which carries a penalty. Thus, like the right to remain

silent, Boggs' exercise of his right to contest extradition was not probative of consciousness of guilt.

Requesting a pretransfer extradition hearing is clearly the exercise of a statutory right. It is also the exercise of a constitutional right because the hearing required by the Extradition Act is protected by the due process clause of the fifth and fourteenth amendments. See Cuyler v. Adams, 449 U.S. 433, 101 S.Ct. 703, 66 L.Ed.2d 641 (1981) (prisoners transferred under Detainer Act must be afforded procedural safeguards of Extradition Act).

If the jury was further convinced of Boggs' guilt because he fought extradition, the error was not harmless. This Court may not find the error harmless unless it is shown beyond a reasonable doubt that the error did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The burden of proof is on the state. Chapman, 386 U.S. at 26; DiGuilio, 491 So.2d at 1139.

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.

Defense counsel objected to testimony about an incident more than twenty years earlier when Boggs discovered Dean Rush at his house on the couch with Boggs' wife. He requested a Richardson hearing because the state had provided no notice of Williams Rule evidence as to this testimony. When the court denied his motion, witness Jerry Boggs testified that the last time Boggs saw Dean Rush he told him to never come back. (R. 930)

Defense counsel objected twice more when Dean Rush testified that Boggs threatened to kill him in 1965. (R. 954, 958) He again requested a Richardson hearing. His request was denied. Rush testified that Boggs put a .22 gun to or between his eyes in 1965. (R. 954)

A. Williams Rule Evidence

Williams Rule evidence is only a special application of the general rule that all relevant evidence is admissible unless excluded by a rule of evidence.[48] The correct focus in determining the admissibility of any evidence, therefore, is relevance to some point at issue. Bryan v. State, 533 So.2d 744, 746 (1988). Even if relevant, the evidence is not admissible if its probative value is outweighed by the danger of unfair prejudice. § 90.403, Fla. Stat. (1987). Accordingly, to determine whether the evidence concerning Boggs' prior threats was admissible, we must determine whether the evidence was

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[48] The "Williams Rule," codified in the Florida Evidence Code at § 90.404(2)(a), takes its name from the case of Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959) in which this Court held that similar fact evidence of a prior criminal act is admissible if relevant except to prove bad character or criminal propensity. Section 90.404(2)(a) of the Florida Evidence Code provides as follows:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

relevant, other than to show bad character or propensity. If so, we must then consider whether its probative value was outweighed by unfair prejudice.

The issues that collateral crime evidence is often used to show are identity, see e.g., Garron v. State, 528 So.2d 353 (Fla. 1988); Peek v. State, 488 So.2d 52 (Fla. 1986); Drake v. State, 400 So.2d 1217 (Fla. 1981), and motive. In the instant case, the testimony that Boggs threatened Dean Rush twenty-three years earlier was too remote to be relevant in proving identity or motive.

The introduction of evidence of unrelated bad acts is precisely what Florida Evidence Code section 90.404(2)(a) is intended to prevent. The testimony was not relevant. Although recent threats to Mrs. Boggs were arguably relevant to show identity and motive, the testimony concerning threats made against Dean Rush twenty-three years earlier was too remote to be relevant. See King v. State, 436 So.2d 50, 54-55 (Fla. 1983), cert. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 163 (1984); Hitchcock v. State, 413 So.2d 741, 744 (Fla.), cert denied, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982) (prior conduct properly excluded because so remote in time and so slightly probative of any relevant issue). Certainly, had Dean Rush not contacted Jerry Boggs in 1987, and had she not divorced the Appellant to marry him, Boggs would have had no motive to drive to Florida to kill Dean Rush.

Even when collateral crime evidence has some probative value, it is inadmissible if the limited probative value is substantially outweighed by the unfair prejudicial effect of the testimony. § 90.403, Fla. Stat. (1987); Williams, 117 So.2d 473 (1961). An example of evidence inadmissible under section 90.403 is provided by the Bryan case. The state introduced two items of collateral crime evidence. The first was that the defendant committed a bank robbery prior to the murder; the second, that he stole a boat. The court found the theft of the boat relevant to show how the defendant came in contact with the victim and the full extent of the crime -- the victim was a night watchman from whom the defendant borrowed tools to try to repair the stolen boat.

The photograph of the defendant committing the bank robbery, however, was probative only because it showed the gun used by the defendant to kill the night watchman. There was a plethora of other evidence that the defendant was in possession of the gun prior to the crime. Thus, its probative value was substantially outweighed by the danger of unfair prejudice. 533 So.2d at 747-48.

In the case at hand, the testimony was that Boggs pointed a gun at Dean Rush in 1965. There is no evidence suggesting that this gun was used in the instant homicide. The evidence was particularly prejudicial because it involved a gun. It suggested to the jurors that Boggs had a propensity for violence. § 90.404(2)(a), Fla. Stat. (1987). This would go a long way in convincing the jury that he drove to Florida and shot three innocent people.

Jackson v. State, 451 So.2d 458 (Fla. 1984), is somewhat like the case at hand. In Jackson, the trial court admitted testimony from a state witness that at some prior time the defendant had pointed a gun at him and bragged that he was a "thoroughbred killer." This Court could "envision no circumstance" in which the testimony could be "relevant to a material fact in issue." 451 So.2d at 461. Although the testimony showed that Jackson may have committed an assault and may have killed before, neither was relevant to the case. The Jackson court found that the evidence was precisely the kind forbidden by the Williams rule:

> There is no doubt that this admission would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. Id. at 1250. However, "the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded." Id. (citing Williams v. State, 110 So.2d 654 (Fla. 1959)).

The evidence in question here falls into that category and should have been excluded.

"Our justice system requires that in every criminal case the elements of the offense must be established beyond a reasonable doubt without resorting to the character of the defendant or to the fact that the defendant may have a propensity to commit the particular type of offense. The admission of improper collateral crime evidence is 'presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged.'" Peek, 488 So.2d at 56; see State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) (test is not sufficiency of the evidence but whether there is a reasonable possibility that the error affected the verdict). A new trial is required.

B. Richardson Hearing

When the state intends to offer evidence of other crimes, wrongs, or acts, no fewer than ten days before trial the state must furnish to the accused

a written statement of the acts or offenses it intends to offer, describing them with particularity. § 90.404(2)(b), Fla. Stat. (1987). Richardson v. State, 246 So.2d 771 (Fla. 1971), requires that the trial judge hold a hearing when the state has failed to comply with the discovery rules. See Distefano v. State, 526 So.2d 110, 114 (Fla. 1st DCA 1988); Ehrhardt, Florida Evidence § 404.18, at 140 (2d ed. 1984). The hearing must cover at least the following three questions: (1) whether the violation was inadvertent or willful; (2) whether it was trivial or substantial; and, most importantly, (3) whether it affected the defendant's ability to prepare for trial. Richardson at 775; Cumbie v. State, 345 So.2d 1061, 1062 (Fla. 1977). Sanctions suggested by this Court include (1) a short recess; (2) a continuance of the trial; (3) exclusion of the testimony; and (4) a mistrial. Wilcox v. State, 367 So.2d 1020 (Fla. 1979). This Court has repeatedly found that failure to hold a Richardson hearing is per se reversible error without regard to the harmless error rule. Brown v. State, 515 So.2d 211, 213 (Fla. 1987); Smith v. State, 500 So.2d 125 (Fla. 1986).

The judge did not ask any of the questions required by Richardson. In fact, when defense counsel objected earlier to Jerry Boggs' testimony about more recent threats with a gun, the court said the evidence was "not Williams Rule." (R. 930) When defense counsel objected to Jerry Boggs' testimony about Boggs' 1965 threats against Dean Rush, the prosector argued that it was not a discovery violation. Defense counsel disagreed. (R. 930) If it is evidence of prior bad act or wrong, governed by Williams and § 90.404, Fla. Stat. (1987), then failure to provide notice was indeed a discovery violation.

Even if there had been no obvious prejudice, failure to hold a Richardson hearing when a discovery violation is alleged is per se reversible error. Brown, 515 So.2d at 213; Smith, 500 So.2d at 125. The purpose of a Richardson hearing is to determine whether a violation is harmless. Smith, 500 So.2d at 126. It ferrets out procedural prejudice. Wilcox, 367 So.2d at 1023. A reviewing court cannot determine whether the error was harmless unless the defense had an opportunity to respond to the Richardson questions. Smith, 500 So.2d at 126. Failure to hold such a hearing is particularly egregious here because the Appellant's life was at stake. See Cooper v. State, 336 So.2d 1133, 1137-38 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). Accordingly, Boggs must be given a new trial.

ISSUE IX

OVER DEFENSE OBJECTION, THE JUDGE PERMITTED THE STATE'S FIREARMS 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.

Defense counsel objected to testimony by the state's firearms expert comparing the size of the bullet hole in Harold Rush's abdomen to the barrel of a shotgun. He argued that he received no report concerning such a comparison and that the state's expert was not qualified to give such an opinion based upon a photograph of the victim's wound after it was sewed up. The judge overruled the objection but allowed defense counsel to voir dire the state's expert. (R. 1078-79) Defense counsel renewed his objection after he voir dired the witness who admitted that he was not asked to and did not perform any tests with the shotgun to determine spread patterns. (R. 1082-83)

After the defense objection was overruled, the witness said the wound was consistent with being caused by a shotgun but he couldn't be certain. (R. 1083) The prosecutor then asked the witness to assume that at the time of the surgery on the individual depicted, twenty-nine number six pellets were removed from his abdominal cavity and to assume further that the medical examiner said it appeared that the wound was caused by a shotgun blast. Based upon the "hypothetical," the witness said that he would tend to agree that the wound was caused by a shotgun if for no other reason than because of the removal of the shotgun pellets and the size of the hole. (R. 1084)

The prosecutor asked the witness whether a specific shotgun in evidence (Exhibit Number 16), loaded with number six shot and fired into a person, was capable of making that wound. Defense counsel objected because there was no comparison measurement of the gun. His objection was overruled. (R. 1084-85) The witness could not tell how far the gun was from the person shot but said that the shotgun could have caused the wound. (R. 1085-86)

Section 90.702, Florida Statutes (1987), provides that an expert may render an opinion if the opinion is within the area of the expert's training, skill, experience, or knowledge. Wright v. State, 348 So.2d 26 (Fla. 1977). However, the court's discretion in determining the admissibility of expert testimony is not unfettered. GIW Southern Valve Co. v. Smith, 471 So.2d 81, 82

(Fla. 2d DCA 1985). Purported expert testimony consisting of guesses, conjectures, or speculation is "clearly inadmissible." Durrance v. Sanders, 329 So.2d 26, 30 (1st DCA), rev. denied, 339 So.2d 1171 (Fla. 1976).

To be admissible, the expert testimony must be (1) so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and (2) the witness must have such skill, knowledge or experience in that field that his opinion will aid the jury in its search for truth. Mills v. Redwing Carriers, Inc., 127 So.2d 456 (Fla. 2d DCA 1961); Sea Fresh Frozen Products, Inc. v. Abdin, 411 So.2d 218, 219 (Fla. 5th DCA 1982). In the often quoted case of Mills v. Redwing Carrier, the court observed that

> [w]hen facts are within the ordinary experience of the jury, the conclusion from those facts will be left to them, and even experts will not be permitted to give conclusions in such cases. (citation omitted) Expert testimony is admissible only when the facts to be determined are obscure, and can be made clear only by and through the opinions of persons skilled in relation to the subject matter of the inquiry.

127 So.2d at 456; see also Florida Power Corp. v. Barron, 481 So.2d 1309, 1310-11 (Fla. 2d DCA 1986) (court erred in permitting expert testimony that powers of concentration decrease from fatigue and person is then more likely to put self in unsafe situation); Johnson v. State, 438 So.2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984) (eyewitness identification did not require special knowledge or experience for jury to form conclusions).

Our case is similar to Ortegus v. State, 500 So.2d 1367 (Fla. 1st DCA 1987), in which the court found that the testimony of the firearms expert concerning the close proximity of the defendant to the victim at the time of the shooting was properly excluded. The expert could not give an opinion that the hole in the victim's shirt, upon which he based his calculations, was caused by a bullet. 500 So.2d at 1367. Thus, the appellate court held that the subject of the expert's opinion was not beyond the common understanding of the average layman and would not have aided the jury. 500 So.2d at 1371.

In Varner v. State, 329 S.W.2d 623 (Mo. 1959), cert. denied, 365 U.S. 803, 81 S.Ct. 468, 5 L.Ed.2d 460 (1961), the court held that a witness whose expertise concerned the identification of bullets through their microscopic markings would not be permitted to testify as to whether a certain wound was caused by a certain weapon. The Varner court noted that the field of wound bal-

listics is usually within the province of a forensic pathologist. In our case, the firearms expert was not a forensic pathologist.

Moreover, he had done no testing to compare the size of the shotgun barrel to the size of the closed wound more accurately than the jury. He had not test fired the gun to determine spread patterns. Based upon the prosecutor's hypothetical -- that twenty-nine shotgun pellets were removed from the decedent -- any lay person could speculate that the wound was caused by a shotgun blast. Comparison of size by use of the human eye, without a microscope, is within the common understanding of a layman.

The testimony of an expert is often accorded special importance and validity by the jury. Florida Power Corp., 481 So.2d at 1310-11; Mills, 127 So.2d at 456. Here, the state's firearms expert testified that a pistol found in Boggs' attic fired bullets found at the crime scene. (R. 1090-95, 1103-04, 1111-17) The prosecutor's attempt to tie the shotgun to the crime through the firearms expert improperly bolstered the expert's testimony and the state's case. This error, especially in combination with the court's error in not allowing defense counsel to obtain an independent firearms expert, (see Issue III), requires a new trial.

ISSUE X

THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTOR TO ARGUE TO THE JURY THE PENALTIES FOR THE LESSER INCLUDED OFFENSES.

Although the prosecutor objected to the trial court's instructing the jury on maximum and minimum penalties for the lessers (R. 1180-83), during his closing argument, he described each of the lesser included offenses, giving examples of each offense. After each offense, he told the jury the possible penalty for the offense.

> [MR. VAN ALLEN (prosecutor):] We talked a lot in voir dire examination about how you are not supposed to consider penalties in making your decision but one thing the Judge is going to tell you when he talks to you about murder are the penalties that are involved. And then he is going to turn around and say: Well, I told you about them but you can't use them. Don't think about them. I am going to use the penalties a little bit in order to explain to you the idea of lesser included offenses and murder.
>
> The least of the lesser included offenses is a crime called manslaughter. Manslaughter requires no intent to kill. Okay? Manslaughter is causing a death by doing an act or engaging in a course of conduct that is so negligent that is culpably negligent that the person pursuing that course of conduct knew or should have known that death was likely to result. The usual example you see is DUI manslaughter. A guy gets in a car, he is drunk. He drives down the road, has an accident and kills somebody. He never intended to kill anybody. Never intended to run into a pedestrian. But he was following a course of conduct that is likely to cause death. That is manslaughter. The penalty for manslaughter is anywhere from nothing, no probation, is the bottom line, up to fifteen years in prison. The Judge has that discretion in there.
>
> Now, there is a crime called attempted third-degree murder.
>
> MR. EBLE [defense counsel]: Objection, Your Honor. Can we approach the bench, sir?
>
> THE COURT: Yes, sir.
>
> (Bench conference.)
>
> MR. EBLE: Your Honor, referring to penalties in this fashion is over emphasizing penalties. It is improperly referring to penalties during the closing argument and what it is suggesting to the jury is that because the penalty is less, you can't consider this crime because it is not enough penalty for the Defendant. It is an improper reference to the penalty and improper inference to the penalties, what these penalties mean because they are lesser, you can't consider this is the crime, this is not sufficient punishment. It is an improper reference to punishment.
>
> THE COURT: Your objection is overruled, Mr. Eble.
>
> (Open court.)
>
> MR. VAN ALLEN: There is a crime called third-degree murder. Third-degree murder also requires no intent to kill. Third-degree murder is when a death is caused during the commission of or the perpetration of certain felonies. Now, a felony is like auto theft, child abuse, felony child abuse. For instance, if I go to steal a

> car, I sneak up into somebody's driveway and I go wire the car and I back out and in my attempt to get away without being caught, I don't see a person walking behind me and I hit that person and kill that person. That is third-degree murder. I have no intent to kill, didn't even know I was going to kill, but because that death occurred during the commission of a felony, it is a third-degree murder because, again, there is no intent. The punishment ranges anywhere from probation up to fifteen years in prison.
>
> Second-degree murder requires an intent. Second-degree murder is a killing that is done as a result of an act which is imminently dangerous to another, evincing a depraved mind regardless of human life and imminently dangerous to another. For instance, a passenger train is going down the tracks at night. You see the passenger cars. The lights are on inside and you see forms inside and you stand on the trestle as the train goes by, with your machine gun, and you start unloading into the passenger train. An act imminently dangerous to another, evincing a depraved mind regardless of human life. You don't know who is in there. You don't have a specific intent to kill a particular individual. You just have an intent to shoot. An act evincing a depraved mind regardless of human life because there is an intent, I submit. The punishment for the crime is anywhere from probation up to life in prison.
>
> At the top of the ladder, when you are talking about murder, this is murder in the first degree. . . .

(R. 1225-29) The judge compounded the error by instructing the jury on maximum and minimum penalties for the lesser offenses in violation of Florida Rule of Criminal Procedure 3.390(a). (R. 1305)

Prior to January 1, 1985, it was reversible error for the trial judge to refuse to instruct the jury upon maximum and minimum penalties for the offense charged when requested by the state or defense counsel. State v. Fitzpatrick, 430 So.2d 444, 445 (Fla. 1983). In Tascano v. State, 393 So.2d 540 (Fla. 1980), this Court determined that the rule was mandatory upon request of either party. The rationale rested upon the plain language of the rule. There was no requirement that prejudice be shown. The court's failure to give such an instruction when requested by either party could never be harmless error. Murray v. State, 403 So.2d 417, 418 (Fla. 1981).

As amended, Rule 3.390(a) provides as follows:

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel. Except in capital cases, the judge shall not instruct the jury on the sentence which may be imposed for the offense for which the accused is on trial.

Citing Tascano, the court in Koscis v. State, 467 So.2d 384, 385 (Fla. 5th DCA 1985) construed the phrase `shall not instruct the jury on the sentence which may be imposed . . .' to be mandatory. The plain and simple language of the rule requires the judge to instruct on the penalty for the capital offense charged but

not for lesser included offenses with which the defendant was not charged.[49]

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. The court's instructions on penalties for lesser included offenses merely encouraged the jury to erroneously consider penalties in reaching a verdict.[50] The prosecutor's remark -- that the judge would tell them not to consider penalties but would instruct them on penalties, might well cause the jurors to conclude that they really should consider penalties. Why else would the prosecutor discuss them in closing argument?

The examples the prosecutor gave suggested to the jury that Mr. Boggs might be sentenced to a short imprisonment or even probation if found guilty of a lesser offense. For example, the prosecutor told the jury that the judge had discretion to sentence someone who fired a machine gun randomly into a passenger train to probation. (R. 1228) The jurors may have been hesitant to find Boggs guilty of second-degree murder because the judge might sentence him to probation. If the jurors found Boggs guilty of first degree murder only to prevent the judge from sentencing him to probation, the error affected the verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

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[49] Although defense counsel did not object to the court's instructions, the prosecutor objected after the judge remarked that the state usually objected. (R. 1180-83) After the state objected to no avail, a defense objection would have been futile.

[50] The trial court instructed the jury as follows:

> 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. 1305)

ISSUE XI

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTION TO ATTACK DEFENSE COUNSEL DURING CLOSING ARGUMENT.

During his closing argument, the prosecutor attacked defense counsel in three ways. First, he argued that the defense failed to produce witnesses and evidence that were available. Secondly, the prosecutor accused defense counsel of misleading the jury and creating a smoke screen. Finally, the prosecutor mimicked one of Boggs' lawyers. Each of these attacks was error.

A. Failure to Produce Witnesses and Evidence

In State v. Michaels, 454 So.2d 560, 562 (Fla. 1984), this Court held that when witnesses are equally available to both parties, no inference should be drawn or comments made on the failure of either party to call the witness. The rule is different when witnesses are particularly available to one party. A comment may be made upon the opponent's failure to call a witness if the witness is available (has special relationship with that party) and competent (has elucidating information). See Michaels, 454 So.2d at 562; Buckrem v. State, 355 So.2d 111, 112 (Fla. 1978); E. Page, "Final Argument and the Failure to Call Available Witnesses," The Florida Bar Journal at 63 (January, 1990).

Defense counsel correctly argued that the state failed to call Oral Woods, the FDLE expert who compared the plaster casts of Boggs' tire tracks with the tire tracks found by the police dog at the entrance to the mobile home park. (R. 1204-05) Although Detective Ferguson said he didn't think there was a match, he suggested that the plaster casts may not have been good for comparison. He didn't know much about it. (R. 1204) Defense counsel argued that, had Oral Woods found evidence that the tire tracks matched those on Boggs' truck, Woods would have been called to testify. Woods, an FDLE agent, had information and a special relationship with the state. Thus, he was available and competent to the state, making defense counsel's argument proper.

On the other hand, the prosecutor's response that "[i]f they would have wanted Oral Woods, they could have put Oral Woods up here and let him say they didn't match. . . . That guy right there, he is an officer of this Court. He's got the same subpoena power. He can bring the same people at the same time I do" (R. 1245), this was improper because Woods was an agent of the state. He

was available and competent to both parties, and especially to the state. Under Michaels, 454 So.2d at 562, it was improper for the state to comment that defense counsel did not subpoena him. Additionally, it again suggested that the defense was required to present evidence of his innocence.

The prosector also commented on defense counsel's failure to call the Appellant's children, Brandy and Amber Boggs, and "Tina," an unidentified person who was apparently in the courtroom, to contradict what Jerry Boggs said. While, generally, the defendant's children would be more available to the defense, in this case they were brought to Florida from Ohio by the state. (R. 1379) Until the prosecution attempted to send them home prior to penalty phase, they were the state's witnesses. (R. 1381) Thus, the prosecutor erred by commenting on Boggs' failure to call them to testify.

Besides the comments on defense counsel's failure to call witnesses available to the state, the prosecutor commented on defense counsel's failure to introduce the state's evidence, sometimes in response to defense comments. Defense counsel commented in closing that the state did not introduce the photo pack into evidence and if it had been so good, they would have done so. (R. 1200) The prosecutor responded by arguing to the jury that if defense counsel "was so interested in you seeing this photo pack, all he has got to do is put it in evidence." (R. 1245) The photo pack was prepared by the state and was the state's evidence. The defendant is not required to present evidence to prove his innocence. Thus, the prosecutor's comment was error.

The prosecutor also argued in closing that defense counsel could have produced the tire track photographs. (R. 1246) As discussed earlier, defense counsel attempted to do so but did not have the originals. The prosecutor had them in a box but because there were so many of them, the judge refused to allow counsel to hunt for them during the trial. After the judge refused to require the prosecutor to produce them for defense counsel (R. 828-30), the prosecutor intentionally argued "[i]f he 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." This was clearly an unfair argument because the prosecutor knew that the photographs were not available to the defense because of the judge's order. Again, the impression was that the Appellant had to prove his innocence.

B. Attacks on Defense Counsel

The prosecutor attacked defense counsel by accusing them of "misleading insinuations," creating a smoke screen, and of not introducing evidence available to them. Comments on defense counsel or defense tactics are particularly offensive as well as unethical. Jackson v. State, 421 So.2d 549 (Fla. 3d DCA 1982) (defense counsel was "cheap shot artist"). In Waters v. State, 486 So.2d 614 (Fla. 5th DCA 1986), the court ordered a new trial based upon cumulative error, one of which was the prosecutor's characterization of defense counsel's closing argument as "misleading and a smoke screen." This is exactly the same accusation that the judge condoned in this case.

The prosecutor characterized defense counsel as "misleading insinuations and creating a smoke screen." He advised the jury not to be blinded by defense comments not based on the evidence. The Waters court found that the comment was not harmless, even in the absence of an objection, and that it served as an additional reason the defendant was not given a fair and impartial trial.

In this case, the prosecutor also told the jury, "[i]f you find him not guilty because you are misled, deceived or fooled by comments not supported by the evidence, then justice is not done." (R. 1247) This was an insinuation that defense counsel lied to them. Defense counsel immediately objected.

> MR. EBLE [defense counsel]: Your Honor, it appears that Mr. Van Allen [prosecutor] is trying to put Mr. Carballo [defense counsel] on trial here.
>
> MR. ALLWEISS [prosecutor]: 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?
>
> 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 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 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.

(R. 1247-49)

Numerous courts have condemned accusations that defense counsel attempted to mislead the jury. In Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984), the prosecutor in Ryan referred to defense counsel as a "fancy attorney playing hide-the-ball," and accused him of not being totally honest with the jury. 457 So.2d at 1089. The court stated that "[r]esorting to personal attacks on the defense counsel is an improper trial tactic which can poison the minds of the jury." Id. The Ryan court found the comments to be fundamental error that could be considered on appeal without an objection. See also Garron v. State 528 So.2d 353, 358 (Fla. 1988) (citing ABA Standards for Criminal Justice 3-5.8 (1980), this Court refused to condone violations of prosecutor's duty to seek justice rather than merely to win; reversed for new penalty phase); Redish v. State, 525 So.2d 928 (Fla. 1st DCA 1988) (defense counsel's "cheap tricks"); Briggs v. State, 455 So.2d 519 (Fla. 1st DCA 1984); Melton v. State, 402 So.2d 30 (Fla. 1st DCA 1981) ("such remarks constitute a gratuitous insult to the adversary system" and are "highly improper and unethical").

C. Cumulative Error

It is a well established principle of Florida law that although errors at trial, standing alone, may not be cause for reversal, their cumulative effect can substantially prejudice a defendant, thereby warranting a new trial. See Garron v. State 528 So.2d 353, 358 (Fla. 1988) (prosecutorial misconduct in penalty phase closing); Duque v. State, 498 So.2d 1334 (Fla. 2d DCA 1986)

(cumulative prosecutorial misconduct warranted new trial); Gordon v. State, 449 So.2d 1302 (Fla. 4th DCA 1984) (two incidents, neither sufficient standing alone, together required reversal); Perkins v. State, 349 So.2d 776 (Fla. 2d DCA 1977) (two harmful comments by state witness, considered together, required reversal).

In Dukes v. State, 356 So.2d 873 (Fla. 4th DCA 1978), the court reversed the conviction and remanded for a new trial based on four alleged errors. As in this case, the prosecutor made improper prejudicial statements during closing argument. The court noted that although the public defender failed to object to many of the improprieties by the prosecutor, if the errors complained of destroy the essential fairness of a criminal trial, they cannot be countenanced regardless of the lack of objection." 356 So.2d at 874. The court concluded that "[w]hile we might be persuaded to overlook any one of the errors about which appellant complains, the totality of the circumstances in this case leads us to believe the appellant was not afforded a fair trial." Id. As this Court stated in Perkins, "[w]hile a defendant is not entitled to an error-free trial, he must not be subjected to a trial with error compounded upon error. 349 So.2d at 778. The case at hand involved error compounded upon error.[51]

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[51] In addition to the errors cited in this argument, the trial court made numerous errors throughout the proceedings as evidenced by the numerous issues herein. Thus, the cumulative error argument also applies to the entire trial.

ISSUE XII

THE COURT ERRED BY FAILING TO USE A GUIDELINES SCORESHEET TO SENTENCE BOGGS FOR THE NONCAPITAL FELONIES.

The trial judge sentenced Boggs for the two noncapital felonies without the benefit of a sentencing guidelines scoresheet. Although the prosecutor told him that a scoresheet was not applicable, defense counsel disagreed, correctly advising the judge that a scoresheet was necessary for the attempted murder and burglary convictions. (R. 1707-08) Without further mention of the sentencing guidelines, the court sentenced Boggs to life in prison for burglary with a firearm and to 30 years for attempted murder, to be served consecutively. (R. 1729)

Section 921.001(4)(a), Florida Statutes (1987), requires that all noncapital felonies committed after October 1, 1983 be adjudicated under the sentencing guidelines. Coleman v. State, 483 So.2d 539, 540 (Fla. 2d DCA 1986). Even though the guidelines are not applicable to capital felonies, a guidelines scoresheet must be prepared and used in sentencing for the noncapital felonies. Id.; Jackson v. State, 528 So.2d 1306 (Fla. 2d DCA 1988); Disinger v. State, 526 So.2d 213 (Fla. 5th DCA 1988). Although the illegal sentences might not matter because of Boggs' death sentences (or possible life sentences if reversed), he is entitled to have the record set straight. Disinger, 526 So.2d at 214. Accordingly, if a new trial is not ordered, the case must be remanded for resentencing as to the noncapital felonies.

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.

In the judge's written findings supporting imposition of the death sentence, he found two aggravating factors -- that the murders were committed while Boggs was engaged in a burglary, § 921.141(5)(d), Fla. Stat. (1987), and that the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, § 921.141(5)(i), Fla. Stat. (1987). (R. 1885) The judge based his finding that the offense was committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification on two alternative theories of the case. He concluded that either (1) "Mr. Boggs was grossly negligent in failing to determine that he was shooting the wrong people," or (2) "he deliberately and intentionally shot the wrong people to intimidate his ex-wife." (R. 1888) Both theories are speculative.

Speculation regarding a defendant's unproven motives cannot support the "cold, calculated and premeditated" aggravating factor. Thompson v. State, 456 So.2d 444 (Fla. 1984). The burden is upon the state to prove, beyond a reasonable doubt, affirmative facts establishing the heightened degree of premeditation necessary to sustain this factor. Thompson, 456 So.2d at 446; Peavy v. State, 442 So.2d 200, 202 (Fla. 1983). The burden is not on the defendant to prove that he lost control, acted in panic or for any other unknown reason. The state presented no evidence that Boggs intended to shoot the wrong people.

This Court found the aggravating circumstances unsupported by the evidence in Hamilton v. State, 547 So.2d 630 (Fla. 1989). This Court's summation fits the instant case precisely:

> Although the trial court provided a detailed description of what may have occurred on the night of the shootings, we believe that the record is less than conclusive in this regard. Neither the state nor the trial court has offered any explanation of the events of that night beyond speculation. Nonetheless, the court found that the crimes were heinous, atrocious, or cruel and that they were committed in a cold, calculated manner with a heightened sense of premeditation. There is no basis in the record for either of these findings. Aggravating factors must be proven beyond a reasonable doubt. The degree of speculation present in this case precludes any resolution of that doubt.

547 So.2d at 633-34. The same ruling should be applied to the court's finding of CCP in the instant case.

This Court has uniformly held that a finding of the "cold, calculated and premeditated" aggravating factor requires that the state prove, beyond a reasonable doubt, a "heightened" premeditation substantially greater than that necessary to sustain a conviction for premeditated murder. The "cold, calculated and premeditated" aggravating factor is reserved primarily for execution or contract murders or witness elimination killings. Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). The homicides in this case were not executions, contract murders, or witness elimination killings.[52] They were random shootings committed by a man who was deranged because his wife left him.

The judge stated that the Appellant drove over 1,000 miles from Ohio to Florida to accomplish his "cold blooded calculations." (R. 1889) It is unknown, however, whether Boggs planned during his drive to kill anyone. Perhaps he intended to beg his wife to come home. The taped telephone conversation after the homicide does not reveal an angry man. Boggs told his ex-wife he was worried about her; repeatedly begged her to give him her telephone number so he could talk to her when lonely; and begged her to come home to see him. (R. 1920-50)

Similarly, the judge's description of Boggs "locating or selecting the victims, and then executing the murders with the precision and brazenness of a middle-Eastern terrorist" is more conjecture. No evidence suggested that Boggs "selected" victims to kill. There was nothing "precise or brazen" about a psychotic, emotionally devastated older man searching for his ex-wife, breaking into the wrong trailer, and shooting everyone in sight. The scenerio is better described as "random," "tragic," and "pathetic."

Even if Boggs drove to Florida intending to kill his ex-wife and/or Dean Boggs, this Court has rejected the transfer of a threat for purposes of finding CCP. In Amoros v. State, 531 So.2d 1256 (Fla. 1988), defendant Amoros threatened his former girlfriend. While she was reporting the threat to the police, Amoros broke into her home and killed her current boyfriend. No evidence suggested that Amoros knew the boyfriend was in the house. Rejecting CCP, this Court rejected the supposition that Amoros' threat to the girlfriend could be

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[52] Both medical examiners testified that Maeras and Rush were not shot from the close-up range normally considered "execution-style." (R. 713-14, 697)

transferred to the victim. 531 So.2d at 1261. Similarly, Boggs' threats to his wife and Dean Rush cannot be transferred to the victims of the homicide.[53]

In Nibert v. State, 508 So.2d 1 (Fla. 1987), this Court reaffirmed that the "cold, calculated and premeditated" aggravating factor requires cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a first-degree murder conviction. 508 So.2d at 4. The Nibert court noted that the "cold, calculated and premeditated" aggravating factor has been found when the facts show a "particularly lengthy, methodical, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." Id.; see Campbell v. State, 15 F.L.W. S342 (June 14, 1990) (where attacker's actions took place over one continuous period of physical attack, attack on second person provided no respite during which he could reflect on or plan resumption of attack).

"A rage is inconsistent with the premeditated intent to kill someone." Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988) (victim stabbed 110 times). Accordingly, if Boggs killed Maeras and Rush, because he was so angry with his ex-wife and her lover that he lost control, the "cold, calculated and premeditated" aggravating factor is not supported by the evidence. If Boggs realized the last minute that he was in the wrong house and started shooting when Harold Rush yelled and threw a chair, then there was no heightened premeditation.

On the other hand, if Boggs actually believed that he was killing his ex-wife and her lover, he had a "pretense of legal and moral justification." See Banda v. State, 536 So.2d 221, 224 (Fla. 1988) ("We conclude that, under the capital sentencing law of Florida, a 'pretense of justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide"). Boggs' ex-wife made a fool of him and Dean broke his promise to stay away from Boggs' wife. Both committed adultery. Despite these offenses, Boggs was passionately in love with his wife. He made a shrine of her pictures, saved a lock of her hair, and bought perfume so the house would smell like her. (R. 1389-91, 1446) When passionate obsession lies behind a killing, there is a

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[53] Over defense objection, the judge granted the state's request for the following jury instruction: "If a person has a premeditated design to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated." (R. 1176, 1282)

"pretense" of moral justification. See Kampff v. State, 371 So.2d 1007 (Fla. 1979).

Although the trial court provided alternative theories of what might have occurred on the night of the shootings, no one offered any explanation beyond speculation. There is no basis in the record for the court's finding that the crimes were committed in a cold, calculated manner with heightened premeditation. Aggravating factors must be proven beyond a reasonable doubt. The trial court's speculation precludes such a finding. See Hamilton, 547 So.2d at 633-34; Thompson, 456 So.2d at 446.

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.

Written findings supporting the death sentence were filed on October 26, 1988. (R. 1884-89) The trial court found two aggravating factors -- that the murders were committed while Boggs was engaged in a burglary, § 921.141(5)(d), Fla. Stat. (1987), and that the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, § 921.141(5)(i), Fla. Stat. (1987). (R. 1885)

In mitigation, he found that the defendant (1) had no significant history of prior criminal activity, § 921.141(6)(a), Fla. Stat. (1987); and (2) was under the influence of some emotional disturbance at the time of the murders, § 921.141(6)(b), Fla. Stat. (1987), resulting from a divorce several months prior thereto, but the emotional disturbance was no longer "extreme." (R. 1885) These were only two of the mitigators on which he instructed the jury. He instructed the jury to consider in mitigation (1) that the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance; (2) that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (3) the defendant's age; and (4) any other aspect of the defendant's character or record or other circumstance of the offense. (R. 1530)

The trial court set out alternative theories as to what might have happened to justify imposition of the death penalty. He concluded that either (1) "Mr. Boggs was grossly negligent in failing to determine that he was shooting the wrong people," or (2) "he deliberately and intentionally shot the wrong people to intimidate his ex-wife." (R. 1888) He wrote that he believed the latter because if Boggs believed he was killing his ex-wife and her lover, he would have wanted them to know who was punishing them and, consequently, he would not have worn a ski mask, and would have said something during the confrontation. Furthermore, he shot three people, not just two." (R. 1888) He concluded that "[i]n 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." (R. 1889)

A. Speculation and Conjecture

Just as aggravating factors may not be based on speculation and conjecture, Hamilton v. State, 547 So.2d 630 (Fla. 1989), a death sentence cannot be based on speculation and conjecture. Although the judge attempted, on the last page of his order, to discuss the two aggravating factors that he found, he devoted more than two pages to his "theories of the case," more aptly entitleD "speculation," and the evidence he felt supported his theories. One of them was not even suggested at trial. Although in his final sentence, quoted above, he attempted to justify the sentence by noting the "glare of these two aggravating circumstances," the order read as a whole shows that he based the death penalty on his own speculation as to what happened. It is error to base a death sentence on nonstatutory aggravating factors. § 921.141, Fla. Stat. (1987).

It is axiomatic that the judge, like the jury, must impose sentence based upon a weighing of the aggravating and mitigating factors. As discussed in the previous issue, CCP was not supported by the evidence but, rather, was based on the judge's theory of the case. The other aggravating factor, that the crime was committed during a burglary, is supported by the evidence but should not be given much weight because it was a part of the homicide. These aggravating factors are not "glaring."

The trial court's first alternative theory, that Boggs was "grossly negligent" in shooting the wrong people, implies that it would have been all right if Boggs had killed the right people. The term "grossly negligent" hardly applies to killing unless the killing was accidental. It seems more likely that Boggs, who was already mentally disturbed, "went off the deep end," than that he was "grossly negligent."

The judge's implication that it is hard to imagine how Boggs could have believed the three people he shot were his ex-wife and her lover is a valid observation. There was no resemblance. There is no answer to this question. Perhaps, Boggs built up such fury during the search for his ex-wife that, when he realized he had the wrong people, he lost control. Harold Rush apparently threw a chair at Boggs (R. 627-28) which may have set off the shooting.

The judge's second alternative is even more absurd. That Boggs killed innocent people to intimidate his wife is not even a logical theory. It is obviously conjecture because there was no suggestion of any such motive during

the trial. The judge based his theory on the further conjecture that "if he believed he was killing his ex-wife and her lover, he would have wanted them to know who was punishing them and, consequently, he would not have worn a ski mask, and would have said something during the confrontation. Furthermore, he shot three people, not just two." (R. 1888)

Driving to Florida and shooting three people was unnecessary to intimidate his wife. If this were true, it seems unlikely that he would feel the need to shoot three people. Taking a shot or two at them would be sufficient to frighten his ex-wife. He did not need to shoot them to eliminate witnesses because he was wearing a mask and did not know the occupants. There is no way of knowing whether Boggs would have said something if he had thought he was killing his ex-wife and her lover.

Additionally, if Boggs shot three innocent people to intimidate his ex-wife, he must have assumed that she would make the connection between the two men named "Rush." If so, Boggs would certainly have known that she would call the police to report that he was a suspect. Law enforcement would then suspect him.

The trial court's observation that, in the recorded telephone call from his ex-wife after the homicide, Boggs "did not appear to register any shock whatsoever on learning that his ex-wife was alive," is unsupported by the tape. After numerous rings, Boggs answered the phone:

> MR. BOGGS: Hello.
>
> MRS. BOGGS: Hi, how ya doin'?
>
> MR. BOGGS: Honey?
>
> MRS. BOGGS: Yeah, it's me. How ya doin'?
>
> MR. BOGGS: (Inaudible.)
>
> MRS. BOGGS: Huh? I can't hear you.
>
> MR. BOGGS: Well, you said your ulcer was bleeding and you said you'd call me. And then you -- then you'd send me a package and I didn't get no package.

(R. 1920) Mr. Boggs seemed somewhat surprised to hear from his wife. He said "Honey?" as though questioning that it was her. He then said something inaudible, perhaps catching his breath. That he did not exclaim, "Oh my gosh, you're not dead!" does not mean that he was not surprised to hear from her. Furthermore, if Boggs thought he was breaking into Dean Rush's trailer, it seems unlikely that he thought he was shooting his ex-wife and lover by the time he saw the people

in the house. He certainly must have realized that he shot the wrong people by the time he left Harold Rush's trailer and would have realized his ex-wife was alive by the time she called.

B. Mitigation

In Campbell v. State, 15 F.L.W. S342 (June 14, 1990), this Court held that the judge must expressly evaluate in his written sentencing order every statutory and nonstatutory mitigating factor proposed by the defendant. If the evidence reasonably establishes a given mitigating factor (question of fact) and if the factor is mitigating in nature (question of law), the judge must find it a mitigating circumstance and weigh it against the aggravating factors. The judge cannot dismiss a factor as having no weight. The judge's final decision must be supported by "sufficient competent evidence in the record."

These guidelines were established to promote uniform weighing of the mitigating factors. Although the trial judge in the instant case did not have the benefit of Campbell, prior case law required that the mitigating factors be considered by the trial court and, if mitigating, given some weight. See Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The written findings in this case are a classic example of the court's failure to find and properly weigh all mitigating factors.

The court found one mitigating factor upon which he did not instruct the jury -- that Boggs had no significant history of prior criminal activity. Defense counsel had not requested this instruction because Boggs had attempted an escape while being returned to the jail after being found guilty by the jury in this case. The judge reasoned, however, that the circumstance of the attempted escape made it insignificant for the purpose of sentencing. (R. 1885)

The judge also found that Boggs was under the influence of some emotional disturbance at the time of the murders, resulting from being divorced by his wife several months prior to the crime. He no longer found the emotional disturbance "extreme." (R. 1885) The judge was in error as to the length of time between the divorce and the homicides. The divorce was on January 11 (R. 914) and the homicides on February 11th -- exactly one month later. Furthermore, no evidence suggested that the emotional disturbance was no longer extreme. Had the trial court read Dr. Meadows' letter or listened to defense counsel's competency arguments, he might have realized how emotionally disturbed Boggs was at the time

of the homicides and during trial. His comment that Boggs' "emotionalism" over the divorce pales in comparison to the aggravating factors suggest that he failed to take Boggs' mental problems seriously.

The judge never mentioned the other three mitigators on which he instructed the jury. One was Boggs' age. He was about 55 years old at the time of the homicides and had little prior record.

A second mitigator was the capacity of the Appellant to appreciate the criminality of his conduct and to conform his conduct to the requirements of law. Again, the judge refused to listen to Dr. Meadows and so had no means of determining whether this mitigator applies. Defense counsel requested at sentencing that the judge listen to the tape of Boggs' telephone conversation with his wife after the homicide during which he cried and begged for her phone number. (R. 1702-05) He noted the testimony of Boggs' children that for several months prior to the homicide he cried all the time and built a shrine of photographs of his ex-wife. (R. 1703)

The third, any aspect of the Appellant's character or record or circumstance of the case, included the factors proposed by defense counsel at sentencing. Boggs was a good worker for the same company for 31 years; was a good provider; and brought up his children well. (R. 1703) The judge does not mention these factors in his written findings.

Because the court erred by improperly considering his theories of the case (which were nonstatutory aggravating factors) rather than the aggravating circumstances, and because he failed to properly find, weigh and discuss the mitigating factors, the sentence of death must be vacated.

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.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), this Court noted that the death penalty was reserved by the legislature for "only the most aggravated and unmitigated" of first-degree murder cases. 283 So.2d at 7. Part of this court's function in capital appeals is to review the case in light of other decisions and determine whether the punishment is too great. 283 So.2d at 10. The instant homicide is not one of the most aggravated first-degree murder cases.

The sentencing judge found two aggravating circumstances. One of them (cold, calculated, and premeditated) was erroneously found. The other, that the homicide was committed during a burglary, is not deserving of much weight because the burglary was only committed to accomplish the homicide. In mitigation, he found that the defendant (1) had no significant history of prior criminal activity and (2) was under the influence of some emotional disturbance at the time of the murders. (R. 1885)

The death penalty has been upheld in very few cases where the mental mitigators were found. See e.g, Fitzpatrick v. State, 527 So.3d 809 (Fla. 1988); Ferry v. State, 507 So.2d 1373 (Fla. 1987); Miller v. State, 373 So.2d 882 (Fla. 1979, on remand, 399 So.2d 472 (Fla. 2d DCA 1981). Here, the court found only one of the mental mitigators. We submit that he should have found both.

The trial court agreed that murders caused by "passionate obsession" require a life sentence but rejected defense counsel's argument that such was the case. See Garron v. State, 528 So.2d 353 (Fla. 1988); Wilson v. State, 493 So.2d 1019 (Fla. 1986). As noted above, the judge decided that Boggs knew he was killing the wrong people. No evidence supports this conclusion. Whether he knew he was killing the wrong people is irrelevant, however, because in either case, the shooting was caused by his "passionate obsession." The evidence supported the theory that Boggs killed Maeras and Rush because of his mental disturbance over his divorce. Dr. Meadows written opinion was that Boggs was "too preoccupied with internal matters psychologically and too paranoid" to participate in the consultation and that he was psychotic. (R. 1913)

In Garron, 528 So.2d 353, the defendant shot his wife and step-daughter. Citing Wilson, this Court found that the imposition of death for the killing of the step-daughter was not proportionally warranted. The record showed "clearly a case of aroused emotions occurring during a domestic dispute. While this does not excuse the Appellant's actions, it significantly mitigates them." 528 So.2d at 361.

In Irizarry v. State, 496 So.2d 822 (Fla. 1986), the defendant murdered his ex-wife with a machete and attempted to murder her lover. The trial court found four aggravating factors and only two mitigating factors. On appeal, this Court found that the jury could have reasonably believed that the appellant's crimes resulted from a passionate obsession, adding that "the jury recommendation of life imprisonment is consistent with cases involving similar circumstances." 496 So.2d at 825. The court ordered a reduction of the death penalty to life. Id.

In this case too, a life sentence would be consistent with other cases involving similar circumstances. Although most cases in which the sentence is reduced to life have been cases in which the jury recommended life, in Wilson, 493 So.2d 1019, the jury recommendation was death. Like this case, Wilson involved a domestic situation. The defendant killed his father and five-year-old cousin while attempting to murder his stepmother. Despite the jury recommendation, this Court reduced Wilson's sentence to life because of the nature of the crime.

The court found two aggravating circumstances -- a prior conviction of a violent felony and that the homicide was heinous, atrocious or cruel. They were not balanced by any mitigating factors. Nevertheless, this Court ordered the sentence reduced to life. Noteworthy is a comparison between the complete lack of mitigation in Wilson and the substantial amount of mitigation in the case at hand. John Boggs was under a lot of stress, having recently been divorced from his wife. He loved his wife and they had been married for thirty years. Not only did she leave him for another man -- an old high school sweetheart with whom she had an affair while married to Boggs -- but she made a fool out of him in front of their grown children and the entire community. She made love with her boyfriend in front of their twenty-one year old daughter, discussed her boyfriend's

large penis with their children, and showed pictures of Rush kissing her in the grocery where she told people she was leaving Boggs to marry her lover.

There are many cases in which the defendant's sentence was reduced to life where there was another victim killed or seriously injured in conjunction with the capital felony. See Holsworth v. State, 522 So.2d 348 (Fla. 1988) (defendant burglarized home of mother and daughter and stabbed both, killing the daughter); Norris v. State, 429 So.2d 688 (Fla. 1983) (two elderly women beaten during the burglary and one died); Amazon v. State, 487 So.2d 8 (Fla. 1986) (double murder of mother and her eleven-year-old daughter who were stabbed during burglary of their home; sexual battery accompanied the homicides). Yet this court reduced the sentences of death to life imprisonment.

Boggs' moral culpability is simply not great enough to deserve a sentence of death. The uncontrolled shooting shows a distorted thought process rather than criminal intent. This is not one of the "unmitigated" first degree murder cases for which death is the proper penalty. Cf. State v. Dixon, 283 So.2d 1, 7 (Fla. 1973).

CONCLUSION

For the reasons discussed in Issues I through XI, the Appellant's conviction should be reversed and a new trial granted. If a new trial is not granted, then the death penalty should be vacated and Appellant should be granted a new sentencing based upon Issues XIII through XIV. If this relief is not granted, the Appellant must be resentenced for the noncapital felonies with the benefit of a sentencing guidelines scoresheet (Issue XII).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Michelle Taylor, Office of the Attorney General, 2002 N. Lois Ave., Tampa, Florida, 33602, this 11th day July, 1990.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NUMBER 0143265

A. ANNE OWENS
Assistant Public Defender
P. O. Box 9000 - Drawer PD
Bartow, FL 33830
(813) 534-4200

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