IN THE SUPREME COURT OF FLORIDA

JOHN EDWARD BOGGS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 83,409

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

At trial, Betsey Ritchie, the surviving victim of appellant's murderous assault that claimed the lives of her mother Nigel Maeras and the unfortunately -- named Harold Rush, testified that an assailant entered their residence. She was shot five times, had eight bullet holes in her and stayed nine days at the hospital. (Tr 416, 420). Harold Rush lived for five or six weeks before expiring (Tr 421).

Surgeon Dr. Susan Apte described the multiple gunshot wounds to Betsey Ritchie (Tr 441 - 442), testified that Mr. Rush had sustained a large ten to fifteen centimeter wound over the abdominal wall; the intestine had prolapsed and was sticking out of the wound. Surgery was performed on him February 12, 1988 (Tr 444 - 445). He was subsequently transferred to St. Joseph's Hospital on March 10, and later died (Tr 446).

James Franklin Bush was the son of Harold Rush and identified a photo of murder victim Nigel Maeras (Tr 462 - 463).

Dr. Edward Corcoran, a forensic pathologist, examined body of the dead woman at the scene of the crime on February 11. The cause of death was two gunshot wounds -- one to the head and one to the face (Tr 465, 468).

Secretary-bookkeeper Francis Napier testified that on February 9 or 10 a man called her at Casa Del Sol asking for Boggs or Rush. She told him that no one was living at that mobile park by that name. The Colony Hills Mobile home park was about a mile away to the west (Tr 475 - 476).

Pathologist Dr. Charles Diggs performed an autopsy on Harold Rush March 21, 1988 and the cause of death was a shotgun wound to the chest (Tr 483, 487).

Allen Jarrett while working at the Sandalwood Mobile Park on February 11 when a man phoned seeking to find the location of Jerry Boggs or Jerry Rush. (Tr 505). The next day a man came into the office at the Colony Hills asking for which lot the Rush's were on. Pat Spurlock took care of him (Tr 506).

Patricia Spurlock saw patrol cars when she arrived for work on February 11 and was told there had been a shooting at Lot 11; she told them she had information (Tr 511). A day earlier a man called on the Colony Hills phone line asking if there were a Boggs in the park; she told him she didn't think so and suggested he call Oaks Royal (Tr 512). Forty-five minutes later a call came in on the Oaks Royal line and the caller asked if there were a Boggs and then a Rush in the park.

Spurlock was told by Mark Grover that a renter named Rush was on Lot 11 -- she relayed that information to the caller and told him she could provide the five digit address if he came to the office. Later that afternoon a man came to the office, identified himself as the one who called, and received the five digit address without needing to write it down (Tr 513 - 516). She identified appellant in court as that man (Tr 526 - 527) and testified about the identification procedures with the police.

Officer Milnes' testimony was read; victim Harold Rush said he'd been shot and described the masked assailant (Tr 548).

Deputy Barry Arnew who responded to the scene of the shooting at Colony Hills described the scene; the door looked pried open (Tr 555). Deputy Bill Ferguson photographed the scene, noting the presence of .22 shell casings and shotgun pellets and buckshot holes. The door had pry marks where forced open (Tr 568 - 570).

Deputy Linda Alland interviewed Betsey Ritchie at the hospital. Detective Wilbur told her he had interviewed Pat Spurlock about the phone call asking for Boggs or Rush (Tr 683). Alland saw a report with the name of Boggs on it on her desk and then contacted Jerry Boggs and Gerald Dean Rush at a mobile home some six to ten miles away from Colony Hills Mobile Park (Tr 686 - 687). Alland learned that John Boggs was the recently divorced ex-husband of Jerry Boggs living in Vermilion, Ohio; she put together a photopack and took it to Spurlock who selected Boggs' photo and said she was 75% certain (Tr 688 - 694). Alland received about fifty shot gun pellets retrieved from the surgery on Harold Rush and a bullet removed from Betsey Ritchie (Tr 696 - 698).

Pat Canter's testimony was read to the jury. She knew Jerry and John Boggs and recalled hearing defendant over the phone around Christmas time threatening to kill Jerry and others (Tr 738 - 740). After the divorce Jerry left Ohio and went to Florida and asked her not to give her address or phone number to appellant (Tr 742). Canter noticed appellant's vehicle was not at the house on February 8 and phoned Jerry to warn her (Tr 743).

Geraldine Rush had been married to Boggs for thirty-one years prior to their divorce. She came to Florida in January and on February 9 got a phone call from Pat Canter reporting his missing vehicle. Appellant had previously threatened to kill her so she called the sheriff's department to report he was coming to Florida (Tr 758 - 764). Appellant called her and said "I seek, I seek, I seek" (Tr 764). A week earlier she had had a phone argument with Boggs and he threatened to kill her and "that bastard Dean". He threatened to kill her in a second conversation (Tr 765 - 766). Appellant also had threatened to kill her with a gun in 1987 (Tr 771).

Gerald Dean Rush - now married to Geraldine -- had known her since 1952; they were high school sweethearts. He saw her again in 1965 when she was married to appellant (Tr 797). Appellant had a gun and said he'd kill him if Gerald saw her again and the witness promised not to. Twenty years later he called her, she subsequently divorced appellant and she moved in with him (Tr 799 - 801).

Kevin Sooy saw appellant driving on the morning of February 12 at 9:58 am. at exit ramp SR 2 in a truck wearing a black coat and black stocking cap headed toward home (Tr 809 - 814). Rush had testified it was a seventeen hour drive from Zephyrhills to Vermilion, Ohio (TR 803)

Roger Hoefs obtained a search warrant for the residence of John Boggs in Vermilion, Ohio (Tr 842). In appellant's vehicle police recovered a map depicting in yellow the route from

Cleveland to Tampa Bay (Tr 851). A coat in his closet had shotgun shells in a pocket (Tr 858). A shotgun and .22 pistol were recovered in Boggs' residence (Tr 862).

Witness Barck, Mayer and Clipson testified to the recovery of the shotgun and .22 pistol (Tr 889, 894), ski mask (Tr 904) and box of .22 ammunition in the vehicle (Tr 916).

FBI crime lab analyst Joseph Michael Hall testified that the shotgun shells fired were from the Exhibit 31 -- 12 gauge double barrel shotgun (Tr 950 - 961). He also testified that the .22 cartridge casings were fired from the Exhibit 32 Colt 22 semi automatic pistol (Tr 968 - 985).

SUMMARY OF THE ARGUMENT

I. There is no merit to appellant's claim that it was improper to schedule a competency hearing; in effect, it was a continuation of the prior competency hearing before Judge Tepper. There was no abuse of discretion in the trial court's denial of a motion for continuance; defense counsel was able to act as a competent advocate in cross-examining the witnesses who testified.

II. The lower court did not err in finding appellant competent to testify as that determination was supported by the testimony of Dr. Delbeato, psychologist Jill Rowan and other lay witnesses.

III. The trial court did not unfairly restrict jury voir dire and the record reflects that all the jurors selected to serve on the jury had not read or heard anything about the case, and could decide the case based on the evidence presented.

IV. The lower court did not err reversibly in ruling on the requests to excuse prospective jurors for cause or in denying the request for additional peremptory challenges. The trial judge is in the best position to evaluate responses of prospective jurors.

V. The lower court correctly denied the motion to suppress identification testimony of witness Spurlock. There was no unduly suggestive identification procedure nor any reasonable probability of irreparable misidentification.

VI. The lower court did not err in denying the motion to suppress evidence seized pursuant to search warrant. Probable

cause was demonstrated and there was no reckless disregard of the truth by the affiant-officer.

VII. The lower court did not abuse its discretion in failing to grant a mistrial at the mere mention of extradition.

VIII. The trial court did not err in ruling inadmissible testimony regarding a visit to the hospital by an unidentified man since the report was innocuous hearsay and speculative.

IX. The lower court did not err in failing to grant a continuance until Pat Canter and Amber and Brenda Boggs could come from Ohio. Canter was unavailable and her prior trial testimony could be read to the jury. Amber and Brenda Boggs -- also unavailable -- had testified in Boggs' previous trial and the defense could and did use Amber's prior testimony and chose not to use Brenda's or even to proffer what she might add.

X. The lower court did not err in ruling it irrelevant to ask witness Geraldine Boggs whether she believed appellant could teletransport himself.

XI. The lower court correctly denied a mistrial request based on prosecutorial remarks at a bench conference. No abuse of discretion has been shown.

XII. The lower court correctly denied the motion for judgment of acquittal based on appellant's threats, the discovery of the murder weapons hidden in his Ohio home, and his identification by witness Spurlock as the man receiving the victims' address just prior to the killings.

XIII. Appellant's challenge on appeal to the CCP instruction is procedurally barred for the failure to object on the grounds now asserted at trial.

XIV. The trial court correctly determined that the jury should be instructed and correctly found the factor to be applicable.

XV. The lower court did not commit error in its sentencing error, correctly found statutory aggravating factors and explained why proffered mitigation was rejected.

XVI. The imposition of a sentence of death for this double homicide is proportionate. See Porter v. State, 546 So. 2d 1060 (Fla. 1990).

ARGUMENT

ISSUE I

WHETHER BOGGS' COMPETENCY HEARING FAILED TO COMPLY WITH DUE PROCESS BECAUSE ALLEGEDLY (1) THE STATE DID NOT HAVE AUTHORITY TO SET A HEARING AND (2) THE DEFENSE WAS DENIED A CONTINUANCE OF THE HEARING.

Trial defense counsel filed a motion to strike the competency hearing (R 2047 - 48) and a hearing was held on that motion August 16, 1993 (R 2054 - 2065)[1] The prosecutor argued to the court as follows (R 2056 - 2061):

> MR. VAN ALLEN: Your Honor, once I received Mr. Carballo's motion I read the rule, and I tried to find some cases that construe the rule one way or another, and there are none that I could find. Then I started recalling the history of the case, which, if I might, will require a minute to go through. But I think the history is what will make this motion subject to being denied.
>
> By order dated October 31st, 1991, after hearing, Judge Swanson signed an order adjudging Mr. Boggs to be incompetent to proceed and committed him to the Department of Health and Rehabilitative Services for treatment in order to attempt to have Mr. Boggs regain his competency.
>
> By letter of March 31st, 1992, from the forensic administrator to Mr. Pittman -- copy to the Court -- Curtis Montgomery, the administrator of the hospital, sent along with the competency evaluation the letter

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[1] Contrary to the assertion in appellant's brief (P 14) at the status hearing on July 23, 1992, there was no testimony presented to Judge Tepper; rather, the court ordered further diagnostic evaluation (R 2286 - 94; R 2035). Experts had apparently testified earlier in 1991.

indicating that the patient is available for return to Pasco County, that he was now competent to proceed. And pursuant to that Mr. Boggs was returned -- or was discharged form Chattahoochee -- discharge date is April 10, 1992 -- and by order of the Court returned to Pasco County.

Upon his return, Judge Tepper, at the request of the defendant, appointed the original doctors to reexamine Mr. Boggs. Those were Dr. Gonzalez, Dr. Szabo, and Dr. DelBeato. These examinations occurred, and the reports to the Court, which are in the court file, with the exception of Dr. DelBeato, who found Boggs competent to proceed on both examinations.

Dr. Szabo and Dr. Gonzalez indicated that there were certain tests that needed to be performed, both physical tests and some -- some -- they suggested an MRI, CAT scan, a number of other things.

Judge Tepper, upon hearing that, determined that Mr. Boggs should be returned. Rather than for Pasco County to pay for these tests in order to assist the three doctors in determining again the competency of Mr. Boggs, in order to prevent the County from having to bear that cost, Judge Tepper sent Mr. Boggs back to Chattahoochee with an order directing that the State of Florida provide or subject Mr. Boggs to the tests that were requested.

She requested notification from the hospital within thirty days from the date of her order. I believe that order was dated -- (Perusing document) -- signed and dated August 7th, 1992, where she directs -- says: The Court hereby commits Mr. Boggs back to the Florida State Hospital. The evaluations -- for further diagnostic evaluation. The evaluations shall include the procedures outlined by Dr. Gonzalez.

And say -- say: They shall be completed within thirty days or the Court must be provided with an explanation for the noncompliance with the order.

On September the 4th, in excess of those thirty days, Chattahoochee sent to Judge Tepper a letter indicating what they had been able to do in complying with her direction and what they had not been able to do, mostly as a result of Mr. Boggs' desire or inability -- desire not to or inability to comply with what they wanted.

By letter dated March 3rd, 1993, the hospital, again Mr. Montgomery, the forensic administrator, sent a report, which is within the court file, outlining what they had done.

THE COURT: This is October?

MR. VAN ALLEN: This is October. No, this is March 3rd, 1993.

THE COURT: Oh, okay, March 3rd.

MR. VAN ALLEN: This is the most recent letter from Chattahoochee. And what they outline is Mr. Boggs' participation in the treatment procedures that they had been directed to provide.

Mr. Boggs in my discussions with him and as contained within the report stood moot -- mute, rather. He would not talk. He would not communicate with them in any way. Therefore, while they were able to do the EEG, the EKG, the MRI, the CAT scans, the neuropsychological testing was not able to be completed because Mr. Boggs would not participate.

When I received that letter, I called and talked again to one of the treating physicians, and we developed what we thought was going to be a little stratagem, because he was refusing to take medication. So, they have these things called a medication hearing where you to to court and get a judge to order him to do it. If he refuses to comply, they can force the medication upon him. Thinking if he were forced into doing something else, he would respond, just to get him to say a word. And he did not.

> So, following that hearing is when I requested that the Court give us time for a competency hearing, because Chattahoochee cannot comply with Judge Tepper's directives to do some neuropsychological testing, because he won't participate in the testing.
>
> Subsequent to that and I believe part of court file, five years elapsed from the date of the offense. I only presume that Mr. Boggs can read and write, because there is a motion filed by Mr. Boggs wherein he says that the statute of limitations has run and his case should be dismissed. What Mr. Boggs has done was read the competency statute that says if five years elapse between the date of finding of incompetency -- or from the date of finding incompetency, then the case will stand dismissed.
>
> And I believe that Mr. Boggs has again indicated to us by additionally filing of a motion to dismiss his mutism as they refer to it in Chattahoochee, is simply another issue or another evidence of his malingering in an effort to get this charge dismissed by the passage of time.
>
> So, we are here not on a request from Chattahoochee, but we're here on my original request from the March -- or from the March 31st, 1992, letter from the administrator finding him competent to proceed and sending him back to court. Judge Tepper asked for the additional tests. Chattahoochee has to the best of their ability done that. They can't do any more, so now we're back here, and that's what I'm asking the Court to do.
>
> (emphasis supplied)

The trial court denied the motion, observing:

> " . . . I think Mr. Van Allen is correct that this is back on the original indication of competency and . .. . of over a year ago."
>
> (R 1064)[2]

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[2] See Vol. 29, Supp. Record -- SR 5 wherein the competency

Thus, the trial court did not commit error; the court could act based on the March 26, 1992 evaluation of competency and the subsequent tests ordered by Judge Tepper. The trial court also was apprised in a report by psychologist Jill Rown dated September 1, 1993 that the results of the CT scan were normal and that consulting psychiatrist Dr. David Moore opined that the patient was malingering (SR 15)

Appellant also complains that the trial court erroneously denied his motion for continuance of the hearing. The record reflects that prior to the scheduled September 27 hearing the defense moved to continue the hearing (on September 23). The court denied the motion but authorized the defense to speak to the witnesses prior to the hearing (R 2073, 2077). The defense renewed the motion to continue but added no further ground and the court denied the motion (R 2450). The prosecutor commented that defense counsel had had the opportunity to talk to witnesses that came down that morning from Chattahoochee and the defense answered that he had talked to five people for a total of twenty minutes (R 2451 - 2452). The state's witness list had included non-mental health experts Grice, Hamilton and Byrd, Dr. David Moore (who did not testify at the hearing) and psychologist Jill Rowan (R 2071). The court denied the motion, noting that counsel could talk to the witnesses when they got there and commenting

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evaluation dated March 26, 1992 reporting "the patient is considered competent to proceed."

that these witnesses could have been anticipated and discovered by the defense (R 2443).

A trial court's ruling on a request for continuance will not be disturbed unless a palpable abuse of discretion is demonstrated. Jent v. State, 408 So. 2d 1024 (Fla. 1981). No abuse of discretion is manifest. Lay witnesses Byrd, Grice and Hamilton who merely testified as to their observations at the Florida State Hospital gave brief testimony and the subject matter was not unduly complicated; defense counsel could, and did, cross-examine them creditably without being awarded a continuance of the hearing (R 2459 - 62; R 2467 - 73; R 2479 - 87). Doctors Szabo and Fellows essentially gave testimony favorable to Boggs.[3] Dr. Delbeato who testified that Boggs was malingering was no stranger to the defense because he had confirmed his earlier 1991 testimony when defense counsel was representing Boggs -- that he was malingering. In any event he too was ably cross-examined (R 2516 - 2530).

As to witness Jill Rowan who preferred to have the court make the determination of competency, defense counsel had the evaluation report she participated in March of 1993 for use in his cross-examination (R 2554; SR 14) and counsel was able to act as an advocate in his cross-examination of her (R 2547 - 2557). The defense was not denied due process of law by the trial

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[3] The defense had used Szabo and Fellows at an earlier hearing (R 2013).

court's order denying a motion for continuance of the competency hearing.

ISSUE II

WHETHER THE LOWER COURT ERRED BY FINDING BOGGS COMPETENT TO STAND TRIAL.

Roosevelt Byrd, a rehabilitation specialist at the Florida State Hospital in Chattahoochee for thirty years, testified that he had contact with Boggs on the days he worked (R 2453 - 54). He has seen Boggs walk in a bent over posture mostly every day and has seen him frequently smoke cigarettes; the cigarette lighters are built into the wall about five feet, eleven inches above the floor. Boggs stands straight up to reach the cigarette lighter (R 2454 - 56). Boggs has to stand up in the shower and Byrd had seen him stand up to look in the mirror to comb his hair (R 2456). The witness heard Boggs verbally identify his room number to get in and he heard Boggs talk to the judge in Gadsden County about his medication (R 2456 - 58). Boggs always wears his shoes on the wrong feet and Byrd has observed him using a phone (R 2458 - 59). Boggs can stand up and can talk when he wants to (R 2461).

Ray Grice, a twenty-nine year employee at the Florida State Hospital has seen Boggs stand up when he lights his cigarettes or comb his hair in the mirror and when climbing up and sitting down on the picnic table (R 2464). Boggs spoke when he wanted papers notarized and when asking to get into his room. Boggs could follow directions, e.g., to go to his room or to take medicines. Grice had seen Boggs talking to other residents (R 2464 - 65). He has seen Boggs talk to the "jailhouse lawyer" at the Florida

State Hospital (R 2465 - 66) and can use the phone. He seemed to do as he wanted to do (R 2466 - 67).

Nurse Sue Hamilton, another thirty year employee, has seen Boggs standing upright when she explained to him why she wanted to give him a tuberculin skin test and heard him refuse the CT scan in September 1992 (R 2475 - 76). He said there was nothing wrong with his head; he didn't need the CT scan. The witness explained that Boggs had a habeas corpus petition and pointed to the notary what he wanted. After notarizing the document it was given back to Boggs (R 2476 - 78).

Dr. Szabo, a psychiatrist, examined Boggs in June of 1991 and May of 1992 and Boggs spoke very little on either occasion (R 2489). Szabo believed Boggs was not competent (R 2490).

Clinical psychologist Cheryl Fellows saw Boggs on September 13, 1993 (R 2494). Boggs was non-communicative and she was unable to administer psychological tests (R 2495 - 96) because he either could not or would not respond. He was able to follow directions (to sit on a chair, pick up a pencil, etc.) (R 2496). She didn't know for sure if he were malingering (R 2497). The behavior she was talking about having observed was his present conduct -- sitting, not speaking, head down, no communication whatsoever; she did not believe it was intentional (R 2502).

Dr. Donald Delbeato, a clinical psychologist, evaluated appellant in June of 1991 and April of 1992. He was generally non-responsive but during the course of the interview became more responsive; the judge makes decisions, a jury decided guilt or

innocence (R 2507). Delbeato gave an abbreviated form of the MMPI and the answer Boggs gave (No, not that I know of) to a question (if he ever felt as if someone was making him do things by hypnotizing him) was a clarifying response because someone who is psychotic or has severe organic damage does not give that type of response. When Delbeato gave a difficult double-meaning type of question, Boggs asked him to repeat it which is appropriate for people who understand whereas psychotic people and others with severe organic impairment simply don't respond (R 2509). The witness got the feeling Boggs was malingering but not that well; a really good malingerer can't be caught. Boggs has learned to be a fairly good malingerer over time (R 2509). At the 1992 interview, deputies brought Boggs in a wheelchair and told Delbeato that Boggs had been walking around, but just asked for the wheelchair when they brought him that day. At this second interview he was almost totally non-responsive (R 2510). Delbeato diagnosed Boggs as a borderline personality disorder with antisocial tendencies and "was giving an example of extraordinary intentional inefficiency and malingering" (R 2512). In 1991 Delbeato believed him to be competent to stand trial and still maintained that view (R 2512 - 13). He explained that such personalities "like to make authority dance" and are quite capable of making choices (R 2513).

Upon reviewing the hospital records he became convinced that Boggs was malingering beyond any reasonable doubt because his ward behavior was the opposite of that shown in the courtroom

(walking, talking, engaging in casual conversation). He was using this extraordinary, sense of persistence because he has all the time in the world (R 2513 - 14).

The witness opined that what was significant about the notarized habeas petition incident was Boggs' desire for a notary public -- a slip up by Boggs -- there is volitional thought in Boggs' awareness there is a process where he can prove that he has written or read something (R 2515). Delbeato had absolutely no doubt in his mind that appellant was competent to stand trial (R 2516). While Boggs had been "a good vegetable for a while", the witness had gotten him to come out (R 2525). The witness concluded that:

> " . . . he can and does know what is going on, and that he can appropriately aid his attorney, and he does know the charges against him, that he knows all too well the advisory process, he knows the potential penalties, that he can help you, he can help you challenge witnesses but he refuses to do so, and that he can endure incarceration and that is his plan."
>
> (R 2528)

Senior psychologist Jill Rowan at Florida State Hospital testified that the results of the court-ordered EEG and CT scan were normal (R 2534). Boggs has been less communicative than in his prior admission (R 2536). Rowan stated it was difficult to assess whether Boggs was mentally ill since he wouldn't cooperate or talk. There was no evidence he was responding to hallucinations or delusions, and there have been no violent outbursts (Tr 2537 - 38). He recalled an incident on October 6,

1992 when Boggs was visibly excited and talked in a clear, moderately soft voice:

> "They're taking me to cut my hair. They can't do it without a court order. I need to look like this in court for identification purposes. I have to have something to show in court that they ordered this done to me." (R 2540)

Rowan testified that Dr. Rush reported that Boggs then responded to several questions with relevance (R 2540)

Rowan noted Boggs' history of malingering (R 2541). In Boggs' case, the stakes are very high (R 2543). Rowan noted that even by random chance Boggs should put his shoes on the correct feet, rather than constantly deliberately putting them on the wrong feet (R 2544). Boggs does not fit into the category of mental illness, does not fit into an organically-impaired physical defect and that he fits into the malingering class (but she could not give an opinion until he talks to her). (R 2547)

Thereafter, the trial court made the following findings (R 2096 - 2098):

> Considering the entire record in this case and the testimony presented on September 27, 1993, along with the argument by counsel, this court now finds beyond any *reasonable* doubt that: (1) Mr. Boggs is malingering. He is deliberately and volitionally trying to make the Florida criminal justice system "dance to his tune," and is doing a splendid job of it, too. He always puts his shoes on the wrong feet. He walks around stooped over except when he wants to straighten up. He is mute except when he wants to talk.
>
> He has the ability to talk to counsel and to assist counsel in planning his defense, but is choosing not to do so. He has the ability

to stand and sit upright, but is choosing not to do so for his own ends. The evidence in this case is overwhelmingly against him, and he has apparently concluded that the only way he can escape some rather several temporal punishment is to feign insanity, and up to now, it has been working wonderfully.

(2) Mr. Boggs is competent to stand trial. This court agrees with the argument by defense counsel, Mr. John Carballo, that a finding of malingering does not necessarily mean that Mr. Boggs is competent. However, when Mr. Boggs talks (or writes) he displays an excellent understanding of the criminal justice process. He filed a pro se petition for a writ of habeas corpus that displays an accurate grasp of Rule 3.213, Florida Rules of Criminal Procedure, except for when the five-year period begins to run. He listens carefully to descriptions of his rights. Dr. Meadows indicates in his letter of September 29, 1988, that he advised Mr. Boggs of his rights and Mr. Boggs refused to talk to him further. Dr. Meadows presumably told him that he had the right not to participate in that psychiatric evaluation and anything he said might be used against him, and Mr. Boggs did not say another word to Dr. Meadows. When this court inquired of Mr. Boggs on September 15, 1988, Mr. Boggs said that the reason he would not talk to a psychiatrist was: "I want no delay in this trial." When the court asked if he would talk to a psychiatrist if he were promised that it would not delay the trial, Mr. Boggs asserted: "No, sir. I have the right to remain silent and I would do so." He has been true to his word.

Mr. Boggs appears to have recognized that the procedure for determining competency is the "Achilles heel" of Florida's criminal justice system. During this justice process he has displayed the ability to learn to better feign insanity and foil the system. And he has displayed the will to put that learning into practice.

Mr. Boggs objected to having his hair cut because it would interfere with his planned

> presentation in court. He refused any medication that might soften his charade of insanity, but allowed the nurse at Florida State Hospital to perform a TB test on him after she explained the reasons for it.
>
> (3) Mr. Boggs has the ability to conduct himself appropriately in the courtroom, in spite of the predictions by several of the experts who examined him. He did so during the first trial, and except for his deliberately stooping over and remaining mute, he has conducted himself appropriately during recent hearings and argument. The best "proof of the pudding is in the eating." Furthermore, he has not been a management problem at Florida State Hospital and follows directions.

Appellant contends that the lower court based its ruling on its opinion that Boggs was malingering and did not attempt to determine whether he had the ability to consult with counsel with a reasonable degree of rational understanding or whether he had a rational as well as factual understanding of the pending proceedings. The lower court specifically found that Boggs "has the ability to talk to counsel and to assist counsel in planning is defense, but is choosing not to do so" (R 2096)

The court added:

> "Mr. Boggs is competent to stand trial. The court agrees with the argument by defense counsel, Mr. John Carbollo, that a finding of malingering does not necessarily meant that Mr. Boggs is competent. However, when Boggs talks (or writes) he displays an excellent understanding of the criminal justice process. He filed a pro se petition for a writ of habeas corpus that displays an accurate grasp of Rule 3.213, Florida Rules of Criminal Procedure, except for when the five-year period begins to run. He listens carefully to descriptions of his rights. Dr. Meadows indicates in his letter of September

> 19, 1988, that he advised Mr. Boggs of his rights and Mr. Boggs refused to talk to him further. Dr. Meadows presumably told him that he had the right not to participate in that psychiatric evaluation and that anything he said might be used against him, and Mr. Boggs on September 15, 1988, Mr. Boggs said that the reason he would not talk to a psychiatrist was: "I want no delay in this trial." When the court asked if he would talk to a psychiatrist if he were promised that it would not delay the trail, Mr. Boggs asserted: "No, sir. I have the right to remain silent and I would do so." He has been true to his word.
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(R 2096 - 98)

Mr. Boggs is not the first -- nor will he probably be the last -- capital defendant to attempt to have the courts" dance to his tune." See Jones v. State, 449 So.2d 253, 259 (Fla. 1984) (defendant may not manipulate the proceedings by willy-nilly leaping back and forth between the choices [of self representation and appointed counsel]; Waterhouse v. State, 596 So. 2d 1008, 1014 (Fla. 1992) (We refuse to permit an intransigent defendant to completely thwart the orderly process of justice).

Appellant alludes to the October 30, 1991 competency hearing conducted before Judge Swanson. But even there Dr. Gonzalez who opined that Boggs was incompetent acknowledged "But my gut feeling, I must say, is that he's faking this. But that's my gut feeling, but I could be wrong" (R 2357). Dr. Gonzalez in 1991 felt "he should have all those tests to be fair" (R 2365). Even Judge Swanson, while finding Boggs incompetent in 1991, observed:

> "I have made it clear my personal feeling is that the defendant has chosen the present attitude as that being most advantageous to him in avoiding trial. But that's a personal observation."

(R 2427)

Appellant contends at page 24 of his brief that "Boggs never 'refused' to talk or cooperate". Boggs asserts that after requesting experts to determine his competency in May of 1991, "he met with the experts and followed directions (R 2464 - 70; 2494 - 96)". The reader would infer from this remarkable assertion that MR. Boggs was completely cooperative and assisted the experts in doing their tests and evaluations. A review of R 2464 - 70 shows that non-mental health expert Grice was describing appellant's behavior with the non-experts and indeed he could talk and follow directions when it suited his purposes to do so. The transcript at R 2494 - 96, the testimony of Dr. Cheryl Fellows reveals that she was unable to administer IQ, personality and malingering tests because of Boggs' noncommunicativeness. He was able to pick up a pencil and sit in a chair -- she could not be sure he was malingering (R 2496 -

97). In addition to Dr. Delbeato who saw through Boggs' charade, Jill Rowan testified that "we knew from his prior admission that he was incommunicative. Really this time he's been even less communicative than he was in the prior admission" (R 2536). Although Boggs had talked to a psychologist the year before about casual things -- issues unrelated to competency tasks -- Boggs did not talk to Rowan "really about anything". (R 2536)

If appellant is suggesting that Boggs was simply following the instructions of the experts to complete his evaluations, there is no support for that contention. If appellant is suggesting that defense experts counseled Boggs not to communicate to thereby enhance the probability of avoiding trial, again there is no evidence of that (and if it were true that would give further support to the trial court's acceptance of Dr. Delbeato's testimony).[4]

Appellant argues that irrespective of the competency determination made by Judge Cobb on October 5, 1993 (R 2087 - 98), trial Judge Swanson erred in failing to conduct additional competency hearings throughout the trial. But cases such as Pridgen v. State, 531 So. 2d 954 (Fla. 1988) and Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) deal with situations when the

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[4] Appellant cites Lane v. State, 388 So. 2d 1022 (Fla. 1980) where none of the three experts who testified at the competency hearing were able to say that the accused was competent to stand trial. Here Dr. Delbeato had no doubt that Boggs was competent to stand trial. (R 2516)

trial court is alerted to changed circumstances. While trial counsel may have informed the judge at the beginning of trial that Boggs would not talk to counsel or the investigators, this was nothing new. Boggs was simply continuing his malingering effort to beat the system. Defense counsel acknowledged below:

> "The last time he spoke in a courtroom, he was demanding myself and Mr. Carbello be removed from this case and he has not acknowledged me since. That was three years ago."

(Tr 19)

Since there was no changes in circumstances, there was no necessity to conduct another repetitive hearing (and trial Judge Swanson noted that he saw nothing inconsistent with Boggs being a very skilled malingerer -- Tr 22).[5] Boggs certainly does not have the right to insist on a competency hearing every fifteen minutes during a trial.

Appellant argues apparently that it does not make sense for Boggs to believe that he could avoid trial for several years by not speaking But why not? In truth he did delay his retrial. And while both Dr. Delbeato and the judge concluded that appellant was a skilled malingerer, appellant erroneously asserts that his silence did not convince anyone he was incompetent; he

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[5] Appellant suggests that the judge seemed to agree that Boggs was incompetent to decide for himself whether to testify. Brief, p. 26. Appellee submits that in contenxt the court was respecting the defendant's decision to remain silent (" . . . he has an absolute right to remain silent" -- Tr 1023).

certainly convinced Dr. Gonzalez who had a gut feeling that he was faking not to make that conclusion unless more testing were done and further evaluations made -- rendered impossible by Boggs' refusal to talk to the experts. Appellant argues that he could have convinced the experts he was incompetent by acting more bizarrely or pretending to hear voices or hallucinate. Of course, mental health experts may have ways of more quickly discerning that type of fakery and as the lower court noted (R 2097) Boggs may have found the Achilles' heel by simple non-communication with Gonzalez, Szabo and Fellows.

The trial court correctly relied on the expert testimony of Dr. Delbeato that Boggs was malingering, supported by the factual testimony of Bird, Grice, and Hamilton that Boggs could walk and talk when it suited his purpose. His CT scan was normal EEG was normal and appellant should no longer succeed in having the system dance to his tune. Waterhouse, supra; Jones, supra.

ISSUE III

WHETHER THE TRIAL COURT UNFAIRLY RESTRICTED JURY VOIR DIRE.

The trial court indicated prior to voir dire examination its intention to ask prospective jurors some questions relative to what they may have read or heard about the case but indicated it would disallow content questions by counsel (Tr 31). The court indicated that it would ask if they read or heard anything about the case and if so, had they formed an opinion as to the accused's guilt and if so could they put aside their opinion and decide the matter entirely upon the evidence presented in court (Tr 32 - 34). If counsel wanted to ask additional questions relating to the content of pretrial publicity, counsel should approach the bench because the court was familiar with the newspaper content (Tr 35).

As argued in Issue IV, infra, the following jurors who actually were selected and sat on the case -- all of them either head not read or heard anything about the case or formed no opinion on guilt or innocence and could decide the case on the evidence: Ball (Tr 55), Weingold (Tr 56), Drago (Tr 58), Craig (Tr 58), Dillon (Tr 60), Allen (Tr 188), Weber (Tr 228), Villa (Tr 246), Counsil (Tr 269), Powell (Tr 296), Wood (Tr 331), Sassaman (Tr 268 - 269). A number of jurors had heard about the case and ended up being excused (Smith, Tr 54, Tr 243; Fried Tr 46, 243; McElhinney (Tr 57, 180 [by the state]; Sayer Tr 57, 224; Johnson Tr 58, 180; Erbe Tr 59, 185; Sweet, Tr 246, 265; Bunch Tr

228, 327; Donaldson, Tr 314, 326 [Donaldson had no feelings about guilt or innocence -- Tr 304, nor did Bunch -- Tr 227 - 228]).

In MuMin v. Virginia, 500 U.S. __, 114 L.Ed.2d 493 (1991), the Supreme Court rejected a defendant's contention that the trial judge's refusal to ask questions on voir dire about contents of news reports concerning the accused violated the Sixth or Fourteenth Amendments. In that case there had been substantial pretrial publicity (unlike the two articles sub judice) and eight of the twelve venire persons eventually sworn as jurors had read or heard something about the case (unlike the instant case where those sworn either had heard nothing or could decide on the evidence presented). The Supreme Court observed:

> "None of those eventually seated stated that he had formed an opinion, or gave any indication that he was biased or prejudiced against the defendant. All swore that they could enter the jury box with an open mind and wait until the entire case was presented before reaching a conclusion as to guilt or innocence."

(114 L.Ed.2d at 503).

The Court concluded that content questions about what information jurors had received from newspapers was not constitutionally required.

> "To be constitutionally compelled, however, it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair. See Murphy v. Florida, 421 U.S. 794, 799, 44 L.Ed.2d 589, 95 S.Ct. 2031 (1975)."

(114 L.Ed.2d at 506)

The court reasoned that wide discretion was granted to the trial court in conducting voir dire in the area of pretrial publicity and other areas that might tend to show juror bias and "we think this primary reliance on the judgment of the trial court makes good sense" Id. at 507. The court noted that the case did not involve the wave of public passion that had occurred in Irvin v. Dowd, 366 U.S. 717, 6 L.Ed.2d 751 (1961) and the Court rejected the same ABA standard that Boggs trots forward in his brief:

> The ABA standards as indicated in our previous discussion of state and federal court decisions, have not commended themselves to a majority of the courts that have considered the question. The fact that a particular rule may be thought to be the 'better' view does not mean that it is incorporated into the Fourteenth Amendment. Cupp v. Naughten, 414 U.S. 141, 389 L.Ed.2d 368, 94 S.Ct. 396 (1973)."

(Id. at 509)

The Due Process Clause does not require that the subject of possible bias from pretrial publicity be covered by questions specifically dealing with the content of what each juror has read. 114 L.Ed.2d 510. See also Johnson v. State, 608 So. 2d 4 (Fla. 1992) (trial court has great discretion in deciding if prospective jurors must be questioned individually about publicity the case may have received and no abuse of discretion shown); Pietri v. State, 644 So. 2d 1347 (Fla. 1994) (no error in the trial court's refusal to conduct individual voir dire of what prospective jurors knew about the case; although several people

who served in the jury had read about the case, all said they had not formed an opinion and would consider only the evidence brought before them. No abuse of discretion shown.)

In Reilly v. State, 557 So. 2d 1365 (Fla. 1993) a prospective juror was aware that the defendant had given a confession but the confession had been suppressed so the juror was aware of damaging evidence which would be inadmissible at trial. The Court held that it was reversible error not to excuse him for cause. Reilly does not provide assistance to Boggs because, as stated above, all the jurors who ended up serving had not read or heard anything in the papers about the case (Tr 55, 56, 58, 60, 188, 228, 246, 269, 296, 331, 268).

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY DENYING DEFENSE REQUESTS TO EXCUSE PROSPECTIVE JURORS FOR CAUSE AND REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES.

In Lusk v. State, 446 So. 2d 1038 (Fla. 1984), this Court held that the test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court. The court additionally pointed out that:

> " . . . a review of the jury selection transcript discloses no sitting juror who appears unqualified and who should have been excused. No proof has been submitted by Lusk that casts any doubt on the conclusion that Lusk was convicted by a fair and impartial jury."

(Id. at 1041)

Determining a prospective juror's competency to serve is within a trial court's discretion. Pentecost v. State, 545 So. 2d 861 (Fla. 1989); Hall v. State, 614 So. 2d 473 (Fla. 1993). No biased juror was seated. Ross v. Oklahoma, 487 U.S. 81, 101 L.Ed.2d 80 (1988); see also Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994) (voir dire transcript shows that each juror met the test of juror competency, i.e., can lay aside any bias or prejudice and render a verdict solely upon the evidence presented and the instructions given by the court).

The jurors selected to hear the case (Wodd, Powell, Dillon, Sassaman, Craig, Drago, Allen, Villa, Weingold, Council, Ball,

Weber - R 1167 - 1168) were all properly selected, qualified impartial jurors. While six prospective jurors had heard about the case (Smith, Fried, McElhinney, Erbe, Sayer, Johnson -- Tr 54 - 60, 176 - 178) none of them served on the jury.[6] Of those actually selected to sit on the jury, Ball had not read or heard anything about the case (Tr 55), nor had Weingold (Tr 56), Drago (Tr 58), Craig (Tr 58), Dillon (Tr 60), Allen (Tr 188), Weber (Tr 228, Villa (Tr 246, Council (Tr 269, Powell (Tr 296), Wood (*Tr 331). Juror Sassaman hadn't read anything but heard what was said around the neighborhood (Tr 268), heard from his wife about the incident about four years earlier (Tr 281) and had formed no opinion on guilt or innocence and could decide the case on the evidence (Tr 268 - 269).

Boggs first makes reference to prospective juror Nelson Smith who worked on the communication system division of the Pasco County Sheriff's office but he had not had contact with the defendant and it would not affect his decision (TR 16). Smith knew the officers by name and some personally, but that would not affect his judgment in any fashion (TR 64 - 65). It would not influence his ability to be fair and impartial and had no problem in following the judge's instructions (Tr 94). He rarely socialized with those with whom he worked (Tr 122). He could

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[6] Among those excused were McElhinney by the state (Tr 180), Johnson (Tr 180), Erbe (Tr 185), Sayer (Tr 224), Fried (Tr 243), Smith (Tr 243) by the defense.

decide the case solely and entirely upon the evidence presented (Tr 55). The trial court correctly denied an excusal for cause on Smith (Tr 180) and the defense peremptorily excused him (Tr 243).

Prospective juror Sayer had contact four years ago with some of the police (her ex-husband was a police officer) but didn't think that would affect her judgment in any fashion (Tr 63) and could render a verdict based on the law and the evidence (Tr 115). While Boggs' counsel sought individual sequestered voir dire of Sayer, he did not seek to excuse her for cause but peremptorily excused her (Tr 224). While apparently Miss Johnson originally gave tentative answers (Tr 59) in subsequent questioning when asked if there were:

> "Anything about the nature of the crime of first-degree murder, not knowing anything more about it, that will cause any feelings that are so strong that it would impair your ability to be fair and impartial?"

Johnson answered, "No." (Tr 110) When the defense sought to excuse Johnson for cause the trial judge responded, I heard the response." (Tr 179). Johnson was excused peremptorily (Tr 180). Because of the superior vantage point of the trial court who sees and hears the jurors and can evaluate their demeanor, Green v. State, 583 So. 2d 647 (Fla. 1991), that court's decision will not be overturned absent a showing of abuse of discretion or manifest error. Mills v. State, 462 So. 2d 1075 (Fla. 1985); Davis v. State, 461 So. 2d 67 (Fla. 1984). The trial court's

conclusion is "adequately supported by the record" Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990).[7]

Appellant points to prospective juror Erbe who acknowledged that she would try to base her verdict entirely on the evidence presented (Tr 60). Erbe stated that she was married to a Hillsborough County Sheriff's deputy but was pending a divorce, a factor that would not affect her judgment in any fashion in this case (Tr 66). Erbe was excused as a defense peremptory challenge (Tr 185).

Ida Fried had not formed any decision or opinion about the case from the newspapers and could render a verdict based entirely on the evidence presented.[8] (Tr 56) She was excused peremptorily (Tr 243). Prospective juror Bunch testified that while she had read a newspaper account in the Tampa Tribune she had not formed an opinion on the defendant's guilt or innocence (TR 227 - 228); she was excused peremptorily by the defense (Tr 327).

Sarah Donaldson had not formed any feelings about whether the defendant was guilty or not guilty based on what she had read (Tr 304). She could decide the case solely and entirely upon the

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[7] Johnson announced she would do her duty (Tr 164).

[8] Whatever Fried had read a couple of weeks earlier "didn't make that much of an impression on me." (Tr 241)

evidence presented in the courtroom (TR 305). Donaldson was removed peremptorily (Tr 326).

Barbara Sweet had read an article a long time ago but had arrived at no tentative view regarding the defendant's guilt (Tr 245 - 246). She could think of no reason why she couldn't be impartial (Tr 256 - 257) and was excused peremptorily (Tr 265)

Prospective juror Carr stated that he had known prosecutor Van Allen casually for over five years but it would not cause him difficulty in sitting on the case (Tr 102).[9] Carr stated that his nephew was married to Van Allen's stepdaughter Tina; he had very little contact with Van Allen (Tr 164) and didn't know him that well (Tr 166). Boggs asked that the juror be excused because related to the prosecutor and the court denied the request (Tr 225 - 226). Carr was excused peremptorily (Tr 264 - 265)

Theresa Craig who served on the jury had been a witness in a prior murder case but she said that would not affect her judgment (Tr 75 - 76). Nothing about that prior trial or the defense lawyers bothered her (Tr 166) (" . . . I came in as a witness and said what I had to say and I left") Juror Sassaman had not read anything but heard what was said about the neighborhood -- he

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[9] At footnote 24 of his brief, Boggs hints that juror Carr may have known jurors Smith and Sayer through law enforcement. But the earlier voir dire established that Carr, Smith and Sayer knew each other but could still act independently as jurors. (Tr 108 - 109)

formed no opinion on guilt or innocence and could decide on the evidence (Tr 268 - 269). He heard about the incident from his wife at the time about four years ago (Tr 281). Both Council and Drago served on the jury also (appellant did not complain or issue any challenge to Drago).

In Lucas v. State, 376 So. 2d 1149, 1152 (Fla. 1979), this court opined that it "will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law." (emphasis supplied). Boggs did not cite any authorities to the trial court in support of his thesis that Carr should be excused for cause because of relationship to the prosecutor (Tr 2260. This argument should be deemed defaulted.

Apart from that the claim is meritless. Appellant cites Polynice v. State, 568 So. 2d 1346 (Fla. 4 DCA 1990), where the court refused to excuse for cause a venireperson who was a stepfather of a police officer who testified for the state. It should be noted that the appellate court did not address whether excusal was required under F.S. 913.03(9), but rather the court concluded that "in order to satisfy the appearance of justice, a sworn jury should not include as its foreman the stepfather of an officer who testified in the case." Id. at 1347. No juror was related to any witness who testified sub judice.

In Walsingham v. State, 56 So. 195 (Fla. 1911), after noting that the wife of the victim was a second cousin of a juror and

that it was not clear whether the wife of the deceased was still living at the time of the trial or that even if still living whether such a fact would have disqualified the juror, this court determined that it was unnecessary to decide the point since the juror did not sit, and must have been peremptorily challenged. Here too, juror Carr was peremptorily removed by the defense.

In Grant v. Odom, 76 So. 2d 287 (Fla. 1954), the court held that a stepson who had petitioned for appointment as curator of property of his stepfather should have been given the opportunity to prove his right to institute such proceedings by showing that the stepfather did not have living father, mother, brother or sister or collateral heirs of closer kin than stepson and if he prevailed on that issue whether a curator should be appointed to take charge of the property. The court indicated that a more expansive meaning of the term next of kin was appropriate where the material and relevant statutes indicate a broader meaning was intended. 76 So. 2d at 289. That a particular statute containing the phrase next of kin was given a particular meaning in a different context does not mean that it applies elsewhere in different contexts. There next of kin was given a broader view than blood relations.

The prosecutor's contention below that stepchildren don't count is supported by Houston v. McKinney, 45 So. 480, 481 (Fla. 1907) where the court stated:

> "The primary sense of 'children' is offspring, and that is the sense of relationship in which it is ordinarily used

> when the question of relationship is involved. It is sometimes applied by elderly people as a word of endearment or affection to a younger, where no relationship whatever exists. It cannot be properly held, when found in a statute or contract, to include stepchildren."

(emphasis supplied)

But even if the court were to accept Boggs' argument, he still should not prevail. In Crosby v. State, 106 So. 741 (Fla. 1925), the court opined:

> " . . . in order to disqualify a juror by reason of affinity with an interested party, it must affirmatively appear that the connecting relative, on account of the marriage with whom the relationship by affinity arose is still living, and the marriage otherwise undissolved, or that there is living issue of such marriage; the burden being upon the party challenging the juror to make such disqualification affirmatively appear."

(emphasis supplied (text at 744)

This court can take judicial notice of the records in the Pasco County Clerk's office (see accompanying motion to take judicial notice and exhibits) verifying that Blake (juror Carr's nephew) and Tina (prosecutor Van Allen's stepdaughter) were divorced in 1991. The prosecutor is not related by blood to any of the characters associated with this trial; and whatever relationship may have existed by marriage was terminated by the 1991 divorce of Tina and Blake. It would be a bizarre result should this court require that there be a new trial here and if juror Carr were again to be summoned for jury could not be the subject of an excusal for cause challenge since there is no relationship by blood or marriage to the prosecutor.

ISSUE V

WHETHER THE LOWER COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS THE IDENTIFICATION OF APPELLANT BY WITNESS SPURLOCK BECAUSE HER OUT-OF-COURT IDENTIFICATION RESULTED FROM AN ALLEGEDLY UNDULY SUGGESTIVE PHOTO DISPLAY AND THE STATE ALLEGEDLY FAILED TO PROVE HER IN-COURT IDENTIFICATION WAS INDEPENDENT OF THE SUGGESTIVE PRETRIAL IDENTIFICATION.

A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness. McNamara v. State, 357 So. 2d 410 (Fla. 1978); Savage v. State, 588 So. 2d 975 (Fla. 1991); Owen v. State, 560 So. 2d 207 (Fla. 1990); Henry v. State, 586 So 2d 1033 (Fla. 1991); Medina v. State, 466 So. 2d 1046 (Fla. 1985); R. Jones v. State, 612 So. 2d 1370 (Fla. 1992).

After a full evidentiary hearing the trial court determined that there was nothing suggestive about this identification procedure (R 1897). The trial court did not abuse its discretion. Gorby v. State, 630 So. 2d 544 (Fla. 1993); Power v. State, 605 So. 2d 856 (Fla. 1992).

(a) Spurlock's identification procedure was not impermissibly suggestive --

At the evidentiary hearing detective Linda Alland described the physical description provided by witness Spurlock (5'8" or 5'9", 160 - 170 lbs, dark hair with some gray, curly, wearing dark blue or dark colored parka, no beard, not certain about mustache and glasses, approximately 60 - 65 years old, with a baseball cap) (R 1831 - 33). When shown the Exhibit 1 photopack,

Spurlock selected appellant's photo and said she was 75% sure; the man in her office had glasses and a baseball cap (R 1842). Spurlock gave similar testimony, explaining that the picture she selected was blurry (R 1849 - 1853). Spurlock then saw appellant on the eleven o'clock news and knew it was the man in her office whose photo she selected (R 1855). The witness testified that appellant in her office was in close proximity to her, that she had looked at him uninterruptedly for five minutes while she was on the phone and recalled that his unusual manner of clothing and that he didn't ask to write down the address she furnished (R 1862 - 64). Officer Alland did not hint as to who to select in the photopack (R 1868). The newspaper photo at the bank was not as blurry, the hair was not as frizzy and she was 100% sure (R 1868). No one told her she selected the correct person (R 1870). When she saw the appellant at the extradition hearing in Ohio, she exclaimed to her fiancee "My God, there he is" and noticed he had changed his appearance. She was able to identify him from his having been in her office (R 1872, 1874).

A review of the photos in the photopack reveals that the men in the photos all have similar facial characteristics. The age discrepancies are not readily apparent; nor can one determine that appellant's photo was taken outdoors in a northern state. The photo of appellant from Ohio showed a mustache. Consequently, the police included in the photopack only men with mustaches. Merely because there are some differences between the various photographs in the display does not render the procedure

unduly suggestive. Compare, Marsden v. Moore, 847 F.2d 1536, 1545 (11th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 534, 102 L.Ed.2d 566 (1988) (Defendant was the only male in photographs shown to witness); Dobbs v. Kemp, 790 F.2d 1499, 1506 (11th Cir. 1986), cert. denied, 481 U.S. 1059, 107 S.Ct. 2203, 95 L.Ed.2d 858 (1987), reh. denied, 483 U.S. 1012, 107 S.Ct. 3246, 97 L.Ed.2d 751 (1987) (Procedure unduly suggestive where witness was shown four photographs, all of the defendant). While the witness here may have been aware the photos contained a suspect (why else would one look at a photopack?), Spurlock was not told the man in her office was in the photopack or whom to select (Tr 519).

(B) Even if there were some suggestiveness, there is no reasonable likelihood of irreparable misidentification. --

Both the in-court and out-of-court identifications of appellant were admissible. An in-court identification is admissible if it is found to be reliable and based solely upon the witness' independent recollection of the offender at the time of the crime, uninfluenced by the intervening illegal confrontation. Neil v. Bigger, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). It is the likelihood of misidentification that violates due process and not the possibility of a suggestive lineup or showup. Id. Likewise, a pretrial identification obtained for a suggestive procedure may be introduced into evidence if found to be reliable and based upon the witness's independent recall. Id. A suggestive confrontation alone is

insufficient to exclude the out-of-court identification. Grant v. State, 390 So. 2d 341, 343 (Fla. 1980), cert. denied, 451 U.S. 913, 1015 S.Ct. 1987, 68 L.Ed.2d 303 (1981). To be admissible, the out-of-court identification must be found to possess certain factors of reliability. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). These factors include:

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

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

Application of the above factors to the circumstances of the instant case show beyond any doubt that there was no likelihood of misidentification. Patricia Spurlock, the manager of Colony Hills Mobile Home Park, had an opportunity to view appellant for at least five full minutes as he stood a few feet away from her on the other side of her desk (R 1862). Her view of appellant was not interrupted, and she was paying attention to Mr. Boggs during all that time. The confrontation occurred in her office in the trailer park at approximately 1:00 p.m. on February 10, 1988 (Tr 514). Ms. Spurlock's attention was drawn to the visitor because he was dressed like he just came out of the woods from hunting and he had not taken the address of the Rush trailer down

in writing. These occurrences are unusual (R 1864). Ms. Spurlock later gave police a fairly accurate description of the suspect: He was in his sixties; 5'8" to 5'9"; 160 - 170 pounds; dark hair with some gray in it, a little curly; he was wearing a dark blue or dark-colored parka just below the waist and dark clothing (R 1831). Ms. Spurlock apparently told police she was not sure if the man had a mustache, but that he did not have a beard; he was wearing a baseball cap, and the hair curled out from underneath (R 1831). He was wearing prescription eyeglasses with rounded lenses (R 1831).

When shown the photopack, Ms. Spurlock picked out appellant's picture and said she was seventy-five percent sure that was the man in her office (R 1853). The witness could not be sure because the photo was blurry and the man did not have on glasses or a baseball cap (R 1842). Ms. Spurlock testified that she picked appellant's picture because he looked like the man in her office, and not because the photo was blurry. The detective did not indicate or hint that she should pick that particular photo (R 1866). The photographic lineup took place on Saturday, February 13, 1988, only three days after Ms. Spurlock saw appellant in her office (R 1865). She identified John Boggs in court approximately eight months after her encounter with him. A few days after Ms. Spurlock viewed the photopack display, she saw a different photograph of appellant in the newspaper at Ms. Spurlock's bank. She was 100% positive that the man in the newspaper photo was the man in her office (Tr 523 - 524; R 1868).

The trial court properly denied appellant's motion to suppress and specifically finding nothing suggestive about the identification procedures (R 1897) because the totality of circumstances indicated no likelihood or possibility of misidentification. Ms. Spurlock's ample opportunity for observing appellant and her heightened degree of attention remove any type of taint which a suggestive procedure may have produced. Compare Edwards v. State, 538 So. 2d 440 (Fla. 1989), wherein the eyewitness saw the suspect during a passing glance and could only see an outline of his face. Id., at 443.

The state's argument also holds true for Pat Spurlock's second pretrial identification of appellant in Ohio at the extradition hearing. That confrontation, even if suggestive, was still reliable due to the circumstances of the original meeting in the trailer office. As a final note, appellee points out that any weaknesses in the eyewitness identification and photo display were argued to the jury (R 1055 - 1060). As noted in Manson v. Brathwaite, 432 U.S. 98, 53 L.Ed.2d 140, 155 (1977) such argument is typical "grist for the jury mill."

See also Pittman v. State, 646 So. 2d 167 (Fla. 1994); A. Washington v. State, 653 So. 2d 484 (Fla. 1995); Gorby, supra.

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE BECAUSE THE SEARCH WARRANT ALLEGEDLY WAS BASED ON AN AFFIDAVIT THAT LACKED PROBABLE CAUSE AND CONTAINED RECKLESSLY FALSE STATEMENTS AND CONCLUSIONS.

Appellant renewed below the motion made in the prior trial and the lower court relied on the prior ruling entered by Judge Cobb on September 26, 1988 finding the search warrant proper and that there was sufficient probable cause upon which to base the issuance of the warrant (R 1914, TR 22-26).

Pasco County Deputy Roger Hoefs testified that he went to Vermilion, Ohio, met with the prosecution agency and caused an affidavit to be created for a search warrant of the Boggs' residence. He hand wrote it, it was retyped by a secretary, reviewed by the county prosecutor and signed before the judge (R 1901 - 1902). The search warrant, journal entries and the whole package including the two page affidavit were put together for the search warrant. The whole package was presented to the issuing magistrate who commented that he liked the format (R 1902 - 03). Hoefs was under oath when he executed the two page and shorter affidavits. There were no additional facts that he was aware of when executing the affidavit and it was complete and accurate as far as he knew (R 1904). Hoefs denied making this affidavit for the purpose of getting an arrest warrant (although form utilized reflected affidavit for arrest warrant). The witness insisted that both affidavits were part of the package

provided to the judge (R 1905 - 1906). He was certain the magistrate handled the two page affidavit (R 1907) and testified the information about Pat Canter was within his personal knowledge and had spoken to Jerry Boggs before going to Ohio. He had received information about Harold Rush's call that he had been shot through communicating with his unit (R 1908), he had interviewed Ms. Ritchie who mentioned the assailant appeared to be an apparition all in black, Sergeant Fairbanks furnished information that appellant was at the office of the trailer park and it had been reported to him that patrolman Sooy had seen Boggs' vehicle coming off the Interstate on February 12 (R 1909 - 1910).

(i) Probable Cause --

The issuing magistrate was presented and considered the short affidavit and the two page affidavit of deputy Hoefs which are reproduced herein:

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.

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 McCullough's 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. 7-31-37 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.

The affidavit is adequate to support the issuance of a search warrant. The information includes Brandy Boggs being told in January 1988 by appellant that he was going to Florida "and blow him away", Pat Canter's noticing appellant's vehicle missing from the residence on February 9 and notifying Jerry Boggs who in turn filed a report with the sheriff's department, the discovery that appellant had visited the office of the trailer park, had made inquiry for Jerry Boggs or Gerald Rush and that victim Rush (Harold) was one of the two murder victims. As stated in United States v. Ventresca, 380 U.S. 102, 13 L.Ed.2d 684 (1965).

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

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

> Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision.

> The task of the issuing magistrate is simply to make a practical, common sense decision whether given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Accordingly, a magistrate's determination of probable cause should be paid great deference by reviewing courts. After the fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. Massachusetts v. Upton, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984). The duty of the reviewing court is to insure that the magistrate who has issued the search warrant had a substantial basis for concluding that probable cause existed. State v. Jacobs, 437 So. 2d 166 (Fla. 5th DCA 1983).[10]

In essence Boggs reads every sentence in isolation and would appear to apply a standard of sufficiency to convict. An officer need not refuse to credit information received from Gerry Boggs by hypothesizing "she obviously wanted to get rid of" her ex-husband (Brief, p. 60). Appellant's threats to kill Dean and his

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[10] Appellant comments at footnote 33 that since the trial judge did not allow the jury to consider the longer affidavit because of hearsay that is evidnece that it was not sufficiently reliable for the issuance of a search warrant. The judge did not allow its admission to the jury because, as the defense urged below (Tr 842 - 845) it contained very damaging hearsay information including the appellant's alleged admission to Brandy Boggs. If this Court were to create an exception to the hearsay rule to allow the state to introduce hearsay that may appear in an affidavit for search warrant, the state will attempt to live with that decision.

ex-wife, the disappearance of his vehicle from Ohio, and reemergence there about thirty-two hours after the murders along with Spurlock's identification of him at the mobile park office retrieving the Dean address more than satisfies probable cause.

As stated in E. Johnson v. State, ___ So. 2d __, 20 Fla. Law Weekly S 347 (Case No. 78,337, July 13, 1995):

> "We believe it would be illogical to hold on the one hand that officers may put hearsay in their affidavits, but on the other hand that they must vouch for the truthfulness of the hearsay on penalty of perjury. As to hearsay, officers obviously are vouching for nothing more than the fact that the hearsay was told them and they have no reason to doubt its truthfulness. It then is within the discretion of the magistrate to determine the weight accorded the hearsay."
>
> (slip opinion, p. 9)

The Court also stated with regard to omitted facts from an affidavit that

> " . . the omitted material must be such that its inclusion in the affidavit would defeat probable cause. . . ."
>
> (slip opinion, p. 14)

* * *

> "All of these 'omissions' at best were de minimis and in no sense vitiated probable cause, and there certainly is no suggestion of reckless or intentional disregard of the truth."
>
> (p. 15)

(B) Good Faith

Appellant contends that Hoefs displayed a reckless disregard for the truth but there is little to support that allegation, either in Hoefs' testimony or elsewhere. Spurlock had made an identification of Boggs, Hoefs provided complete and accurate information to the issuing magistrate and the information recited was either of his personal knowledge or transmitted by other officers investigating the case. Similarly, if the judge in Ohio signed the wrong page that does not affect Officer Hoefs acting in good faith. United States v. Leon, 468 U.S. 897 (1984); Massachusetts v. Sheppard, 468 U.S. 981 (1984). No intentional falsification by Hoefs is demonstrated anywhere.

See also E. Johnson v. State, ___ So. 2d ___, 20 Fla. Law Weekly S 347 (Case No. 78,337, July 13, 1995) (exclusionary rule is meant to deter abuses by law enforcement, not to use law enforcement as the whipping boy for the magistrate's error. Officers are not expected to possess a lawyer's understanding of the nuances of Fourth Amendment law. Nor are they permitted to second guess the validity of a facially sufficient warrant).

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN A WITNESS MENTIONED SHE WENT TO OHIO FOR AN EXTRADITION HEARING.

The witness Linda Alland was testifying about the identification witness Spurlock had made of appellant in Ohio:

> "Q. While the two of you were together, did she have an occasion to see John Edward Boggs?
>
> A. Yes, she did.
>
> Q. Tell us what happened.
>
> A. We were up there for an extradition hearing --- "

(Tr 704)

The defense objected, asked for a cautionary instruction and a mistrial. The court denied the mistrial request but agreed to give a cautionary instruction if the defense wanted it (Tr 705 - 707). The court then instructed the jury:

> THE COURT: Ladies and gentlemen, I'm going to give you what is called a cautionary instruction. The Court has stricken the last response by the officer. You are to strike from your minds totally the last response given by the officer.
>
> It is not for you, relative to this case, as to why the police officers -- the reason why the police officer was visiting the State of Ohio.
>
> What may or may not have been the reason for doing so is not relevant to these proceedings and you're not to consider it in any fashion.
>
> Strike completely from your minds this officer's response as to her reason or what she did in the State of Ohio.

(Tr 707)[11]

The defense cross-examined this witness about Ms. Spurlock's identification of Boggs in the room in Ohio (Tr 720). Spurlock had previously testified that she had met with detectives in Vermillion, Ohio, was in a courtroom and was able there to identify Boggs as the man who had been in her office on February 10 (Tr 525 - 526).

In Dailey v. State, 594 So. 2d 254 (Fla. 1991), the prosecutor commented in opening statement that "Detective Halliday will indicate to you he had to go out because Mr. Dailey was fighting extradition to come back to Florida". The defense unsuccessfully moved for a mistrial. During Halliday's testimony the witness was asked what an extradition process was. After another denial of a mistrial request, the detective explained he went to California to identify Dailey and no further mention of extradition was made. This Court ruled:

> "Because the statements were extremely brief and the testimony undeveloped however, we find beyond a reasonable doubt that the error did not affect the verdict. See State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986)."

(text at 256)

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[11] Appellant cannot now complain of the cautionary instruction since the trial judge only gave it because the defendant was requesting it (Tr 707). See McPhee v. State, 254 So. 2d 406 (Fla. 1 DCA 1971); State v. Belien, 379 So. 2d 446 (Fla. 3d DCA 1980). Thus, his appellate complaint is now barred.

So too in this case. The one line statement of witness Alland mentioning extradition without further explaining the ramifications of the process, if error, was cured by the given instruction or was harmless error (especially since it added nothing more damaging than the proper submitted testimony of Alland and Spurlock that the latter made an Ohio identification of the appellant.)

ISSUE VIII

WHETHER THE TRIAL COURT DENIED APPELLANT THE RIGHT TO PRESENT A DEFENSE BY EXCLUDING ALLEGEDLY RELEVANT EVIDENCE REGARDING A REQUEST BY AN UNIDENTIFIED MAN TO DELIVER AN UNFINISHED MESSAGE TO ONE OF THE VICTIMS AT THE HOSPITAL.

Appellant sought a dismissal of charges on January 24, 1994 following receipt of police reports that indicated there was a suspicious incident reported by one Melissa Williams that a man had approached her in the hospital wanting to deliver a message to Betsey Ritchie (Tr 1 - 12). The prosecutor responded that the defense could have pursued information they had received in 1988 and that police reports were not required to be given to the defense in 1988 but that such reports were now given in response to the Motion to Compel Production. He further argued the information was innocuous (Tr 14 - 15). The trial court denied a motion to dismiss or to continue (Tr 17).

During the cross-examination of Linda Alland, the trial judge sustained the prosecutor's objection (on hearsay and relevancy grounds) regarding whether she received a report from deputy Maston about a suspicious incident at the hospital that someone had asked to visit Betsey Ritchie. The court would not allow inquiry of the witness whether Ritchie was shown a photopack at the hospital and had not selected Boggs' photo (Tr 726 - 728)[12]

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[12] Ritchie had testified that she did not know appellant John Edward Boggs (Tr 422) and on cross-examination was not asked whether she had participated in a photo display at the hospital

The defense also cross-examined Alland, over the prosecutor's objection that Ritchie was visited in the hospital by U.S. Marshals who may have been assigned to the witness protection program (Tr 714).

Subsequently at the hearing on motion for new trial, appellant again urged that he had tracked down Melissa Williams, the hospital employee who had provided the suspicious incident information to police (R 2590 - 92). The prosecutor responded and read Melissa Williams' affidavit of February 16, 1994 into the record (R 2610 - 11).[13] The prosecutor argued that Melissa Williams did not have relevant or admissible information -- only that a person she did not know had come to the hospital to deliver a message to Ritchie. Her statement was hearsay, and based on speculation. There was nothing exculpatory (R 2610 - 2613). The Court denied the motion for new trial, observing:

> The Court would observe first, on the question of Melissa Williams, it has been the experience of this court, both personally as well as through reading and watching cases of considerable public interest, that there are many people who have had many things to say

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(Tr 426 - 438). Ritchie was subsequently recalled and testified she requested that after her admission to the hospital she be listed under a different name because she was frightened and was assured by the nurse she was safe and protected. Federal investigators asked if she were part of a witness protection plan. She told them she wasn't (Tr 939 - 932).

[13] The handwritten affidavit is contained at R 2246 - 47.

about murders, high-profile crimes. People even confess to crimes which they have not committed for whatever reason, which they have not done for whatever reason.

I'm saying that because I think when I hear the testimony that Melissa Williams would have presented were she to have testified, it falls into this category no one has mentioned so far, that it could very well be someone out there that decided they wanted to muddy up the waters and made a statement to Melissa Williams and then get out.

I think the statement of Melissa Williams given to the Court would have been, at best, highly speculative and most likely inadmissible.

I do not see that even if she had given a statement exactly as set forth in the affidavit that it would have been, frankly, admissible and I would not have admitted that statement anyway.

But if it had been admitted, I cannot see of what purpose it would have been admitted. I have half a dozen people who have admitted to killing of people somewhere, they were probably rejected and the psychiatrist put them back in the mental hospital and they forgot about it.

I don't see this as being anything more than usual deranged people that come out after every high-profile crime. I do not mean in reference to Melissa Williams, that it was a deranged person she talked to. He may well have been.

(R 2616 - 17)

Appellant contends that the lower court erred by excluding testimony that would have assisted the jury in determining the truth, that the defendant wanted to give evidence of a third party's involvement with the crime. But the information furnished by Melissa Williams does not accomplish that; all that

the information amounts to is that some anonymous person came to the hospital and attempted to convey a message to Ms. Ritchie. What was said to Melissa Williams was hearsay and too speculative to be admissible. The lower court did not abuse its discretion.

There is no reversible error presented by the trial court's refusal to allow a proffer of testimony of Betsey Ritchie. Ritchie had already testified that she had requested that her name on admission at the hospital be changed to Betsy Ross at her request (Tr 929), that she was frightened, that federal investigators came to see her for two minutes and asked if she had ever been part of a protection plan and she said, "no" (Tr 930 - 932). Whether she was advised of a suspicious individual inquiring of her on February 11, 1988 is irrelevant; thus, the failure to permit a proffer (Tr 935) about it cannot amount to reversible error.[14]

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[14] In the prior trial Ritchie was asked by defense counsel if she had furnished the names of suspects to the police including Mr. Rush's son. She said she had, didn't recall if the police first mentioned Mr. Rush but must have been grasping at straws because she didn't suspect Rush's children at all (R 916 - 920).

ISSUE IX

WHETHER THE LOWER COURT ERRED REVERSIBLY IN FAILING TO GRANT A CONTINUANCE UNTIL PAT CANTER AND AMBER AND BRENDA BOGGS COULD COME FROM OHIO TO TESTIFY AND BY ALLOWING THE STATE TO USE CANTER'S PRIOR TRIAL TESTIMONY.

A week prior to trial the prosecutor represented that witness Pat Canter who had testified in the prior trial of Mr. Boggs could not travel because of her difficulties with pregnancy (R 2320 - 21):

> "MR. VAN ALLEN: Secondly, there is a witness by the name of Pat Cantor. Pat Cantor testified during the last trial to an agreement that she had with the ex-Mrs. Boggs; that being that she would contact Mrs. Boggs if Mr. Boggs or his vehicle were gone from the residence in Ohio for a period in excess of so many hours. She did do that, which caused Mrs. Boggs down here to make a report to the police department, which is how ultimately they ended up taking Mr. Boggs into custody.
>
> We received word yesterday from Mrs. Cantor's doctor. We were supposed to have had a letter this morning and it's not here yet. My. understanding of what has occurred is that Mrs. Cantor was pregnant, and that she was having some difficulty with the pregnancy. It got to the point where she was -- where the medical people attempted to induce labor. For one reason or another, after the labor was induced, Mrs. Cantor was unable to give birth naturally to the child and they had to do a C-section. And it's my understanding that she is presently in the hospital, and I believe that she's had the baby, but her doctor is telling us that she cannot travel and will not be here next week.
>
> I intend to have that documentation for the Court. And again, I would ask the Court to allow me to present the testimony of Mrs. Cantor from the last trial.

The defense objected, noting that its cross-examination might not be the same in this trial (R 2322) and suggesting a two to three week continuance (R 2323). The trial court declined the request for continuance and noted there had been full cross-examination of the witness and this case had been pending for five or six years (R 2325).

At trial, the prosecutor reiterated that he had received a letter from Canter's doctor who opined that his patient should not travel until after postpartum depression (T 35 - 36). The Court denied the defense objection (Tr 37).

> "THE COURT: The objection will be denied. I will allow the entire testimony given by Ms. Canter from the previous trial to be introduced.
>
> I might suggest that to a large extent I'm persuaded is because it's testimony given at a previous jury trial. It's not merely a deposition, but testimony given before a jury at the trial.
>
> I think -- well, I might well have found differently were this to have been her initial contact with the courts and this was a deposition, but previous testimony -- the Supreme Court did not get to the issues -- no fault found or, even as I understand, any objections on the appellate record to her testimony, so I think that's sufficient for her previous testimony to be read."

The defense renewed its objection to allowing Canter's prior testimony to be read to the jury (Tr 754) and the court ruled (Tr 755):

> "THE COURT: Objection denied. For the purpose of the record, the Court's permitting this to be read, it was based to a very large extent on the fact that prior testimony was

> presented at trial at which the defendant was present in front of the jury.
>
> I also find the unavailability of the witness will be sufficient in that set of circumstances. I emphasize that was trial testimony and not deposition testimony."

In Thompson v. State, 619 So. 2d 261, 265 (Fla. 1993), this Court declared:

> [2] The use of prior testimony is allowed where (1) the testimony was taken in the course of a judicial proceeding; (2) the party against whom the evidence is being offered was a party in the former proceeding; (3) the issues in the prior case are similar to those in the case at hand; and (4) a substantial reason is shown why the original witness is not available. *Hitchcock v. State*, 578 So. 2d 685 (Fla. 1990); *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242 (Fla. 1st DCA 1984), *review denied*, 467 So. 2d 99 (Fla. 1985); *Layton v. State*, 348 So. 2d 1242 (Fla. 1st DCA 1977). The record reflects that the prior testimony met all of these criteria.
>
> [3] Thompson also asserts that, because the cross examination of Barbara Savage at the first trial was brief and he did not have the opportunity to examine her in these proceedings, his right of confrontation under the Florida and United States constitutions was violated. We find that all that is required is that the party have an *opportunity* at the prior proceedings to cross-examine the witness. *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 59 7 (1980). Because Thompson's cross-examination of the witness in the first trial was brief, his right of confrontation in this second sentencing proceeding is not constitutionally impaired. We conclude that the trial court did not err in declaring the witness unavailable.

See also Foster v. State, 614 So. 2d 455 (Fla. 1992); Hitchcock v. State, 578 So. 2d 685 (Fla. 1990).[15]

With respect to Amber and Brenda Boggs, the record reflects that the defense informed the trial court of the desire to have Amber Boggs testify (she had testified in the prior sentencing proceeding) and sister Brenda (Tr 1181 - 1183). While awaiting a plane flight from Cleveland airport, the flight was cancelled due to inclement weather (ice) (Tr 1182). The Court announced it would accept that she was unavailable and allow the defense to use her prior testimony (Tr 1183). Amber Boggs' testimony was read to the jury (Tr 1224 - 1254) after the court informed the jury that the witness was unable to be here for reasons beyond her control.

Appellant did not proffer Brenda's testimony.[16]

See Finney v. State, ____ So. 2d ___, 20 Fla. Law Weekly S 401 (July 20, 1995) (the claim is not properly before the court

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[15] In the lower court appellant characterized Ms. Canter as "crucial" (Tr 754) and in this Court appellant declares that her testimony "was not crucial" (Brief p. 71). Without attempting to determine the nuances of consistently maintaining both positions, it is perhaps safe to say that Canter's testimony is somewhere in between. Her testimony was cumulative to and supplemental with the testimony of Geraldine Boggs regarding appellant's having threatened his wife.

[16] Appellant's daughter Brenda Hartle testified previously in the penalty phase of Boggs' first trial (R 1644 - 1680) but Boggs apparently did not attempt to have her prior testimony read to the jury.

because Finney never proffered the testimony he sought to elicit from the witness and the substance of that testimony is not apparent from the record . . . . Without a proffer it is impossible for the appellate court to determine whether the trial court's ruling was erroneous and if erroneous what effect the error may have had on the result.)

A continuance may be granted in a trial court's discretion but only for good cause shown by the party seeking the continuance. The trial court's ruling will not be disturbed unless a palpable abuse of discretion is demonstrated to the reviewing court. Jent v. State, 408 So. 2d 1024, 1028 (Fla. 1982), Gore v. State, 599 So. 2d 978 (Fla. 1992), Echols v. State, 484 So. 2d 568 (Fla. 1985). No such abuse of discretion has been demonstrated; both Amber and Brenda had testified in the previous penalty portion of the first trial and their testimony was available to be read to the jury, although appellant elected only to read Amber's testimony. Cf. Gore, supra (defendant was able to use videotaped deposition at trial).[17]

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[17] Appellant cites Scull v. State, 569 So. 2d 1251 (Fla. 1990) where the defendant was rushed into resentencing upon counsel's return from vacation; there was no such rush sub judice. In Wike v. State, 596 So. 2d 1020 (Fla. 1992). The trial court improperly denied a continuance depriving the defendant of bringing forth family members including a cousin and ex-wife who could have provided useful background information. Here, the two unavailable witnesses had testified in an earlier proceeding and their testimony could have been reread, and one's was.

ISSUE X

WHETHER THE TRIAL JUDGE ERRED BY REFUSING TO ALLOW GERRY BOGGS TESTIFY SHE BELIEVED APPELLANT COULD TELETRANSPORT HIMSELF.

The record reflects the following colloquy during the cross-examination of Geraldine Boggs:

> Q. Is it true that you also believe that John could teletransport himself outside his body?
>
> MR. VAN ALLEN: Objection. Relevancy.
>
> THE COURT: Objection granted.
>
> MR. EBLE: May we approach, Judge?
>
> THE COURT: Sure. Approach the bench with the court reporter.
>
> (BENCH CONFERENCE)
>
> MR. EBLE: Until 1988 when she was giving a deposition and he was in jail, she talked about the teletransporting, asked if he had been losing weight in the jail. Because the only reason you can teletransport is if you lose weight because she read up on this stuff.
>
> She testified there was knocks on the door at four o'clock in the morning. She indicated that -- she wouldn't say it was John, wouldn't say it wasn't John, it was just a feeling. She believed that John could teletransport himself.
>
> It goes to her credibility if she believes the man's going to kill her, she believes he can take himself out of his body and fly to different states.
>
> THE COURT: I'll not allow that testimony.
>
> MR. EBLE: I need to proffer it for the record. Can we do it by stipulation, what her answer would be, or are we going to have to do it outside the presence of the jury?

My question would be: Do you believe John Boggs could teletransport himself out of his body to a different location? I believe her answer to be yes.

Do you believe he teletransported himself on at least two occasion when you lived in Ohio? I believe her answer to be yes. Once to visit his mother, once to visit his aunt.

Do you believe that when Mr. Boggs was incarcerated in the Pasco County Detention Center in 1988, that Mr. Boggs had come to your house and knocked on the door on two separate occasions?

I think here answer to that will probably be, "I'm not saying he did, I'm not saying he didn't. It's just a feeling that I had or just a feeling that one has or has."

And that's the way it was in the deposition. That's -- I'm expecting her answer to be that way. That would be the proffer of the questions and answers.

MR. VAN ALLEN: I would agree that she testified -- she has said that in the past, but I don't know how that's relevant. That's like asking someone, "Are you an antagonist?" [sic]

MR. EBLE: It goes to whether she has rational fears or not.

MR. VAN ALLEN: Why is that relevant?

MR. EBLE: Teletransportion --

THE COURT: I think it's totally irrelevant. Objection granted."

(Tr 784 - 787)

Appellant argued below and here that the testimony impeached the witness' credibility (The defense argued below that it goes to show whether she has rational fears or not -- Tr 786). The

court correctly ruled that it was irrelevant. Whether Geraldine Boggs had rational fears -- or irrational ones -- was not an issue in the trial.[18]

A second argument raised here -- but not below and therefore procedurally barred, see Steinhorst v. State, 412 So. 2d 332 (Fla. 1982) -- that it may have reflected on Boggs' mental state is also meritless since the proffer of Geraldine Boggs as to her views says nothing about appellant's views.

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[18] Whatever beliefs Ms. Boggs may have regarding teleportation or astral projection or similar vein, the fear of injury from appellant Boggs turns out, in retrospect, not to have been an ill-founded one since the evidence establishes that Geraldine Boggs fortuitously remained alive when appellant targeted the wrong victims in the mobile park. And testimony of the appellant's threats to Geraldine Boggs came from other witnesses besides her (Tr 740). Error, if any, is harmless.

ISSUE XI

WHETHER THE LOWER COURT ERRED IN DENYING A MISTRIAL REQUEST BASED ON PROSECUTOR'S REMARKS AT A BENCH CONFERENCE.

Determination of whether substantial justice warrants granting of a mistrial is within the sound discretion of the trial judge. A motion for mistrial should be granted only when necessary to insure that defendant receives a fair trial. Power v. State, 605 So. 2d 856 (Fla. 1992); Salvatore v. State, 366 So. 2d 745 (Fla. 1978); Marek v. State, 492 So. 2d 1055 (Fla. 1986); Buenoano v. State, 527 So. 2d 194 (Fla. 1988).

Appellant has failed to demonstrate an abuse of discretion by the trial court's refusal to grant a mistrial at the defense assertion that the prosecutor's comments at a bench conference at Tr 820 - 821 were loud enough for the jurors to overhear. Obviously, the trial court was in the best position to determine the loudness of the remarks and whether it warranted even an inquiry of the jurors, especially where, as here, there was no averment by the defense that the prosecutor acted intentionally (Tr 821)

ISSUE XII

WHETHER THE TRIAL JUDGE ERRED BY FAILING TO GRANT THE DEFENSE MOTION FOR JUDGMENT OF ACQUITTAL.

Appellant contends that the evidence was insufficient for the jury to conclude that Boggs was the perpetrator of the double homicide and the attempted murder of Betsey Ritchie. Appellee disagrees.

Betsey Ritchie was awakened by a loud crash, testified the assailant appeared to have a shotgun in his hands and heard multiple blasts (Tr 401 - 409).

Victim Harold Rush told officer Bruce Milnes assailant had a mask, pistol and shotgun and gave a description of 5'8" to 5'10" and 170 - 180 pounds (Tr 548).

Napier, Jarrett, and Spurlock testified that phone calls were made to their mobile parks inquiring as to the whereabouts of Boggs or Rush a day or two before the killings (Tr 473 - 475, 505 - 506, 570 - 575). Spurlock explained that when Mark Grover informed her there was a renter named Rush she told the caller she could provide the five digit address if he came to the office. A man came to the office and she provided the address. She was shown a photopack including Boggs photo and selected it noting she was 75% sure (Tr 515 - 520). The photo of Boggs used had been blown up from another photo and was grainier, not as clear -- Tr 691). Spurlock also stated she saw a newspaper picture -- not the same as the photo she had looked at -- and recognized it as the person who came to the office and received

the Bush address (Tr 524). She subsequently identified Boggs in Ohio and in court at this trial (Tr 524, 526). She made the identification because he was in the office (Tr 527).

On February 9, Geraldine Boggs notified the sheriff's office and informed them that her ex-husband appellant was coming to kill her (Tr 763 - 764). Both Geraldine Boggs and Pat Canter testified that appellant had made threats to kill Geraldine Boggs (Tr 740, 763 - 766) and Geraldine Boggs and Dean Rush testified to appellant's threats to kill Rush (Tr 766, 799).

A search of appellant's car revealed a map showing the route from Cleveland to Tampa Bay, marked out in yellow (Tr 851), a coat in his closet was seized containing shotgun shells and a search of Boggs' residence revealed a hidden shotgun, .22 pistol and a ski mask (Tr 862, 889, 904).

Lab analyst Joseph Michael Hall opined that the shotgun shells were fired from the Exhibit 31 shotgun and the .22 shells from Exhibit 32 (Tr 950, 961). In light of all the circumstances there can be no doubt that appellant was the perpetrator of the assault which resulted in severe injury to Betsey Ritchie and the death of Harold Rush and Nigel Maeras. If Boggs is not guilty, how did the murder weapons find their way to the attic of his home a thousand miles away in Vermilion, Ohio?

The standard announced in Atwater v. State, 626 So. 2d 1325 (Fla. 1993) has been satisfied. See also Washington v. State, 653 So. 2d 362 (Fla. 1995).

ISSUE XIII

WHETHER THE LOWER COURT ERRED IN ITS INSTRUCTION TO THE JURY ON THE CCP AGGRAVATING FACTOR.

The trial court instructed the jury:

> "Three, the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification."

(Tr 1360)[19]

Defense counsel had no additional objections other than previously made (Tr 1363). None of the objections previously made pertained to the contention that the CCP instruction was unconstitutionally vague. Of the proffered written instructions none pertained to vagueness of CCP (R 2184 - 2218). The only defense argument made at the jury charge conference pertaining to the CCP was as to its evidentiary sufficiency (Tr 1303 - 04). This court has repeatedly held that a contemporaneous objection to the constitutional validity of this aggravating instruction is required to preserve the issue for appellate review.

---

[19] Appellee notes that the prosecutor in his closing argument to the jury at penalty phase stated that simply because they had found a premeditated murder at the guilt phase did not suffice for a CCP finding:

> "No, it's different. What this aggravated circumstance calls for, what needs to be shown is a heightened premeditation. Something above and beyond killing, after deciding to kill, something planned, something extremely purposeful, something extremely cold, something extremely calculating." (Tr 1328)

In Walls v. State, 648 So. 2d 381, 387 (Fla. 1994), this court explained:

> [6, 7] As to cold calculated premeditation, there is no doubt that the instruction given here violated the requirements recently established in *Jackson v. State*, 1994 WL 137914, 19 Fla. L. Weekly S215 (Fla. April 21, 1994). Defense counsel both argued that the standard instruction was constitutionally inadequate and presented his own proposed instructions to the trial court, which were rejected. Counsel also has raised the issue on appeal. To preserve the error for appellate review, it is necessary both to make a specific objection or request an alternative instruction at trial, *and* to raise the issue on appeal. Id. Because Walls has met these requirements, we proceed to the merits of the issue.

See also Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994).

> [4] Claims that the instruction on the cold, calculated, and premeditated aggravator is unconstitutionally vague and procedurally barred unless a specific objection is made at trial and pursued on appeal. *James v. State*, 6145 So. 2d 668, 669 & n. 3 (Fla. 1993). However, Jackson objected to the form of the instruction at trial, asked for an expanded instruction which essentially mirrored this Court's case law explanations of the terms, and raised the constitutionality of the instruction in this appeal as well. Thus, the issue has been properly preserved for review.

Appellant's failure to submit a contemporaneous objection below challenging the constitutional validity of the now-challenged instruction precludes review. See also Crump v. State, ___ So. 2d ___, 20 Fla. Law Weekly S 195 (Fla. April 27, 1995); Gamble v. State, ___ So. 2d ___, 20 Fla. Law Weekly S 242 (Fla. May 25, 1995).

While appellant contends that he did adequately object below at T 1196 - 97, and T 1291, an examination thereof shows that the complaint at T 1196 - 97 related to the weight to be accorded the jury recommendation and the complaint at T 1201 concerned the phraseology about aggravating outweighing mitigating or vice versa. Neither concerned the invalidity vel non of CCP.

ISSUE XIV

WHETHER THE LOWER COURT ERRED BY INSTRUCTING THE JURY ON AND FINDING THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The trial court articulated its findings regarding the CCP factor as follows:

> "In communications with his former wife, Defendant had indicated he was going to kill her.
>
> Defendant drove from Vermilion, Ohio, to Zephyrhills, Florida, a trip of at least 18 hours duration for the purpose of doing something to his former wife. He carried with him the guns that he used to commit the murders. He had no reason to see his former wife except to do her harm.
>
> He spent several hours in the Zephyrhills area trying to find where his former wife lived and broke into what he thought was her home in the early morning darkness. He had ample time to knock on her door and confront her during the daylight hours if he only meant to talk to her or to kill her if he was in such a rage at finding her that he was irrational.
>
> He parked his auto at least one-fourth mile from what he thought was his former wife's house. Clearly his intention was to slip up to his former wife's house as quietly as he could, do his deed, then slip away without being seen or having his auto seen by any neighbor who might have heard the blasts of his gunfire.
>
> He used a shotgun with a shortened barrel and a shortened stock. This type of weapon has no other purpose than for ease of concealment and certainly of maximum harm to the victim when used at short range as the Defendant did in this case.

He used a twenty-two caliber pistol which could easily be concealed and gives off a very small sound when fired.

He entered into what he thought was his former wife's home in the early morning darkness. Clearly, he had hoped to find her asleep to make his deed easier to perform and perhaps give him more time to get away before her body was found.

By performing the murders in the early morning darkness, Defendant was unable to verify that he was killing his former wife and her paramour and, in fact, killed persons who were total strangers to him. If he had any moral justification for killing his former wife, he certainly had absolutely no moral justification for killing the persons he did kill.

After returning to Ohio, Defendant segregated the murder weapons from his many other guns, by putting them in a remote part of his attic where they were found almost accidentally by a very observant police officer who was searching the house for weapons. Defendant clearly was trying to cover his tracks. Because the shotgun was so distinctive Defendant may well have thought that hiding it made more sense than throwing it away where it could be found and traced to him.

The attempted murder of Betsy Ritchie can only be explained as a cold, calculated attempt to destroy an innocent third party who may have observed his murders. As such, it also shows the cold, calculated fashion in which he performed the whole episode.

Defendant wore a mask and dark clothes during the commission of the murders and was clearly trying to conceal his identity. This is not the action of an emotional spur-of-the-moment distraught killer.

Defendant's feigned incompetence before and during this trial, in light of the expert opinions that he was merely malingering, clearly shows the extent to which he is able and willing to go to further his designs,

certainly a cold and calculated action on his part."

(R 2250 - 52)

Appellant amusingly observes that "it seems likely that the judge put a lot more thought into Boggs' planning than Boggs did' (Brief, p. 82). To the extent that appellant is crediting the trial court's thoroughness and care, we agree. The record shows that appellant had previously threatened to kill his ex-wife Gerry (Tr 740, 762, 766, 770), had years earlier threatened to kill Gerald Rush if appellant ever saw him with his wife again (Tr 799). Witnesses reported having received phone calls at mobile parks in which the caller asked if Boggs or Rush were living there (Tr 475, 505). Boggs drove a thousand miles from his home in Ohio to the mobile park in Florida, telephoned and stopped in at the mobile home park to receive the five digit address on the lot where renter-victim Rush lived (Tr 513 - 516, 526 - 527), waited until one o'clock in the morning to break into the residence, masked and carrying two guns and blasted the occupants therein. Boggs returned to his home in Ohio, was seen driving his truck at the exit ramp wearing a black coat and black stocking type cap (Tr 811). Police discovered in Boggs' Ohio residence pursuant to a search warrant the two murder weapons used to kill Harold Rush and Nigel Maeras (Tr 862, 889, 950 - 985) as well as a ski mask (Tr 904).

Appellant's view of the case is that if he intended to and believed that he was killing his ex-wife and her lover, this was

a mere passionate obsession which does not qualify for a CCP finding; and that if he recognized that he made an error in his intended targets when he entered the premises it would still be a domestic killing.[20] Another view of this case is that it involved a cold calculated and heightened premeditation, an assassination that went awry only in the sense that the hapless victims died because Boggs was given the address of another man with the same last name as his ex-wife's boyfriend.

Appellant suggests that even if the killings were cold, calculated and premeditated that he receives sustenance by the proviso that there was a pretense of moral or legal justification. And that pretense of moral or legal justification is . . . ? Boggs argued below to the jury that it could be a pretense in Boggs' mind that he had the right to kill the man for stealing his wife (Tr 1345); if so, what is the pretense in killing his ex-wife after their divorce?

Appellant alludes to an opinion of Dr. Szabo (R 2372 - 75), Dr. Szabo was not called to the stand to give testimony at the penalty phase of trial; no expert testified to the jury during

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[20] Boggs cites Amoros v. State, 531 So. 2d 1256 (Fla. 1988) for the proposition that the doctrine of transferred intent is inapplicable for CCP purposes. Actually the Amoros court rejected transferred intent there "under these circumstances." In that case, the only evidence of a plan was the defendant's threat to his former girlfriend; there was no evidence presented that he was even aware the victim was residing there when he entered the apartment. In this case Boggs had a plan as his map to Florida and thousand mile drive attest after his threat to ex-wife and Gerald Dean Rush.

that portion. Boggs is referring to a transcript of a hearing held October 30, 1991 on the accused's competency. Whether Mr. Boggs was out of contact with reality at the time of his exam in 1991, that does not address the issue of whether the killings in 1988 were committed in a cold, calculated and premeditated manner with no pretense of moral or legal justification. At any rate, the contrary view of Dr. Delbeato made contemporaneously with Dr. Szabo was that Boggs was malingering (R 2400) and that his conduct was a matter of choice (R 2403); his conduct in short was to "make everybody dance" (R 2404).

Unlike most of the cases relied on by appellant this crime does not involve an emotional outburst during a heated argument between two lovers or family members. Boggs and his wife had been completely divorced for over a month and she moved to Florida to start a new life. He attempted to track her down - bringing his mask and guns down from Ohio in a seventeen hour drive (Tr 803). None of the cases urged by appellant involved a thousand mile pursuit to slay his intended victims. In terms of planning and execution of the plan the instant double homicide is far more cold, calculate and premeditated than that presented in Walls v. State, 641 So. 2d 381 (Fla. 1994) where this court approved the finding.[21] The instant case is like Porter v.

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[21] In Douglas v. State, 575 So. 2d 165 (Fla. 1991) and Santos v. State, 591 So. 2d 160 (Fla. 1991), there "was no deliberate reflection . . . only mad acts prompted by wild emotion." 591 So. 2d at 163. In Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992), the "element of coldness, i.e., calm and cool reflection is not present here." Maulden v. State, 617 So. 2d

State, 564 So. 2d 1060 (Fla. 1990) -- not a case involving a sudden fit of rage. Porter previously had threatened to kill his victims, watching the house for two days before the murders. While Porter's motivation may have been grounded in passion, it is clear that he contemplated the murder well in advance.

The same is true of appellant Boggs.

298, 303 (Fla. 19913) was "not the product of a deliberate plan formed through calm and cool reflection."

ISSUE XV

WHETHER THE TRIAL COURT ERRED BY BASING ITS WRITTEN FINDINGS IN SUPPORT OF THE DEATH PENALTY ON NONSTATUTORY AGGRAVATING CIRCUMSTANCES, BY FAILING TO CONSIDER AND DISCUSS ALL THE MITIGATION PRESENTED AND BY FAILING TO FIND CLEARLY ESTABLISHED MITIGATION.

The trial court did not err. The defense presented no mental health expert testimony at the penalty phase[22] and the trial court explained in its discussion of mental mitigating factors (extreme mental or emotional disturbance and capacity to appreciate the criminality of his conduct or conform his conduct to the requirement was substantially impaired) why they should be rejected:

> " . . . this court found that his present condition is the result of malingering and feigned incompetence."

After the jury returned its recommendation of death by an 8 to 4 vote, defense counsel argued below that he had no additional evidence to present but urged the court to review the reports of Dr. Szabo and Dr. Fellows (Tr 2623 - 2624). The court did so; it reviewed the reports of experts Delbeato, Szabo, Fellows, and Gonzales. All had previously evaluated Boggs for competency purposes and not penalty phase mitigation. Having accepted the

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[22] Cf. Lucas v. State, 568 So. 2d 18 (Fla. 1990); Hodges v. State, 595 So. 2d 929, vacated on other grounds, Hodges v. Florida, ___ U.S. ___, 121 L.Ed.2d 6 (1992), affirmed on remand, Hodges v. State, 619 So. 2d 272 (Fla. 1993), cert. denied, 126 L.Ed.2d 460 (1993).

defense invitation, the court correctly concluded that there was conflict in the reports (Delbeato always believing that Boggs has been malingering and the others disagreeing). The court did not err -- it considered that which was presented and argued. Boggs points to SR 14 that one doctor suggested he might suffer from extreme denial and depression. Denial is not a mitigating factor; remorse which constitutes admitting one's culpability might be, but that is the opposite of denial. With respect to appellant's depression that was answered by the trial court's order:

> "Consequently, his present condition is more likely caused by his fear of death in the electric chair. . . . "

(R 2253)

Appellee disagrees that comments about a vague personality disorder constitutes mitigation. See Graham v. Collins, 506 U.S. ___, 122 L.Ed.2d 260, 291 (1993) (J. Thomas concurring, criticizing defendants' asserting their victimization by complaining that credit has not been given "evidence that defendant suffers from chronic 'antisocial personality disorder' -- that is, that he is a sociopath"); Harris v. Pulley, 885 F.2d 1354, 1381 - 1384) (9th Cir. 1988) (distinguishing a personality disorder from a psychosis).

Appellant argues that Judge Swanson erroneously relied on Judge Cobb's competency finding -- but what was offered by the defense was simply the competency evaluations and reports. Since Judge Cobb had determined that Boggs was competent -- and Dr.

Delbeato agreed that Boggs was malingering -- there was no need for the trial court to do more than consider what the defense presented.[23]

The trial court did consider appellant's having taken the divorce very poorly (R 2252) and that he was a good provider and father but that his "feigned incompetence shows him to be a selfish ego-centered person without any concern for the harm he has caused innocent people which effectively rebuts his alleged good character as a mitigating circumstance." (R 2254)

Appellee must take issue with a portion of the sentencing order below, which, while it does not compromise the instant sentence imposed, nevertheless needs to be corrected for the bench and bar. At R 2250, the sentencing order recites, "Since the heinous, atrocious or cruel manner of committing a murder may no longer be an aggravating circumstance, this circumstance was not presented to the jury and is not considered by this court."

This comment does not impact on Boggs' case because the HAC factor was not provided to the jury and the trial judge did not find it. Indeed, the prosecutor was not urging accepting of HAC, relying instead on the three aggravators found. (Tr 1292)

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[23] Appellant is not aided by Corbett v. State, 602 So. 2d 1240 (Fla. 1992). Here, the sentencing judge who presided at the trial reviewed all the evidence presented and imposed death; the sentencing judge here merely indicated that he found no basis to overturn the prior judge's competency ruling.

However, in the event a new sentencing proceeding is required, HAC might well apply to the murder of Harold Rush who did not die promptly but languished, suffering in the hospital for days prior to expiring. In any event, the lower courts need to be informed that there is no truth to the rumor that HAC "may no longer be an aggravating circumstance" and as Mark Twain once observed about rumors of his own demise, the reports of what Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854 (1992) may have done to the HAC aggravating circumstance "are greatly exaggerated".

ISSUE XVI

WHETHER A SENTENCE OF DEATH IN THIS CASE IS DISPROPORTIONATE TO OTHER CASES.

The sentencing judge in the instant case found three aggravating factors: prior conviction of another capital felony, to wit: the attempted murder of Betsey Ritchie,[24] homicide committed during a burglary, and murders committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R 2249 - 52). The judge found only as mitigation no significant history of prior criminal activity and explained in his findings why he was rejecting other proffered mitigation (R 2252 - 54). The jury recommended death by an eight to four vote (Tr 1365). Appellant argues that the CCP finding for the double homicide "should not be given much weight" because of Boggs' mental state and the homicide committed during a robbery "is not deserving of much weight because the burglary was incidental" (Brief, p. 97).

Appellant relies on a number of cases distinguishable form the case sub judice. Boggs cites Santos v. State, 629 So. 2d 838 (Fla. 1994) (trial court refused to obey this court's remand order regarding erroneous CCP finding, and state had conceded the presence of the two statutory mental mitigators, only one valid

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[24] The court refused to consider the conviction of Mrs. Maeras murder in the Rush homicide or the conviction of the murder of Harold Rush in the Maeras homicide by refusing to adjudicate the homicides prior to penalty phase -- Tr 2628, Tr ____.

aggravator which was of less magnitude than the case for mitigation and trial court should also have found no significant history of prior criminal activity); Garron v. State, 528 So. 2d 353 (multiple error resulted in vacation of both judgement and sentence, all four aggravators found to be invalid); Holsworth v. State, 522 So. 2d 348 (Fla. 1988) (override of jury life recommendation supported mental health expert testimony that defendant had borderline personality with paranoid and schizoid features, used alcohol and PCP on night of murder and had been physically abused as child); Wilson v. State, 493 S. 2d 1019 (Fla. 1986) (murder was result of heated, domestic confrontation "and was most likely upon reflection of a short duration".); Amazon v. State, 487 So. 2d 8 (Fla. 1986) (override of jury life recommendation improper in light of evidence of extreme mental or emotional disturbance and age of nineteen supported by expert testimony); Klokoc v. State, 589 So. 2d 219 (Fla. 1991) (trial judge found only one aggravating factor CCP but presence of five mitigators including extreme emotional distress [bipolar affective disorder, manic type with paranoid features] resulted in reeducation of life imprisonment); White v. State, 616 So. 2d 21 (Fla. 1993) (CCP erroneously found because defendant high on cocaine during the crime, thus only one aggravator outweighed by three mitigators including the two statutory mental mitigators); Douglas v. State, 575 So. 2d 165 (Fla. 1994) (jury life recommendation plus error to find CCP; death penalty disproportionate since only one valid aggravator and additional

mitigation adduced at resentencing); Farina v. State, 569 So. 2d 425 (Fla. 1990) (error to find CCP, killing was result of heated domestic dispute); Blakely v. State, 561 So. 2d 560 (Fla. 1990) (disproportionate where marital discord culminated in an argument the night of the attack); Amoros v. State, 531 So. 2d 1256 (Fla. 1988) (only two aggravators found were improper -- HAC and CCP, insufficient showing of calculation or planning -- and thus with no aggravators death sentence could not stand); Irizzary v. State, 496 So. 2d 822 (Fla. 1986) (override of jury life recommendation invalid where crime resulted from passionate obsession accompanied by mental health testimony that defendant had extreme emotional disturbance and impaired capacity to appreciate the criminality to appreciate the criminality of his conduct); Ross v. State, 474 So. 2d 1170 (Fla. 1985) (trial court erred in not considering the defendant's drinking and the killing was the result of an angry domestic dispute wherein the trial court found the "commission of the death act was probably upon reflection of not long duration."); Blair v. State, 406 So. 2d 1103 (Fla. 1981) (trial court improperly included several aggravating factors and court considered post-mortem acts as aggravation); Kampff v. State, 371 So. 2d 1007 (Fla. 1979) (no valid aggravating circumstances established).

While Boggs focuses on a number of cases wherein the facts showed a domestic argument gone awry, this case is more than that. In Porter v. State, 546 So. 2d 1060, 1063 - 1064 (Fla. 1990), this Court opined:

> This is not a case involving a sudden fit of rage. Porter previously had threatened to kill Williams and her daughter. He watched Williams' house for two days just before the murders. Apparently he stole a gun from a friend just to kill Williams. Then he told another friend that she would be reading about him in the newspaper. While Porter's motivation may have been grounded in passion, it is clear that he contemplated this murder well in advance.
>
> [8, 9] Finally, Porter argues that the death penalty is not proportional in this instance. We disagree. Because death is a unique punishment, e.g., *Fitzpatrick v. State*, 527 So. 2d 809, 811 (Fla. 1988), it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances. *See, e.g., Hallman v. State*, 560 So. 2d 223 (Fla. 1990) (reversing a jury override despite a finding of four valid aggravating circumstances weighed against only nonstatutory mitigating circumstances). The circumstances of this case depict a cold-blooded, premeditated double murder. The imposition of the death penalty is not disproportionate to other cases decided by this court. *See, e.g., Turner v. State*, 530 So. 2d 45 (Fla. 1987) (on rehearing), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989).
>
> (emphasis supplied)
> (564 So. 2d at 1064 - 1065)

See also Turner v. State, 530 So. 2d 45, 51 (Fla. 1987) ("After reflection, Turner appeared at the home early next morning armed with a single-shot shotgun and a very large [buck] knife . . . Any assertion that he was in an uncontrollable frenzy is belied by the testimony of witnesses . . . We are satisfied that the judge did not err in finding heightened premeditation without any pretense of moral or legal justification").

The instant case is similar to Brown v. State, 565 So. 2d 304 (Fla. 1990) where this Court upheld a CCP finding and determined that the death penalty was not disproportionate. There the defendant had taken bolt cutters with him to the victim's home and entered the room armed with a handgun. A defense psychologist had admitted that Brown made a statement to him indicating that he had considered shooting the victim prior to going to the residence; the psychologist conceded the homicide may have been preplanned rather than impulsive. This court agreed with the trial court's assessment of this killing as "nothing less than an execution" by affirming the judgment and sentence. Mr. Boggs' case is of similar quality -- only his drive to the victims' residence was of greater duration.

Unlike the cases cited by appellant the instant case is not a jury override case, is not a case involving little in aggravation and much in mitigation, it is not a case where the jury heard extensive or uncontradicted testimony by a mental health expert that statutory or nonstatutory mental mitigators were present to reduce his culpability. Rather, this is a man who drove over a thousand miles with the intent to assassinate his ex-wife and her new boyfriend following the divorce. He calmly tracked down his victims, albeit making the mistake of killing the wrong people. And then he drove back to Ohio where he hid the murder weapons. The instant case was more cold, more calculated and more premeditated than were the facts presented in Walls v. State, 641 So. 2d 381 (Fla. 1994) where this Court

upheld a finding of CCP and found proportionality not to be violated by the imposition of a death sentence (despite the court's consideration of an improper instruction on the issue) where it too was an execution-style killing and the preparation was much less than what was involved sub judice. See also Gamble v. State, 20 Fla. Law Weekly S 242 (Fla. 1995).

Appellant's claim is meritless.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to A. Anne Owens, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 5th day of September, 1995.

OF COUNSEL FOR APPELLEE.