IN THE SUPREME COURT OF FLORIDA

JOHN EDWARD BOGGS, :

Appellant, :

vs. : Case No. 73,499

STATE OF FLORIDA, :

Appellee. :

_____:

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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TOPICAL INDEX TO BRIEF

NOTE: Appellant relies on the argument presented in the Initial Brief of Appellant for all other issues in the case.

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF THE FACTS

Florida Rule of Appellate Procedure 9.210(c) provides that, in an answer brief, "the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified." See Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114, 1122 (Fla. 1984); Overfelt v. State, 434 So.2d 945, 949 (Fla. 4th DCA 1983). "This simple, concise statement plainly means that the appellee's answer brief shall not contain a reiteration of the statement of the case and . . . facts stated in appellant's brief, but shall only state wherein appellee disagrees with appellant's statement and supplement that statement to the extent necessary to correct any material misstatements and omissions in appellant's statement." Metropolitan Life and Travelers Ins. Co. v. Antonucci, 469 So.2d 952, 954 (Fla. 1st DCA 1985).

In its brief in this case, the **Appellee** has not indicated any disagreement with the Appellant's statement of the facts. With few exceptions, every piece of evidence in the Appellee's statement was mentioned in Appellant's statement. The Appellee merely edited the Appellant's statement of facts, omitting all mitigation evidence except that "the defense presented testimony from family members that Appellant was a good provider and a stable family man." Thus, Appellee's statement includes only unfavorable penalty phase testimony taken out of its context.[1] Appellee has added a few pieces of additional evidence which add more detail to the

[1] Compare Appellee's statement at page 12 with Appellant's statement at pages 3-6.

facts stated by Appellant and are apparently intended either to make Boggs appear more guilty[2] or evil[3] or to make the crime seem more horrible.[4] Most of the additional facts were apparently submitted merely to influence this Court on an emotional level.

If the Appellee is offering its statement of the facts as an alternative to the Appellant's statement and is representing it as a summary of the evidence presented at trial, then the Appellant wishes to make clear that the state has presented a grossly distorted picture which omits or trivializes all of the evidence favorable to the Appellant.

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[2] For example, Appellee included Ohio Officer Sooy's testimony that Boggs' camper truck had a build-up of snow and looked like it had been on the road a long time while excluding his testimony that the camper could have been on the road for only ten minutes. (R. 969) (See brief of Appellee at 9)

[3] For example, Boggs' threat to kill his ex-wife and family on Christmas (brief of Appellee at 2), adds detail to Appellant's statement that Boggs previously threatened his wife with a sawed-off shotgun (brief of Appellant at 6).

[4] For example, Appellee's quotation from the testimony of Betsy Ritchie concerning her feelings while being shot was not relevant to any issue in the case. (See brief of Appellee at 6) In reference to gruesome photographs, former Justice England once admonished prosecutors to "strive for a system in which juries convict alleged criminals solely on the basis of proof, without resort to the horror of particular crimes." Funchess v. State, 341 So.2d 762, 765 (Fla. 1976), cert. denied, 434 U.S. 878, 98 S.Ct. 31, 54 L.Ed.2d 158 (1977).

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.

Appellee correctly noted that the trial judge is responsible for determining a defendant's competency and that experts' reports are simply advisory. In none of the cases cited by Appellee, however, did the judge simply ignore the expert's opinion and conduct his own examination.[5] In all three cases, one or more experts found the defendant competent to stand trial, none found the defendant incompetent, and the judge ruled accordingly. In our case, the only expert who examined Boggs found that he was not competent to stand trial.

In Gilliam v. State, 514 So.2d 1098 (1987), three experts found the defendant competent to stand trial. On the eve of trial, defense counsel requested a second competency evaluation because the defendant insisted on discharging his appointed counsel. The court again appointed an expert who testified that, although Gilliam had not cooperated, he remained competent to stand trial. The judge agreed. 514 So.2d at 1099-1100.

In Muhammad v. State, 494 So.2d 989 (Fla. 1986), the trial court tried various times to have the defendant evaluated. Muhammad refused to cooperate. A week before trial, Muhammad finally cooperated with an expert who found him competent to stand

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[5] See brief of Appellee at 29-30.

trial. 494 So.2d at 970-71. Thus, the judge found him competent.

In Brown v. State, 245 So.2d 68 (Fla. 1971), vacated in part on other grounds, 408 U.S. 938, 92 S.Ct. 2870, 33 L.Ed.2d 759 (1972), one expert appointed by the court was unable to give a valid estimate of the defendant's competency. The other expert found that, although the defendant was severely retarded, he was competent to stand trial. The defense attorney offered no testimony and did not cross-examine the experts. Thus, the trial court found no reason to order further examination. 245 So.2d at 71.

Appellee noted that "a defendant may not thwart the process by refusing to be examined by experts" and that, "[i]f the trial court has abided by the procedural rules and 'the defendant's own intransigence deprives the court of expert testimony, the court must still proceed to determine competency in the absence of such evidence.'"[6] Boggs did not attempt to thwart the legal process. To the contrary, he tried to expedite matters by ignoring the advice of counsel and proceeding immediately to trial. Nor did the court have to determine Boggs' competency without expert opinion.

The defendant in Gilliam, 514 So.2d at 1100, delayed his trial for a year by dismissing his first lawyer. He tried to dismiss a second lawyer on the eve of trial. Despite the fact that three experts had already found the defendant competent, the trial judge again appointed an expert to examine him. Despite Gilliam's lack of cooperation, the expert found him competent to stand trial.

In the case at hand, the trial was held only seven months

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[6] See brief of Appellee at 30.

after the homicide and only four months after Boggs was extradited to Florida. Boggs never attempted to dismiss counsel. He did nothing to delay his trial. In fact, he refused to waive speedy trial and refused to agree to a continuance. Although Boggs did not cooperate with Dr. Meadows, he met with him and Dr. Meadows was able to determine that Boggs was not competent based on verbal and nonverbal communication, in addition to a 1985 psychiatric opinion and depositions provided by counsel.[7] The colloquy between Boggs and the trial judge strongly 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 have agreed to do so immediately to expedite his trial.

Appellee asserts that the colloquy between Boggs and the judge was "initially tendered by defense counsel and agreed upon by the State . . . ."[8] This is a gross distortion of the facts. Although defense counsel said that the court has "the right to inquire as to [Boggs'] understanding of the process and of his ability to relate to counsel and his ability to assist us in planning a defense," he did not suggest that the trial judge conduct such his own inquiry instead of appointing experts. (R. 1559) His statement was intended to explain that, although the court had the right to inquire of the defendant, this case required the appointment of experts and a full-blown competency hearing.

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[7] In Christopher v. State, 416 So.2d 450, 452 (Fla. 1982), cited by Appellee, the defendant refused to see the appointed psychiatrists; thus, no reports were issued.

[8] See brief of Appellee at 30.

Counsel reiterated his request for the appointment of experts twice just prior to his statement concerning the court's right to inquire.[9] (R. 1557-59)

It was the prosecutor who suggested that the court conduct an inquiry such as that conducted in Rolle v. State, 493 So.2d 1089 (Fla. 4th DCA 1986). It was the prosecutor who presented the Rolle opinion to the court.[10] He was not agreeing with a suggestion by defense counsel; instead, he used defense counsel's comment to bolster his suggestion that the court conduct such an inquiry. The prosecutor then misrepresented the facts of the Rolle case by failing to mention that the judge in Rolle based his denial of a competency hearing not only on his colloquy with the defendant, but also on the testimony of a psychiatrist.[11] (R. 1560)

Appellee argues that the judge's inquiry showed that Boggs understood the charges, the possibility of receiving the death penalty, and the role of the judge and parties; that Boggs "indicated his willingness and ability" to consult with counsel

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[9] Defense counsel's motion was filed pursuant to Florida Rule of Criminal Procedure 3.210(a) which requires that the trial court appoint two to three experts and order a hearing when there is reasonable ground to believe that the defendant may be incompetent.

[10] Although the prosecutor discussed the Muhammad case, his suggestion that the trial judge conduct an inquiry was based only on Rolle and not on Muhammad as stated by Appellee. (R. 1560) See brief of Appellee at 20.

[11] Although the Rolle opinion does not disclose the content of that testimony, the district court would certainly have discussed its content in relation to the court's findings if the psychiatrist had found the defendant incompetent to stand trial.

during trial; and that he understood his right to a speedy trial and his right to refuse various defense strategies.[12] None of these factors indicate competency. In fact, Boggs' "refusals" and his request for a speedy trial evidenced his lack of understand of the seriousness of the charges and the possibility of conviction.

Although Boggs told the judge he was willing and able to consult with counsel, his "consultation" during voir dire merely hampered his lawyers in selecting a jury. (R. 318) Although Boggs had certain knowledge concerning the legal proceedings, he had no real understanding of the standard of proof or possible defenses. His outburst when the jury returned a guilty verdict shows that he had no appreciation of the possibility of conviction. (R. 1324)

"[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 . . . ." Drope v. Missouri, 420 U.S. 162, 180, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975). Here, all three factors indicated that Boggs might be incompetent. His irrational behavior (refusing to be examined by psychiatrists, to release medical information or to continue the trial when his attorneys were unprepared); his demeanor at trial (outburst after the verdict), and the opinion of Dr. Meadows were certainly sufficient to show that Boggs may have been incompetent. See Scott v. State, 420 So.2d 595, 597 (Fla. 1982) (test is not whether defendant is incompetent but whether he may be incompetent); Tingle v. State, 536 So.2d 202 (Fla. 1988)

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[12] See brief of Appellee at 31.

(judge's review of mental health files and conversations with emergency response personnel following defendant's suicide attempt were not sufficient to ensure that Tingle was not deprived of his right not to be tried while incompetent).

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.

Appellee contends that, "[a]t no time . . . does Appellant allege that the State prevented the defense from gaining access to the weapons or ammunition at issue."[13] The only record evidence of interference by the state was the prosecutor's request, during the motion hearing on the Friday prior to trial, that the evidence not leave the courthouse. The judge agreed that the defense would have to find an expert who could bring his equipment to the courthouse. (R. 1581-82) When defense counsel asked if the clerk could accompany the evidence to the FDLE lab, the judge said he would have to wait and see. (R. 1582) Had it not been for this "interference" by the prosecutor and the court's indecisiveness, defense counsel probably could have had the evidence examined by an independent expert at the FDLE lab during voir dire on Monday, the

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[13] See brief of Appellee at 37.

first day of trial, with no delay in the trial.

Appellee contends that nothing in the record "contradicts the fact that at all times the ballistics evidence was available for testing upon proper request."[14] There is also nothing in the record to show that the ballistics evidence was ever available to the defense to examine. Although it seems logical to assume that the evidence was available some of the time prior to trial, it is clear that it was not available "at all times." The record does not indicate when it first became available nor how long it was in the possession of the state's expert prior to trial.

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.

Although Pat Spurlock may not have been told specifically that the suspect's photograph was among those in the photo display, she was certainly led to believe that it was.[15] When Spurlock first told the officers about the man who inquired, they asked her to sketch 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

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[14] See brief of Appellee at 37.

[15] See brief of Appellee at 42.

getting a picture from "up north." (R. 741) He told her that they would show her a picture. (R. 1612) Shortly thereafter, Detective Alland took the photo display to Spurlock's house. (R. 840-41, 855) This scenario was certainly sufficient to convince Spurlock that the "suspect" was depicted in the display.

Appellee asserts that Spurlock had "the opportunity to view Appellant for at least five full minutes" in her office; that her view was not interrupted; and that she was "paying attention to Mr. Boggs during all that time."[16] This is contrary to the facts. Although Spurlock testified at trial that she observed the man in her office for about five minutes, her earlier testimony was that it was only two or three minutes. (R. 738, 1593) She was talking on the telephone most of the time the man was there. (R. 736-38) If she was listening and responding to the conversation on the telephone, she could not have been paying close attention to the man waiting in her office.

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[16] See brief of Appellee at 43.

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.

Appellee argues that it is not important to verify the reliability and veracity of the informants in this case because they were "disinterested."[17] Some of the information contained in the affidavit apparently came from Jerry Boggs, the Appellant's ex-wife, who was certainly not a "disinterested witness." She had recently divorced Boggs for another man, with whom she was living, and testified that Boggs had threatened them numerous times. Thus, she clearly had a reason to falsify information.

That Boggs was in Florida and within close proximity to the victims on February 11, 1988, was not "established," as contended by Appellee.[18] Testimony concerning the telephone call to Jerry Boggs, referred to by Appellee, was unconvincing. The caller allegedly said nothing more than "I sic, I sic, I sic," or "I seek, I seek, I seek" in what Jerry Boggs described as a disguised voice. (R. 921, 936-37) She first thought the caller said "I sic, I sic, I sic." (R. 921, 936-37) When she called Boggs after the homicide, she accused him of saying, "I'm sick, I'm sick, I'm sick." He denied making the call and insisted that he

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[17] See brief of Appellee at 51-52.

[18] See brief of Appellee at 52 and 53.

never left Ohio. (R. 1928) It seems apparent that Mrs. Boggs changed her story to suit the situation. Additionally, there is no way she could have known whether the call was local.

More importantly, the information about the telephone call was not in Hoef's affidavit. (R. 1772) Therefore, the Ohio magistrate knew nothing about it. The magistrate cannot base his probable cause decision on facts of which he is unaware.

At the time the search warrant was obtained, Pat Spurlock was only 75% sure that Boggs was the man who came to Colony Hills Mobile Home Park. Unfortunately, Hoef omitted Spurlock's "75% certainty" from his affidavit. (R. 1772) That the magistrate was misled by Hoef's omission of this fact, among others, precludes reliance on the "good faith" exception.

ISSUE VII

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

Appellee's argument that Pat Spurlock told the jury only that she saw Appellant at a "hearing," without mentioning the word "extradition," and that it was an isolated comment made in passing,[19] is misleading. Spurlock testified that she "identified" Boggs at a hearing "in Ohio." (R. 748-750, 854, 863)

Officer Sooy's reference to the extradition hearing alerted the jurors to the fact that the "hearing" discussed earlier

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[19] See brief of Appellee at 68-69.

by Pat Spurlock was an extradition hearing and, therefore, Boggs must have fought extradition. Counsel's failure to object to Sooy's testimony in no way causes his earlier objection to Pat Spurlock's testimony to be "abandoned." Appellee cited no case law to support such a suggestion.[20] Although Boggs' counsel did not object to Sooy's reference to the extradition hearing, he objected to Spurlock's testimony on specific grounds.

Additionally, 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 as the man in her office. (R. 863) Boggs' counsel objected again because the testimony called attention to the extradition proceeding. (R. 863-64)

Calling the case "unpersuasive," Appellee misleadingly (but perhaps inadvertently) inferred that State v. Henson, 221 Kan. 635, 562 P.2d 51 (1977), cited by Appellant, concerned the exercise of the constitutional right to remain silent rather than a statutory right.[21] In Henson, which is precisely on point, the Supreme Court of Kansas held that evidence that the defendant fought extradition should not be admitted because "waiver of extradition is no evidence of innocence, and resistance is no evidence of guilt." 562 P.2d at 64.

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[20] See brief of Appellee at 68.

[21] See brief of Appellee at 68.

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.

Appellee asserted that Huff v. State, 495 So.2d 145 (Fla. 1986), "cited by Appellant," is dissimilar.[22] Huff was not cited by Appellant. Appellee's comparison of Ortagus v. State, 500 So.2d 1367, 1371 (Fla. 1st DCA 1987), is confusing. Like the "close proximity" testimony excluded in Ortagus, Hall's testimony that the victim's wound could have been made by the shotgun was not beyond the common understanding of a layman. Thus, no matter how firm Hall's opinion, the evidence was inadmissible.

ISSUE XI

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

Appellee's argument that defense counsel failed to preserve his objection to the prosecutor's comments attacking defense counsel is without merit.[23] Boggs' counsel objected and the trial court found "nothing improper." (R. 1249) It would have been futile and a waste of time for counsel to have requested a curative instruction and mistrial after the judge overruled his

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[22] See brief of Appellee at 78.

[23] See brief of Appellee at 91.

objection. Furthermore, there is no requirement that defense counsel specifically request a curative instruction. See Clark v. State, 363 So.2d 331, 335 (Fla. 1978). If the objection is overruled, as in the case at hand, a motion for mistrial is not even required. Simpson v. State, 418 So.2d 984, 987 (Fla. 1982) (where a timely objection is made and the objection is overruled, thus rendering futile a motion for mistrial, the issue is properly preserved for appeal).

Appellee's argument that the prosecutor's comments were proper rebuttal is specious. Certainly, the law is not such that the prosecutor may freely attack defense counsel's ethics and integrity whenever he wants to rebut something he disagrees with but for which he can think of no other rebuttal.

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.

Many of Appellee's "facts" are merely speculation. For example, the evidence failed to show that Mr. Boggs traveled to Florida taking a twelve-gauge sawed off shotgun.[24] Michael Hall, the state's FDLE firearms expert, testified that three shotguns were submitted to him. The pellets from the homicide could have been fired from any of these shotguns or from any other shotgun not in evidence. Hall could not even tell if the pellets were fired

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[24] See brief of Appellee at 94 and 96.

from a sawed-off shotgun. (R. 1121-23)

Appellee refers to the killings as "executions" to fit the definition of the "cold, calculated and premeditated" aggravating factor.[25] The evidence shows that Harold Rush and Betsy Ritchie tried to scare the intruder by clapping hands and saying "bang, bang." (R. 611-14) Further evidence suggests that Rush then threw a chair at the intruder. (R. 627-28) It seems most likely that, after realizing his mistake, Boggs panicked and started shooting when the inhabitants tried to defend themselves.

In Amoros v. State, 531 So.2d 1256 (Fla. 1988), when the defendant confronted his former girlfriend's current boyfriend, he certainly did not think the boyfriend was his old girlfriend. Most likely, he panicked when he realized his mistake and shot the boyfriend. The Amoros court held that the defendant's threats against his girlfriend could not be transferred to her boyfriend. Here, Boggs' threats cannot be transferred from his ex-wife and her lover to Harold Rush and Nigel Maeras. Thus, premeditation could not have commenced until Boggs confronted the victims and realized his mistake. There is no evidence that Boggs broke in intending to kill whoever was in the trailer.[26]

The "pretense" of moral justification arose from the adultry of Boggs' ex-wife and her lover. Although adultry does not justify murder, it raises a "pretense" of justification. In the recent case of Cheshire v. State, 15 F.L.W. S504 (Fla. Sept. 27,

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[25] See brief of Appellee at 95-96.

[26] See brief of Appellee at 96.

recent case of Cheshire v. State, 15 F.L.W. S504 (Fla. Sept. 27, 1990), this Court found that the emotional distress leading to the defendant's killing of his estranged wife and her boyfriend was valid mitigation. "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." Cheshire, 15 F.L.W. at S505 (citing Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2958, 57 L.Ed.2d 973 (1978)). If passions rising from adultry constitute valid mitigation, such passions must raise at least a pretense of moral justification.

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.

Although the state's theory -- that Boggs realized his mistake only when he confronted the victims -- makes little sense, it is the only logical conclusion. Considering the differences in appearance between the victims and Boggs' alleged targets, it seems incredible that Boggs could have thought he killed his ex-wife and her lover unless he was totally detached from reality. Similarly, to accept the judge's preferred theory that he intended to kill innocent people to intimidate his ex-wife is incredible and would require a departure from sanity. In his alternative theory -- that Boggs was "grossly negligent" in failing to realize that the

shooting victims were not his ex-wife and her lover -- the judge tried to apply the rational concept of "gross negligence" to a completely irrational crime.[27] Evidence in this case strongly suggests that Boggs was not rational when he committed the crime.[28] Thus, both alternatives upon which the judge based his sentence were speculative and were not supported by the evidence.

In Cheshire v. State, 15 F.L.W. S504 (Fla. Sept. 27, 1990), the defendant shot and killed his estranged wife and her lover. The defense argued that the shooting was a crime of passion. The prosecution argued that it was calculated revenge. As in the instant case, the judge concluded that the defendant's mental disturbance was not "extreme." Citing Rogers, 511 So.2d at 534, this Court reiterated that the judge "is under an obligation to consider and weigh each and every mitigating factor apparent on the record, whether statutory or nonstatutory." 15 F.L.W. at S505.

Although the trial judge considered Boggs' emotional disturbance, apparently according it little weight because he found it no longer "extreme," he failed to mention other mitigation presented at penalty phase. Among other factors, Boggs' long-standing quarrel with his ex-wife over her infidelity should have

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[27] Appellee omitted the judge's second alternative, replacing it with the prosecution's theory of the case which is much more believable. The fact that Appellee ignored the judge's "gross negligence" alternative suggests that the Appellee also found it unpersuasive. See brief of Appellee at 99.

[28] Had the trial court appointed experts to determine Boggs' competency he might have had a better understanding of Boggs' mental processes. See Issue I, supra.

been considered as mitigation.[29] In Cheshire, this Court found that, "based upon the state's case and the physical evidence, the murders at issue in this case reasonably could be characterized as the tragic result of a longstanding lovers' quarrel between Cheshire and his estranged wife. It is well established under Florida law that this type of situation constitutes valid mitigation." 15 F.L.W. at S505 (citations omitted). The same is true in the case at hand.

Appellee's argument that the error was harmless because the mitigation was not truly mitigating or because the judge would have given it little weight is meritless.[30] Florida law requires that the judge consider all mitigation of which evidence was presented. Campbell, 15 F.L.W. S342; Rogers, 511 So.2d 526.

Appellee argues that the evidence showed that Boggs understood the criminality of his conduct.[31] Even if he did, there was no evidence that he was able to conform his conduct to the law. The inference that he was not is supported by his random shooting of three people whom he must have realized were not the people he expected to find. Boggs was obviously emotionally disturbed and irrational as a result of his wife's infidelity and recent divorce.

Although Appellee did not find Boggs to be a good father, his children evidently thought that he was, as evidenced by their

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29 See facts in Appellant's initial brief at pages 3-6.

30 See brief of Appellee at 100.

31 See brief of Appellee at 101.

penalty phase testimony.[32] That he worked at U.S. Steel for thirty years, until he suffered a head injury, indicates that he provided financially for his family. (R. 1301, 1416) Boggs' son-in-law testified that he had never seen Boggs drink. (R. 1373)

Contrary to Appellee's argument, the guidelines set out in Campbell v. State, 15 F.L.W. S342 (Fla. June 14, 1990) apply to this case. The guidelines were based upon what was already the law. See Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The same guidelines have since been applied in Nibert v. State, 15 F.L.W. S415, S416 (Fla. July 26, 1990), and Cheshire, 15 F.L.W. at S505.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Michele Taylor, Office of the Attorney General, 2002 N. Lois Ave., Tampa, Florida, 33602, this 17th day of October, 1990.

Respectfully submitted,

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[32] See brief of Appellee at 101. The Boggs children's testimony is summarized in Appellant's initial brief at 3-6.