IN THE SUPREME COURT OF FLORIDA

JOHN EDWARD BOGGS, :

Appellant, :

vs. : Case No. 83,409

STATE OF FLORIDA, :

Appellee. :

_______________________________ :

FILED
SID J WHITE
JUN 1 1995
CLERK, SUPREME COURT
By ________
Chief Deputy Clerk

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This appeal is from the retrial of John Boggs, following the reversal of his earlier conviction and death sentence in Boggs v. State, 575 So. 2d 1274 (Fla. 1991). This record on appeal contains the transcripts of both trials, including hearings and sentencings. The record contains two sets of numbers. Volumes 1 through 17 contain everything except the transcripts from the second trial and its penalty phase, and are numbered consecutively from 1 through 2695. These volumes include all motions, pleadings and other court documents from both trials, all hearing transcripts, including the sentencing hearings, from both trials, and the transcript of the first trial and its penalty phase. These documents will be referenced by the letter "R," followed by the appropriate page number.

The transcript of the second trial, including penalty phase, the subject of this appeal, is in Volumes 18 through 28, and is numbered consecutively from 1 through 1377. The transcript of the second trial and penalty phase will be referenced by the letter "T," followed by the appropriate page number.

The supplement to the record on appeal is in two parts. The first volume includes the competency reports, in sealed envelopes stapled to numbered pages; thus, the pages within the reports are not included in the numbering, which is from 1 to 28. These reports will be referenced by the letters "SR," followed by the page number of the entire report. The second supplemental contains only the presentence investigation report ("PSI"), which will be referenced by the letters "PSI," followed by the page number of the PSI.

The issues in this brief are arranged and argued in approximate chronological order. Because of this Court's denial of Boggs'

motion to exceed the 100 page limit for capital cases, the following meritorious issues were deleted from the original brief:

Former ISSUE III: THE TRIAL COURT DENIED THE DEFENSE MOTION TO WITHDRAW DUE TO IRRECONCILABLE DIFFERENCES BETWEEN COUNSEL AND CLIENT, WITHOUT CONDUCTING AN INQUIRY, THUS DENYING BOGGS EFFECTIVE ASSISTANCE OF COUNSEL.

Former ISSUE X: THE TRIAL COURT ERRED BY OVERRULING DEFENSE COUNSEL'S OBJECTION TO VARIOUS TESTIMONY ABOUT THREATS ALLEGEDLY MADE BY BOGGS.

Former ISSUE XV: THE TRIAL COURT ERRED BY ALLOWING THE STATE TO PRESENT EVIDENCE AT PENALTY PHASE BASED ON AN ELIMINATION OF WITNESSES ARGUMENT, WHEN THE JURY WAS NOT INSTRUCTED ON THAT AGGRAVATOR.

Former ISSUE XVIII: THE TRIAL JUDGE REFUSED TO INSTRUCT THE JURY ON SPECIFIC NONSTATUTORY MITIGATORS REQUESTED BY THE DEFENSE.

Relevant parts of other issues, and some of the facts of the case, were also deleted to comply with this Court's order.

STATEMENT OF THE CASE

On April 4, 1988, a Pasco County grand jury returned an amended indictment charging Appellant, JOHN EDWARD BOGGS, with the (I) first-degree murder of Nigel Maeras; (II) attempted first-degree murder of Betsy Ritchie; (III) first-degree murder of Harold Rush; and (IV) burglary with a firearm. (R. 11-13) Boggs was arrested in Vermilion, Ohio, on February 15, 1988, and extradited to Florida on May 10, 1988. (R. 14-15, 1975; PSI 1) He was tried by jury September 24-28, 1988, Circuit Judge Wayne Cobb, presiding, and was convicted and sentenced to death.

On February 7, 1991, this Court overturned his conviction, Boggs v. State, 575 So. 2d 1274 (Fla. 1991), and remanded to the trial court to determine Boggs' competency pursuant to Florida

Rules of Criminal Procedure 3.210 and 3.211. (R. 1973-78) Judge Maynard Swanson held a hearing October 30, 1991, found Boggs incompetent, and sent him to Florida State Hospital ("F.S.H.") (R. 2350-2433) Boggs was returned to Pasco County the following year and, on July 23, 1992, Judge Lynn Tepper held a competency hearing and returned him to F.S.H. for further testing. (R. 2286-94) When F.S.H. was unable to make a competency determination, Judge Wayne Cobb held a hearing September 27, 1993, and found Boggs competent based on his opinion Boggs was malingering. (R. 2087-2112)

Boggs was retried commencing January 24, 1994, the Honorable Maynard F. Swanson, presiding. (T. 1-1127) The jury found Boggs guilty as charged (T. 1167), and recommended he be sentenced to death, by a vote of eight to four. (T. 1365) On February 24, 1994, the judge sentenced Boggs to death on Counts I and III, and to life in prison on Counts II and IV. (R. 2255-65, 2686-87) On March 15, 1994, Boggs filed a Notice of Appeal with this Court under Article V, Section 3(b)(1), Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(1)(A)(i). (R. 2267)

STATEMENT OF THE FACTS

John Boggs was born October 23, 1932. (T. 787) He married "Gerry" Boggs (Rush) in 1957. They were married for thirty-one years and raised four children -- Guy, Brenda, Brandy and Amber. Boggs worked as a crane operator for U.S. Steel for many years. (PSI 4-5) On January 11, 1988, his wife divorced him. That same day, she left their home in Vermilion, Ohio, and drove to Florida. (T. 773) She moved into a mobile home in Zephyrhills, with her high school sweetheart, Gerald Dean Rush ("Dean"). (T. 759-62)

Boggs' son Brandy, age 30, recalled that his father worked at the steel mill twelve or sixteen hours a day when the children were growing up. On vacations, he would spend quality time with his children -- camping, fishing and traveling. When Boggs came home from work, his wife started bickering. Although Brandy saw Boggs hit their mother twice, he did not hit his children. (T. 1263-66)

The youngest daughter, Amber, age 23 at the time of the first trial, lived at home until her parents divorced. (T. 1225) She cited various instances when her mother tried to catch her father cheating on her out-of-town, but found him alone. Boggs sometimes went to his father's home in Portsmouth, Ohio, to work on the house. Gerry Boggs tried to commit suicide various times because she erroneously believed Boggs was seeing other women. (T. 1226)

Dean Rush, now married to the former Gerry Boggs, testified he had known Gerry since they were teenagers in 1952. (T. 795-96) He did not see her after he joined the Navy in 1955, until 1965, after his divorce. Gerry was then married to John Boggs and had four children under the age of six. Rush visited Gerry at her home when her husband was at work and the kids were in bed. (T. 805) Boggs discovered them together once, pointed a gun at Rush, and threatened to kill him if he saw Gerry again.[1]

Dean Rush moved to Florida about 1967. Some twenty years later he called Gerry Boggs and wanted to see her again. That

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[1] Defense counsel objected to Rush's testimony about Boggs' alleged threat twenty years earlier. (T. 789) Rush's testimony was too remote to be relevant. See Heuring v. State, 513 So. 2d 122 (Fla. 1987); Hitchcock v. State, 413 So. 2d 741, 744 (Fla. 1982). If Boggs intended to kill Rush, his intent was based on more recent events than the 1965 confrontation. The admission of improper collateral crime evidence is presumed harmful, Holland v. State, 636 So. 2d 1289, 1293 (Fla. 1994).

year, he visited her in Ohio for his fiftieth birthday. She was still married to Boggs. (T. 800) In September, 1987, Gerry Boggs and her then 21-year old daughter, Amber, went to Florida, allegedly to see the oldest son, Guy, who was in prison at UCI. (T. 783) Mrs. Boggs told Amber she had to see Dean Rush first. When they arrived at a Tampa motel, Mrs. Boggs called Dean who was still married at the time. He came to the motel and they made love in the bathroom. They would ask Amber to leave the room late at night and she would sit in the alley. When she came back, they made love in the bed next to her. (T. 1231-32) Dean Rush was an alcoholic and he and her mother drank all the time. During these three weeks, Gerry decided to go back to Rush. (T. 1231-33, 1243)

Brandy Boggs testified that, in October, 1987, his parents came to their house to tell he and his wife they were divorcing. He saw his father cry for the first time. His mother told him she had a year to live and Boggs was going to let her be happy and live with whomever she wanted; she loved Dean Rush. Brandy remembered Rush coming to their house about twenty years earlier. Although his mother tried to refresh his memory of a threat Boggs made against Rush, Brandy knew the gun was not in the house and the incident never happened as she said it did. (T. 1259-60)

During the months before the divorce, his father changed drastically. He cried and went into fits of anger. Brandy said, if his father committed this crime, his mother drove him to it. (T. 1267-68) Gerry Boggs Rush testified that Boggs threatened to kill her a couple weeks before Christmas, 1987. (T. 769-70)

Amber testified that her father bought "Obsession" perfume and sprayed it around the house because it smelled like Gerry, not

knowing Dean bought the perfume for her. Boggs listened to sad love songs and cried while his wife wrote letters to Dean. Gerry and Dean dedicated songs to each other on the radio. Boggs took laxatives to lose weight so his wife would stay with him. (T. 1238-42) He took her out to dinner and sent flowers. (T. 1252-53)

Boggs had placed photos of his wife on the coffee table with candles, like a shrine, and left numerous lip prints on his wife's pictures. (T. 1247, 1263) When Amber visited, her father would cry and hug her. She was not used to seeing him that way and could not handle it. (T. 1244-46) He had always been a strong parent who was there when she needed him. (T. 1252)

Although Boggs knew his ex-wife was living with Dean Rush, he had not seen Rush since 1965, and did not know their address. (T. 1218-19) Gerry instructed her Ohio friend, Pat Canter, to call if Boggs' camper was absent for a couple days. (T. 760) Pat observed Boggs' camper truck missing February 8th and did not see it until the 13th or 14th. (T. 746) Vermilion Patrolman Sooy, who was told to be on the lookout for Boggs, saw him drive into Vermilion in his camper about 10:00 a.m. February 12, 1988. (T. 809-13)

On February 9, 1988, Gerry received a call from Pat Canter warning her that Boggs' camper truck had been missing for a day or two. She called the Pasco County sheriff's office to report that Boggs was on his way to kill her. She received a call she believed was from Boggs. The person said, "I seek. I seek. I seek." She called the sheriff to report the call. (T. 760-65)

* * * * *

Nigel Maeras, a 70 year old widow, and Harold Rush, age 69, had been "companions" for two or three years. (T. 394-95) They had

rented a double-wide mobile home at Colony Hills Mobile Home Park in Zephyrhills for the first three months of 1988. (T. 398, 400) In February of 1988, Betsy Ritchie, daughter of Nigel Maeras, flew to Florida from Illinois to take a cruise with her mother and Mr. Rush for her mother's birthday. (T. 396)

Maeras and Rush slept in separate bedrooms and Betsy Ritchie on the couch in their living room. (T. 401) In the early morning of February 11, 1988, Ms. Ritchie was awakened by a loud crashing noise. She could see a black shoulder outside the door. She ran to Rush's bedroom and said, "Harold, somebody is breaking in." Rush ran out of the bedroom. (T. 404-05) By then the man was in the laundry room, running at her. He wore a black flowing coat with bulging pockets, and had a gun in his right hand. (T. 407)

Ms. Ritchie ran into Harold's bedroom and hid on the floor behind a dresser. She never moved until the police arrived. She heard her mother say, "What in the world is going on in here?" Right afterward, she heard five loud shotgun blasts. Then things fell all over her. She heard a loud blast outside the bedroom door, "like an earthquake" which "seemed to rock the trailer." Someone shot at her, and she saw bullets go through her legs. She slumped over when a bullet entered her shoulder. She had five wounds. She heard Harold telephoning for help. (T. 408-16)

Officer Bruce Milnes of the Zephyrhills Police Department received Rush's call at approximately 1:48 a.m. Rush told him the assailant was 5'10" tall, 170-180 pounds, with a mask over his face. (T. 547-58) Barry Arnew, Pasco County Sheriff's Department, responded to the scene at about 2:00 a.m. on February 11, 1988. The officers entered through the carport where the door had been pried

open. (T. 552-55) They found Harold Rush on the kitchen floor with a wound to his abdomen. Nigel Maeras was dead in the dining room. Betsy Ritchie was crouched by a dresser in the bedroom. (T. 555-56)

When medical personnel arrived, they splinted Ritchie's leg and transported her to the hospital on a stretcher. (T. 420) Dr. Susan Apte removed a bullet from Betsy Ritchie's chest. She gave the bullet to Detective Linda Johnson Alland. (T. 442) Ritchie remained at East Pasco Medical Center for nine days. (T. 420)

Harold Rush was taken to the same hospital. He had a large bullet wound to the abdomen. Dr. Apte gave the pellets removed during surgery to Detective Linda Johnson Alland. Rush was later transferred to a hospital in Tampa where he died of pneumonia, a complication of the gunshot wound, five or six weeks later. Dr. Charles Diggs, Hillsborough County medical examiner, testified that Rush was shot at the junction of his chest and abdomen, causing pellet wounds to the abdomen, liver, diaphragm, intestines, and elbow. (T. 423, 444-46, 483-87, 496). Dr. Edward Corcoran, Pasco County medical examiner, observed the body of Nigel Maeras at the scene. During the autopsy, he found gunshot wound to the head and face. Either would have caused death. Maeras would have become unconscious instantly and died within a few minutes. (T. 465-73)

Detectives Ferguson and Wilber collected evidence at the crime scene. Ferguson found .22 shell casings, shotgun pellets and buckshot holes in several rooms. (T. 566-69) He kept the evidence in his locker from February 11 to 16, 1988, when taken to the property custodian. (T. 588-92) Some of the buckshot was taken to New Port Richey and examined by Sergeant Gill February 12th. The bags were not sealed until between February 12th and 16th. (T. 599)

Bosco, a police dog, picked up a trail leading to tire tracks and shoe prints at the entrance to the trailer park. Casts were made from the tracks. (T. 630-33) Oral Woods, FDLE, examined these casts but the track was insufficient to make a comparison. (T. 661-62) Woods also examined photographs of the tire tracks which appeared to be a different tread design than those on Boggs' camper truck. (T. 665) The boots and shoes Woods was given for comparison did not match the plaster cast of the footprint. (T. 676)

Pat Spurlock, who worked in the office and answered the phones for the Oaks Royal and Colony Hills mobile home parks, testified that, on the morning prior to the homicides, a man called the phone numbers for each park and asked for a resident named "Boggs" or "Rush." She told him they had someone named "Rush" in Colony Hills. She asked the man to come in that afternoon to get the house number. He arrived dressed like a hunter. (T. 512-14)

When Spurlock arrived at work the following morning, she saw "patrol cars everywhere." (T. 512) Detective Wilber asked her to come into the station Friday morning to sketch the man she saw. When she arrived Friday, however, he told her they were getting a picture of a suspect from "up north" and she would instead look at photographs. (T. 517-18) On Saturday, Detective Johnson took the photographs to Spurlock's house.[2] Spurlock picked Boggs' photo, but was only 75% certain because the photo was blurry and the hair frizzy. (T. 519) Although Spurlock described the suspect as sixty, the other men looked to be in their thirties. (T. 536-38)

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[2] Defense counsel renewed his pretrial (prior to the first trial) motion to suppress the identification. He also objected to the testimony about the Ohio extradition hearing. The court denied the motion, and granted a continuing objection. (T. 520-22)

On Monday, Detective Wilber told her they had someone in custody, and to watch the news on television. She saw the photo she picked on the news that night and videotaped the news. She kept a scrapbook of news articles and photos. The next week, she saw a different photo of Boggs in the paper and was 100% certain. Spurlock went to Ohio to identify Boggs. She recognized Boggs, who was handcuffed, though his appearance had changed. She identified him in court although his appearance had changed again. (T. 523-26)

Linda Johnson Alland, formerly Detective Johnson with the Pasco County Sheriff's office, remembered reading a police report about someone named "Boggs." (T. 686-87) Gerry Boggs had called the sheriff's office two days before the homicide to report that she believed her ex-husband, John Boggs, was en route to Florida to kill her. After reviewing the report, Johnson went to see Gerry Boggs who lived about six to ten miles from the crime scene in Zephyrhills. Living with Mrs. Boggs was her boyfriend, Gerald Dean Rush. Thus, Alland learned about John Boggs. The sheriff's office obtained a photograph of Boggs from Ohio. (T. 687-88) Alland had the photo enlarged and put it with others to make a photo pack. When enlarged, Boggs' photo was grainier and not as clear. (T. 682) When Spurlock was shown the photo pack, she selected the photo of Boggs but was only 75% certain of her identification. (T. 694)

On February 13, 1988, Detectives Gary Fairbanks and Roger Hoefs, Pasco County Sheriff's Department, went to Vermilion, Ohio. (T. 839-42) John Boggs was arrested February 15, 1988, pursuant to a Florida warrant. (T. 703, 914) An hour or so later, Hoefs and Fairbanks obtained a search warrant. (T. 907) They were assisted by local law enforcement in the search. In Boggs' camper, they

found a map of the Eastern United States. The map had a route outline from Ohio to the Tampa area, as well as marked routes to Jacksonville and various Ohio cities. They found a Pasco County map in a Florida atlas in the camper. (T. 848-54) In a closet in Boggs' home, they found a black coat with eight .12 gauge shotgun shells in the pocket.[3] (T. 857-58) Detective Alland testified that 92 items were seized, including guns, clothing, soil, carpet, sweepings, a floor mat, steering wheel, and numerous other items from Boggs' camper. (T. 699-700) Vermilion Police Officer Mayer found a black ski mask with other clothing in a bedroom. He agreed it was not unusual to find a ski mask in Ohio. (T. 904, 907-08)

Fred Barch, Vermilion Police Department, found a .16 gauge shotgun and a .22 caliber automatic pistol behind the couch in the living room. He found five shotguns and rifles under some insulation in the attic near the opening to the crawl space. Noticing that dust had been disturbed, he found two unloaded guns under the insulation behind the furnace pipes of the attic crawl space. One was a sawed-off shotgun and the other a Colt .22 semi-automatic pistol. He found a spent shotgun casing near them. (T. 889-95)

Joseph Hall, FDLE, examined a crowbar and could not positively identify it as having made the marks on the door.[4] (T. 944-49) Hall examined a .12 gauge double barrel shotgun and a .12 gauge

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[3] Defense counsel objected to the introduction of the affidavit and journal entry on the search warrant. The judge excluded the affidavit but refused to exclude the journal entry because it was part of the warrant. Counsel also renewed a motion to suppress all tangible evidence seized. (See Issue VI, <u>infra</u>.) The judge denied the motion because Judge Cobb had already ruled on it. (T. 843-47)

[4] No identifiable fingerprints were found on the crow bar. (T. 575) Fingerprints in the trailer did not match those of Rush, Maeras, Ritchie or Boggs. (T. 625-26)

fired shotgun shell submitted to him, and determined the shell was fired from the double barrel .12 gauge shotgun, to the exclusion of any other gun. (T. 949-50, 960-62) Although the pellets submitted might have come from shells fired from the .12 gauge shotgun, Hall was not sure. He examined a Colt Huntsman .22 caliber long-rifle autoloading pistol and a number of cartridge casings and bullets which he determined were fired from that pistol.[5] (T. 963-82)

The defense presented no case. (T. 1019) The jury found Boggs guilty as charged January 28, 1994. (T. 1167) The judge instructed on three aggravators: (1) Boggs was convicted of a prior violent felony; (2) the crime was committed while Boggs was engaged in a burglary; and (3) the crime was committed in a cold, calculated and premeditated manner. He instructed on the following mitigators: (1) Boggs had no significant history of prior criminal activity; (2) the crime was committed while he was under extreme mental or emotional disturbance; (3) his capacity to appreciate the criminality of his conduct or to conform it to the law was substantially impaired; (4) his age; and (5) any other aspect of his character or record, or circumstance of the offense. (T. 1359-60) The jury recommended death eight to four. (T. 1365) The judge sentenced Boggs to death on both murder counts. (R. 2255-65) He found the three aggravators upon which he instructed the jury. In mitigation, he found only that Boggs had no significant history of prior criminal activity, rejecting all other proffered mitigation. (R. 2249-54)

[5] Defense counsel's motion for judgment of acquittal was denied. (T. 1008-10) After resting without presenting evidence, defense counsel renewed the motion for judgment of acquittal, and all previous motions, which the judge again denied. (T. 1019)

ISSUE I

BOGGS' COMPETENCY HEARING DID NOT COMPLY WITH DUE PROCESS REQUIREMENTS, BECAUSE THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTIONS (1) TO STRIKE THE COMPETENCY HEARING BECAUSE THE STATE HAD NO LEGAL AUTHORITY TO SET A HEARING, AND (2) TO CONTINUE THE COMPETENCY HEARING UNTIL THE DEFENSE HAD TIME TO DEPOSE WITNESSES AND RECEIVE AND REVIEW HOSPITAL RECORDS.

"[F]ailure to observe procedures to protect a defendant's right not to be tried or convicted while incompetent deprives him of his due process right to a fair trial." Drope v. Missouri, 420 U.S. 162 (1975); see also Pate v. Robinson, 383 U.S. 375 (1966); Lane v. State, 388 So. 2d 1022 (Fla. 1980). In Pate v. Robinson, the United States Supreme Court affirmed the Seventh Circuit's reversal, because the trial judge denied defense counsel's request for a continuance of several hours to secure the appearance of a psychiatrist. 383 U.S. at 385 n.7. Thus, the defendant "was convicted in an unduly hurried trial. . . ." 383 U.S. at 377.

The case at hand is similar. John Boggs was found competent in an unduly hurried competency hearing, scheduled by the State Attorney in violation of Florida Rule of Criminal Procedure 3.212 (c)(5), and for which defense counsel had little time to prepare. Counsel was unable to depose the State's witnesses and was denied access to records concerning John Boggs' hospitalization. Thus, he was denied a fair hearing in accordance with due process of law.

After this Court vacated Boggs' first death sentence and remanded for the trial court to properly determine whether Boggs was competent to proceed, the judge appointed several mental health experts who examined Boggs and testified at the October 30, 1991, competency hearing. (R. 2350-2433) Judge Swanson found Boggs in-

competent to proceed and ordered that he be confined to a forensic hospital for testing. (R. 2014-15, 2018). A March 31, 1992, report from Florida State Hospital ("F.S.H.") concluded that Boggs seemed to be malingering and, thus, was competent to proceed. The report's author stated on page 5, however, that, "[a]dmittedly, there is no positive evidence of competency to proceed." (SR 5) No neuropsychological testing was done. (R. 2288) At a hearing July 23, 1992, three experts testified Boggs was incompetent, and a fourth that he was malingering. Judge Lynn Tepper found Boggs incompetent and ordered him rehospitalized for testing. (R. 2286-94)

On March 3, 1993, the administrator at F.S.H. submitted an annual competency evaluation (SR 14), with a letter stating Boggs was not competent to proceed.[6] Nevertheless, the prosecutor set a competency hearing for September 27, 1993. Defense counsel moved to strike the competency hearing because the staff at F.S.H. had not found Boggs competent. Florida Rule of Criminal Procedure 3.212(c)(5) permits a competency determination only (1) when the hospital administrator determines the defendant is competent to proceed, or (2) upon motion by defense counsel. (R. 2046-47) At the August 16, 1993, hearing on the motion to strike (R. 2054-66), the prosecutor told the court that F.S.H. had done an EEG, EKG, MRI and CT scan but could do no neuropsychological tests because Boggs would not talk. (R. 2059) Although Judge Tepper nor F.S.H. found

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[6] The letter and competency report were apparently sent to the court pursuant to Florida Rule of Criminal Procedure 3.212(c)(6), which requires that the hospital administrator provide a yearly report to the court during an extended commitment. Although the letter said Boggs was not competent to proceed, the report's conclusion was that the F.S.H. staff was unable to determine Boggs' competency and, thus, the trial court might want to determine Boggs' competence based on information available. (SR 14)

Boggs competent, the judge denied the motion based on F.S.H.'s competency finding prior to Judge Tepper's contrary ruling. (R. 2451)

On September 22, 1993, the defense filed a motion to continue the competency hearing, alleging that the prosecutor gave them the names of five witnesses September 17, 1993, and they did not have time to depose them. Also, they had been unable to get Boggs' records from F.S.H. (R. 2084, 2071) Judge Cobb held a hearing on the motion September 23, 1993, four days before scheduled hearing. (R. 2434-45) Although the defense had issued a subpoena for Boggs' medical records, when they called F.S.H., the attorney said they needed a court order in addition to a subpoena. (R. 2436-38)

Because the prosecutor had the same problem, he had prepared an order authorizing F.S.H. to release the records to Dr. Rowan to bring when she came to testify. Defense counsel said he would be going into the hearing blind and would not be able to adequately cross-examine state witnesses. (R. 2435-39) The prosecutor said the witnesses would arrive at 11:15 a.m. Monday and would be available to the defense before the 2:00 hearing. (R. 2441) He continued:

> I am also aware of the fact that the Supreme Court, as we go through this case, is changing the law. When we first argued the motion to continue the Boggs trial . . . this Court spent a great deal of time inquiring of Mr. Boggs if a hearing to determine competency was necessary. The court did that. Based upon law that up until that time indicated that if the court found, based upon the review and interrogation thereafter, there was no need for a competency evaluation, that was enough. Apparently, the Supreme Court either didn't like the law or decided it was time to change it or death is different, or for whatever reason has sent this case back to us again.[7]

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[7] This is not true -- the law never changed. The prosecutor and judge relied on Rolle v. State, 493 So. 2d 1089 (Fla. 4th DCA 1986), which this Court found factually distinguishable. See Boggs v. State, 575 So. 2d 1274, 1275 n.1 (Fla. 1991).

> And we've spent enumerable dollars and hours coddling what I believe to be one of the best malingerers in my 20 years of prosecution that I have ever seen. I sit here today as I sat here years ago with the belief strongly held that John Boggs is nothing more than a manipulator with remarkable will power. But that feeling and the court's findings have not, in the past, been sufficient to satisfy Ms. Barkett and her Court. So, I'm concerned about objecting to a continuance. In light of the fact that Mr. Carballo is sitting here saying he can not adequately cross-examine witnesses whom I believe will establish the competency of Mr. Boggs, and if he is found competent and we proceed to trial, we're going to get reversed again, that's not fair to the taxpayers.

(R. 2441) Despite the State's concerns, the judge refused to grant a continuance. He said the defense could have easily discovered the witnesses and anticipated the State would call them. (R. 2443)

At the September 27, 1993, competency hearing (R. 2446-2561), defense counsel renewed the motion to continue. When the prosecutor contacted the defense, they had about twenty minutes to "chat with" (not depose) five people, and did not get medical records in time to use them in talking to witnesses.[8] Because counsel was not provided with Boggs' hospital records until just before the hearing started, he was unable to read them to prepare for cross-examination, or to find other witnesses at the hospital that might have had evidence favorable to the defense. When he alleged a discovery violation, the judge said "thank you." (R. 2450-52)

The judge first erred by refusing to grant the defense motion to strike the hearing because the prosecutor had no legal authority to set a hearing when F.S.H. had not found Boggs competent. See Fla. R. Crim. P. 3.212(c)(5). Because the F.S.H. annual report suggested the judge might want to determine Boggs' competency based

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[8] Dr. Jill Rowan, F.S.H., testified that Boggs' test results were provided to counsel at noon that day. (R. 2550)

on the information available, arguably, the judge could have set a competency hearing, although the rules do not cover this situation. The Court need not determine whether the judge could have scheduled a hearing without a competency finding by F.S.H., however, because, even if he had such authority, he abused his discretion by failing to grant the defense a continuance to obtain Boggs' records and adequately prepare for the hearing. Accordingly, Boggs was denied due process and the judge's findings are invalid.

Florida Rule of Criminal Procedure 3.220(b)(1)(A) requires that the prosecutor provide the defense with names and addresses of all persons known to have relevant information. Defense counsel is not required to anticipate the State's witnesses and depose them before the State provides their names in compliance with the rule. Moreover, without Boggs' medical records, the defense had no means of "anticipating" the state witnesses. Due process required that the judge grant a continuance until Boggs' hospital records were made available to the defense, and counsel had time to depose the state witnesses, and prepare for the hearing.

The granting of a motion for continuance is within the sound discretion of the trial court. Jent v. State, 408 So. 2d 1024 (Fla. 1981). When the denial of a continuance results in a denial of due process or of effective assistance of counsel, however, reversal is mandated. "The common thread running through those cases in which a palpable abuse of discretion has been found, is that defense counsel must be afforded an adequate opportunity to investigate and prepare any applicable defense." Smith v. State, 525 So. 2d 477, 479 (Fla. 1st DCA 1988) (citations omitted). "Adequate time to prepare a defense is a right that is inherent in the right to

counsel." 525 So. 2d at 479. The court has inherent authority to grant a continuance when, through no fault of the defense, counsel has been unable to depose the witnesses prior to trial. Lightsey v. State, 364 So. 2d 72, 73 (Fla. 2d DCA 1978).

Although Boggs' counsel had five work days to depose the state witnesses, they were in Chattahoochee, more than 200 miles from Pasco County.[9] Defense counsel was not given Boggs' records prior to the hearing. The case was complex, particularly in light of Boggs' mutism; thus, counsel's performance was necessarily inadequate because he lacked time and resources to prepare for the hearing. The judge found Boggs competent at this hearing without considering the legal standards for determining competency, because he thought Boggs was malingering. Had a continuance been granted, the evidence would have been different, and the judge's decision might have been different. Cf. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Because Boggs was denied due process and a fair hearing, the case be reversed.

ISSUE II

JUDGE COBB ERRED BY FINDING BOGGS COMPETENT TO PROCEED BASED ON HIS DETERMINATION THAT BOGGS WAS MALINGERING, BECAUSE THE STATE PRESENTED NO EVIDENCE SHOWING THAT BOGGS MET THE LEGAL REQUIREMENTS FOR COMPETENCY; AND JUDGE SWANSON ERRED BY FAILING TO DETERMINE THAT BOGGS WAS COMPETENT AT THE TIME OF TRIAL.

Due process prohibits a person accused of a crime from being prosecuted while incompetent. Nowitzki v. State, 572 So. 2d 1346, 1349 (1990); Lane v. State, 388 So. 2d 1022, 1024-25 (Fla. 1980).

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[9] The State filed its witness list Friday, September 17. The defense had from Monday through Friday, September 20-24, to depose the witnesses and prepare for the hearing Monday, September 27.

The test for determining competency is (1) whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding, and (2) whether the defendant has a rational, as well as factual, understanding of the pending proceedings. Fla. R. Crim. P. 3.211(a)(1); see also Dusky v. United States, 362 U.S. 402 (1960); Hill v. State, 473 So. 2d 1253 (Fla. 1985). In this case, the judge based his competency determination on his opinion that Boggs was malingering by refusing to talk, and never attempted to determine whether Boggs met either prong of the test set out in Rule 3.211 to determine competency.

After this Court vacated Boggs' death sentence and remanded to the trial court to determine whether Boggs was competent, in accordance with Rules 3.210 and 3.211, the judge appointed several mental health experts. On May 24, 1991, the first hearing after this Court remanded the case, the judge appointed Drs. Szabo and DelBeato to determine competency.[10] (R. 1980) In July, 1991, he appointed Dr. Gonzalez to determine competency, and Dr. Cheryl Fellows as a confidential defense expert. (R. 2004-08)

On October 30, 1991, Judge Swanson held a competency hearing. Boggs was in the room but was not responsive. (R. 2353) Defense counsel called Drs. Gonzalez (R. 2353), Szabo (R. 2367), and Fellows. (2381). The prosecutor called Dr. DelBeato. (R. 2390) Because of differing opinions amongst doctors, the court found

[10] The pretrial conference on May 24, 1991, was the last time Boggs spoke in court. At the hearing, Boggs requested the appointment of Larry Shearer, a lawyer in Lakeland, and Austin Maslanik, an assistant public defender in Polk County. Boggs requested that the judge appoint two psychiatrists and HRS to evaluate his competency. (R. 1983-89)

Boggs incompetent and ordered confinement in a forensic hospital.[11] (R. 2429-39). Judge Tepper conducted a competency hearing July 23, 1992, and returned Boggs to F.S.H. for testing. (R. 2286-94)

Over defense objection (See Issue I, supra), Judge Cobb held a competency hearing on September 27 and October 1, 1993.[12] The State called various witnesses from F.S.H. Drs. Szabo, Fellows and DelBeato testified again. The witnesses testified as follows:

> Roosevelt Byrd, Unit Treatment Specialist at F.S.H., had seen Boggs stand up to light cigarettes. He heard him say "ten" over the intercom for access to his room. He heard Boggs tell a judge that his brother had power of attorney and told him not to take medication. He had seen Boggs on the phone. He did not know whether Boggs met the criteria for competency, and had no information as to the level of his mental functioning. (R. 2454-61)

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[11] Dr. Arthur Gonzalez found Boggs totally "obtunded," and thought he might have motor aphasia, meaning his brain was unable to process input. He had a history of stoke in 1989. He said Boggs was definitely not competent. (R. 2355-58) Dr. Stephen Szabo found Boggs psychotic, meaning out of contact with reality; and unable to exercise adequate judgment. He thought Boggs had been unstable all his life and lapsed into psychological and organic psychoses. As to his articulate behavior at the May 24 hearing,, Dr. Szabo said that even insane people sometimes make meaningful insightful statements. (R. 2372-80) Dr. Cheryl Fellows could get no response from Boggs -- not even eye contact or reflex, but found him incompetent based on behavioral observations. She agreed that testing was needed. (R. 2383-86) Dr. Donald DelBeato said that Boggs told him he worked for U.S. Steel for 30 years and fell from a crane, due to which he saw double, got dizzy and had a hearing loss. He lost his sense of smell and taste and got confused. He needed 24-hour care as he was incompetent and people would take advantage of him. He thought Boggs could understand the charges and whether he wanted to deal with them was a matter of choice. He thought Boggs wanted to make everyone dance and would continue to do so as long as it was to his advantage. (R. 2393-2404)

[12] At the hearing, defense counsel moved to withdraw because of irreconcilable differences between client and counsel, based on something that had come up the prior week. The judge refused to consider the motion unless counsel provided more detail, which counsel would do only in chambers, ex parte, based on the attorney-client privilege. Judge Cobb refused to ask any questions. Defense counsel "certified" that a conflict existed. The judge said denied the motion, finding it "insufficient." (R. 2450)

Ray Grace, another Unit Treatment Specialist, had seen Boggs stand upright to light cigarettes although, most of the time, Boggs got his own light so he did not have to stand. (R. 2446, 2470) He obtained a notary at Boggs' request.[13] Although Boggs did not talk much, he could order cigarettes at the canteen and follow directions like "go to your room," and "come get your medicine." Grace had not talked with Boggs; did not know if Boggs was in pain when he stood up; and did not know if Boggs had the ability to consult with a lawyer. (R. 2464-71)

Sue Hamilton, nurse at F.S.H., said Boggs stood up for her to give him a TB skin test. When she accompanied him to have a CT scan, he said there was nothing wrong with his head. When she witnessed Boggs' petition for habeas corpus, he would only point. (R. 2476-77) Although Boggs was seen conferring with a jailhouse lawyer, the inmate was adjudicated incompetent when he was giving legal advice. She admitted that mentally ill people could do things Boggs did. She could not answer questions posed by defense counsel as to competency. (R. 2479-86)

Dr. Stephen Szabo said Boggs spoke little at either interview (1991 and 1992). He responded in a confused manner, sometimes gave inappropriate answers, and was sometimes startled. He seemed preoccupied and out of contact with reality. Dr. Szabo found Boggs incompetent. When shown Boggs' petition for habeas corpus, Szabo said it did not change his opinion on competency. (R. 2489-92)

Dr. Cheryl Fellows saw Boggs three times. Boggs sometimes followed simple directions. (R. 2494-96) She did not know whether he would not or could not talk because she could not communicate with him to find out. She agreed that, if he "would not," it did not mean he was competent. (R. 2497, 2504) Negative results from the EEG and CT scan would not change her opinion because the absence of test evidence does not negate mental problems. (R. 2498) She found it unusual that someone could consistently present the same behavior for years if he were malingering. Boggs could not interact with attorneys or meet the statutory criteria for competency. (R. 2500-03)

Dr. Donald DelBeato had not seen Boggs since April of 1992, a year and a half earlier. (SR 6) In 1991, Boggs said that a judge's role was to judge right from wrong and a jury was to decide guilt or innocence. When asked to name four presidents since 1950, he could name only

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[13] The prosecutor argued at the August 16, 1993, hearing that Boggs' pro se habeas corpus petition to dismiss the charges was evidence of malingering. (R. 2060) Ray Grace, other witnesses and the prosecutor refer to this habeas corpus petition, which was witnessed and neuter by personnel at Florida State Hospital.

Ford and Kennedy. During his second interview, Boggs was non-responsive. DelBeato thought Boggs was a good malingerer, and had improved since 1991. (R. 2507-10)

In June, 1991, Dr. DelBeato's diagnosis was borderline personality disorder with antisocial tendencies. He read Boggs' medical records from F.S.H. and was convinced Boggs was malingering. (R. 2512-14) He concluded that Boggs was able to help with his defense but refused to do so, although he was unable to specify anything he relied on to determine that Boggs met any specific criteria for competency. He admitted that malingering and incompetency were not mutually exclusive. (R. 2528-29)

Dr. Jill Rowan, senior psychologist at F.S.H., recommended letting the judge decide competency because the staff at F.S.H. was unable to discuss issues with Boggs due to his mutism. She said they considered mental illness, organic impairment, and malingering. She could not tell whether Boggs was mentally or organically ill due to lack of communication, although she found no signs of it. (R. 2535-37) They could not perform neurological tests to determine higher cortical functions because Boggs did not talk. Factors which suggested malingering were the high stakes, Boggs' inconsistency in the physical realm, and that his symptoms did not resemble any disorder they had seen in the past. (R. 2542-48)

Because Boggs chose not to speak (if true), and was malingering (if true), did not mean he was competent. Neither expert who had seen Boggs since the 1992 hearing (Fellows and Rowan) found him competent. (R. 2563-65) The F.S.H. staff testified about Boggs' physical capabilities but were unable to answer questions concerning his mental competency. Even Dr. DelBeato was unable to point to anything he relied on to determine that Boggs met the criteria for competency. (R. 2528-29) Nevertheless, in a published order,[14] Judge Cobb found Boggs competent (R. 2087-2112), concluding:

> So, thousands upon thousands of tax dollars have been spent during the past two years in housing Mr. Boggs, in subjecting him to physical and psychological and psychiatric testing and evaluation, and in evaluating and

[14] State v. Boggs, 2 Fla. L. Weekly Supp. 17 (6th Jud. Cir. Oct. 5, 1993) ("Order Finding Defendant to be Competent to Stand Trial" in Circuit Court Case No. 8800381CFAES).

reevaluating him in the courts of this State. The result is that the recommendation by the expert who should know him best is for this court to do exactly what it did five years ago, that is, to determine the issue of Mr. Boggs' competency to stand trial. Five years ago there was no professional expert opinion that Mr. Boggs was incompetent. There was only the speculation of a psychiatric expert that he might meet two of the tests for incompetency. . . . Now, five years and thousands of tax dollars later, we have two experts voicing opinions that he must be incompetent because he consistently refuses to cooperate with them,[15] one expert who says he is beyond any reasonable doubt deliberately malingering and competent, and one expert (interestingly, the expert with by far the most experience with Mr. Boggs) who cannot or will not voice an opinion on his competency and who believes the trial court should decide the issue. . . .

[T]his 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 severe 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. . . .[16] (R. 2095-97)

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[15] This, of course, does not accurately describe the opinions of Drs. Szabo and Fellows. See discussion on pp. 32, <u>infra</u>.

[16] No evidence shows that Boggs wrote or filed the petition himself. Boggs was seen with a jailhouse lawyer who may have written the petition. Moreover, the petition does not show "an excellent understanding of the criminal justice process." As Judge Cobb noted, the five-year period was erroneously computed from

Although the judge stated earlier in his order that Boggs "refused to cooperate with," and "refused to talk" to the experts (R. 2089, 2091), Boggs never "refused" to talk or cooperate. At the May 24, 1991, hearing, Boggs asked that two psychiatrist and HRS be appointed to determine his competency. (R. 1983-89) He met with the experts and followed directions. (R. 2464-70, 2494-96)

In Lane v. State, 388 So. 2d 1022 (Fla. 1980), this Court considered a similar case in which the prosecutor argued that the defendant was malingering. Lane had been found competent nine months earlier after a stay at F.S.H. Just prior to trial, three mental health experts were not able to determine whether Lane was competent. Lane refused to take his medication. The judge held that Lane was malingering and there was no reason he could not participate in his defense. 388 So. 2d at 1024.

On appeal, this Court vacated Lane's conviction, holding that (1) the finding of competence nine months earlier did not control because the issue of incompetence can be raised at any time, and (2) a defendant's intentional action does not eliminate the necessity of applying the test of whether a defendant has the **present** ability to assist counsel with his defense and to understand the proceedings against him. When there is doubt as to the defendant's competency, the law requires further examination. 388 So. 2d at 1025-26. Judge Swanson erred as to the first prong of the Lane holding, and both Judge Cobb and Swanson erred as to the second.

Boggs' arrest (actually his extradition), rather than a finding of incompetency. If Boggs had understood his own case, he would have known he was not found incompetent until 1991. Although the petition was not in evidence, the prosecutor read it to the judge at the hearing. (R. 2579)

As to the first prong, Judge Swanson, who presided over the trial, did not know he had a continuing duty to assure that Boggs was competent to proceed. See Drope v. Missouri, 420 U.S. 162, 180-81 (1975) (even when defendant competent at start of trial, court must be alert to change that would render accused unable to meet competency standards); Nowitzki v. State, 572 So. 2d 1346, 1349 (1990) (judge should have ordered competency hearing despite earlier competency determination); Pridgen v. State, 531 So. 2d 951, 954 (Fla. 1988) (when facts suggest defendant unable to meet competency standards, judge required to suspend proceedings and order hearing); Calloway v. State, 20 Fla. L. Weekly D602 (Fla. 1st DCA Mar. 6, 1995) (judge erred by refusing to order competency hearing before sentencing, despite defendant's articulate testimony at trial). Even if Boggs' condition had not changed since the competency hearing when Judge Cobb found him competent, Judge Swanson had a duty to make his own observations. He should not have presided over a trial in which the defendant was incompetent because another judge had found him competent four months earlier.

Although defense counsel continued to tell Judge Swanson that Boggs was unable to assist counsel, he refused to listen. On the morning of trial, defense counsel said that Boggs was not speaking to or assisting counsel.[17] The defense could not make decisions

[17] Defense counsel also told Judge Swanson that he filed a motion to withdraw at the competency hearing, but Judge Cobb did not want to deal with it. Judge Swanson said that because Judge Cobb found Boggs competent, it was Boggs' choice now, and counsel did not need voluntary cooperation. If Boggs chose not to cooperate, he would have to pay the price. He denied the motion, and said he saw nothing inconsistent with a very skilled malingerer. (T. 22) Boggs was denied his constitutional rights to due process, to testify in his defense and to effective assistance of counsel.

about cutting Boggs' hair or beard because he did not talk to them. He said that, "frankly," he did not think Boggs was competent. He had not seen Boggs speak since 1988.[18] (T. 18-19) The judge's response was that, **because Judge Cobb found Boggs competent,** he was not called upon to reaffirm his competency. (T. 20-22)

At the end of the State's case, the prosecutor said he believed Boggs was indicating to his attorneys that he wanted to testify. Defense counsel said it was not in Boggs' best interest to testify. He disagreed with Judge Cobb's competency determination, and had no rational communication with Boggs. (T. 1019-22) The judge said he had no constitutional right to ask Boggs whether he wanted to testify because to do so would violate Boggs' right to remain silent; thus, he accepted counsel's decision as to what was in Boggs' best interest. Defense counsel said he had no authority to agree "to let you do that." (T. 1022-24) By letting defense counsel make this important decision for Boggs, the judge seemed to agree that Boggs was incompetent to decide for himself.

When the judge agreed to allow the prior testimony of Boggs' daughter to be read to the jury because she was "snowed in" at the Cleveland airport, Boggs made an "unintelligible verbalization." (T. 1183) Although the outburst showed Boggs' inability to manifest appropriate courtroom behavior, the judge instead found it an attempt to sway the jury.[19] (T. 1223)

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[18] The defense lawyer who was addressing the court was not present at the May 24, 1991, pretrial hearing when Boggs requested other attorneys be appointed; the other defense lawyer represented Boggs at that hearing. (R. 1983-89)

[19] Prior to sentencing, defense counsel reiterated that the defense maintained that Boggs was incompetent. He asked the judge to review the reports in the file and any transcripts of testimony

Judge Cobb erred in making his competency determination by failing to apply the second prong of the Lane holding -- that a defendant's intentional actions do not eliminate the necessity of applying the statutory criteria for competency. Even if Boggs' mutism was intentional, the court was required to apply the legal criteria to determine competence. The State presented no evidence Boggs had the ability to assist counsel or understood the proceedings. It presented no evidence Boggs' mutism was not caused by mental illness. Boggs' higher cortical functioning was not tested because of his mutism and no one tried to counsel Boggs to find out why he did not talk and perhaps return him to competency.

None of the experts knew why Boggs did not speak. (R. 2568) Because they were frustrated at their inability to get Boggs to talk to them, some speculated that he was not talking to avoid being found competent and tried. The judges, also frustrated with the situation, agreed. Nevertheless, the State presented no evidence to even suggest, let alone establish, that Boggs thought he could avoid going to trial by not speaking for years.

Such conjecture made little sense because, before the first trial, Boggs was anxious to go to trial without delay, and insisted he was competent. He refused to talk to a psychiatrist because he wanted no delay. (R. 2104, 2110-11) If Boggs thought an immediate trial would produce an acquittal although his attorneys were not prepared and he had no defense, his belief was unrealistic and incompetent. His later habeas petition showed that he still had the irrational belief that he would be freed.

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presented and previously considered. (R. 2622)

Although Dr. DelBeato and Judge Swanson thought Boggs was a "very skilled malingerer," his silence did not convince anyone that he was incompetent.[20] In McCants v. State, 395 So. 2d 278, 279 (Fla. 1st DCA 1981), the defendant "laughed, made obscene gestures, sang, tried to leave the courtroom, jumped up from the witness stand, and even tried to take the top off the witness stand" during his trial. If Boggs wanted to convince the experts that he was incompetent, he could have acted in a bizarre manner or pretended to hear voices or hallucinate. Boggs' behavior was indicative of depression and extreme denial, as suggested by one of his F.S.H. doctors, rather than of malingering. (SR 14) The inconsistency of his behavior suggests a volatile mental state, rather than an attempt to feign incompetence.

Defense counsel's impression should have been considered by the court. In Scott v. State, 420 So. 2d 595, 597 (Fla. 1982), as in this case, defense counsel had great difficulty communicating with his client who was unable to assist in preparing the defense. Quoting from Drope, 420 U.S. at 177-78 n.13, this Court stated:

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

Scott, 420 So. 2d at 597-98. In the instant case, the judge gave little if any credence to counsel's impressions.

At a hearing prior to the competency hearing, defense counsel

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[20] Dr. DelBeato testified that Boggs was a "good malingerer," and had improved since 1991; during the second interview, he was non-responsive. (R. 2507-10) Judge Swanson described Boggs as "a very skilled malingerer." (T. 22)

told Judge Cobb that, when he tried to speak with Boggs, he "kind of crawled up on the stairs, sat on the floor and looked at me." He never uttered a sound. (R. 2436-38) At a pretrial conference about a month after Judge Cobb's competency determination, counsel said he needed Boggs' help to decide whether to hire an independent ballistics expert, because the judge had ruled that the findings would not be confidential. Counsel also wanted to go to Ohio to see Boggs' family. Boggs was unable to assist in making such decisions. Although the judge agreed that counsel had ethical constraints, he refused to reconsider competency. (R. 2344-49)

Instead of observing Boggs' behavior and considering counsel's arguments, Judge Swanson relied on Judge Cobb's prior determination of competency, which he believed to be "law of the case." He took no responsibility for ascertaining that Boggs was competent during trial. His unwavering conviction that Boggs was malingering, or perhaps his unwillingness to deal with the competency issue, is evidenced by his comments to Boggs after sentencing him to death:

> Mr. Boggs, your drama is over. Your act failed. It's time now for you to pay the price for your murders you committed. It is time now to stand up and take responsibility for the actions you have committed. You have failed to sway either the jury or this Court of any consideration other than those as previously indicated.

(T. 2684)

Not a single witness applied the two prong test to determine whether Boggs was competent, and found him competent. Dr. DelBeato, the only doctor who opined that Boggs was competent, could point to no evidence that Boggs met the legal criteria for competence. (R. 2528-29) Judge Cobb did not attempt to apply statutory criteria. Judge Swanson refused to even consider Boggs' competence.

No evidence showed that Boggs had a rational understanding of the proceedings or was able to assist counsel. "[F]ailure to observe procedures to protect a defendant's right not to be tried or convicted while incompetent deprives him of his due process right to a fair trial." Drope, 420 U.S. 162; see also Pate v. Robinson, 383 U.S. 375; Lane, 388 So. 2d 1022. Because of Boggs' incompetency, defense counsel was unable to adequately represent him, and Boggs was denied due process and a fair trial.

ISSUE III

THE TRIAL COURT UNFAIRLY RESTRICTED JURY VOIR DIRE, THUS VIOLATING BOGGS' SIXTH AMENDMENT RIGHT TO BE TRIED BY AN IMPARTIAL JURY.

Florida courts have traditionally viewed meaningful voir dire of prospective jurors as necessary to the impartial jury guaranteed by Article I, sections 9 and 16 of the Florida Constitution. Pope v. State, 94 So. 865, 869 (Fla. 1922). This Court observed in Singer v. State, 109 So. 2d 7 (Fla. 1959), that a juror's statement that he can and will return a verdict based on the evidence and law provided at trial is not determinative. Because it is hard to admit to being incapable of being fair and impartial, it is crucial that jurors be voir dired to determine what they already know about the case from reading or listening to pretrial publicity, and whether they have formed preconceived opinions.

Prior to voir dire, defense counsel told Judge Swanson there had been newspaper publicity about Boggs' hospitalizations and the retrial. The judge said he intended to ask the jurors what they had heard or read, and would disallow questioning of the jurors based upon the content of any pretrial publicity. Depending on

jurors' reactions, he would determine whether to question them out of the hearing of the jury. (T. 31-32) Defense counsel argued that answers to general questions were insufficient to determine bias or enable him to intelligently exercise peremptory challenges. (T. 35)

Defense counsel introduced as exhibits, the St. Petersburg Times (Pasco edition) article from Jan. 24, 1994, the first day of voir dire (Def. Exh. A), and the Tampa Tribune (Pasco edition) article from the front page on the prior Sunday, January 16, 1994, entitled, "Was Suspect Acting or Insane?" (Def. Exh. B) The article quoted from Judge Cobb's competency order that, "Mr. Boggs has apparently concluded the only way he could escape some rather severe temporal punishment was to feign insanity. Up to now it has been working wonderfully." It reported that Boggs could talk and stand straight, his bedraggled appearance was a put-on, and he was "betting his life on his acting ability." It revealed Boggs' prior conviction, that his ex-wife said he malingered after a U. S. Steel accident, and quoted the prosecutor that Boggs was faking.

On the second day of voir dire, an article in the St. Petersburg Times (Pasco edition) showed Boggs on the front page, slumped over in his wheelchair with his long hair hanging down, under the headline, "Defendant is silent as the second trial opens." (Def. Exh. E; and appendix to this issue) The defense requested that the judge ask whether any jurors read it, but he refused. (T. 362-63)

Six of the first thirteen prospective jurors had heard or read about the case; five had formed opinions; and two were not sure they could put aside their opinions. Nevertheless, the judge refused to allow counsel to ask these jurors what they read, and refused to excuse for cause those who had formed opinions. Counsel

was forced to use eight of his ten peremptory challenges to excuse jurors whom he was not permitted to voir dire to learn what they knew about the case.[21] (T. 1180-81)

Defense counsel requested additional peremptory challenges because he had to use eight peremptories to excuse these jurors who were exposed to pretrial publicity. He renewed his request, and specified which four jurors he would use additional challenges to excuse, and why. The judge denied each request. (T. 327-29, 346)

Whether individual sequestered voir dire is allowed falls within the sound discretion of the judge. Pietri v. State, 644 So. 2d 1347, 1351 (Fla. 1994); Randolph v. State, 562 So. 2d 331 (Fla. 1990). There are, however, limits to this discretion. See Stano v. State, 473 So. 2d 1282 1285 (Fla. 1985) (counsel must be permitted to ascertain the latent or concealed prejudgments of prospective jurors). Meaningful voir dire is critical to the accused's constitutional right to a fair and impartial jury. The scope of voir dire "should be so varied and elaborated as the circumstances surrounding the juror under examination in relation to the case on trial would seem to require. . ." Lavado v. State, 469 So. 2d 917,

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[21] Counsel struck (1) Ms. Johnson who said it would be very difficult for her to put aside her preconceived opinions (T. 105, 185); (2) Ms. Erbe who was divorcing a deputy sheriff and had an opinion about the case which she would "try" to put aside (T. 59-60, 66, 185); (3) Ms. Sayer whose ex-husband was a police officer (she did not think it would affect her judgement), who would put aside her opinions about the case (T. 58, 63, 224); (4) Mr. Smith, an employee of the sheriff's department who had reached a tentative verdict but could put it aside (T. 61-65, 243); (5) Ms. Fried who read about the case but had not reached a tentative verdict (T. 56, 243); (6) Ms. Donaldson who had probably formed an opinion, but would put it aside (T. 314-16, 326); (7) Ms. Bunch who remembered the facts of the case but had no opinion (T. 227-28, 324-327); and (8) Ms. Sweet who recalled the case but had no opinion. (T. 249, 265) (See discussion and page references in Issue IV, infra.)

919 (Fla. 3d DCA 1985) (Pearson, J., dissenting) (quoting from Pinder v. State, 8 So. 837, 839 (Fla. 1891)). Judge Pearson's dissenting opinion was adopted by this Court in Lavado v. State, 492 So. 2d 1322 (Fla. 1986).

Individual voir dire was especially important in this case. The St. Petersburg Times and the Tampa Tribune had recently run stories, including photographs, telling its readers that this was Boggs' second trial, and that Judge Cobb had recently found that Boggs was malingering. This information was not admissible at trial. A number of jurors reported that they had read the Tribune article. (See Issue IV, infra). Although the judge asked if they had formed opinions and whether they could put them aside, he never asked or permitted counsel to ask what their opinions were.

It is not enough that a juror's opinion will readily yield to the evidence because the accused is not required to present evidence of his innocence. Singer, 109 So. 2d at 24; see Irvin v. Dowd, 366 U.S. 717, 723-24 (1961) (prospective jurors' statements of their own impartiality should be given little weight); Jordan v. Lippman, 763 F.2d 1265, 1275 (11th Cir. 1985) (juror is in poor position to determine own impartiality). Without knowing what the jurors read or what opinions they formed, the judge had no basis on which to determine whether to grant challenges for cause.

In Pietri, 644 So. 2d 1347, this Court found that the trial judge did not abuse his discretion in failing to conduct individual voir dire because it did not result in a trial that was fundamentally unfair. See Mu'Min v. Virginia, 500 U.S. 415 (1991). Pietri is distinguishable from this case, however, because Pietri's judge excused all prospective jurors who had formed opinions. In this

case, although a number of prospective jurors had formed opinions, and two were not sure they could set them aside, the judge refused to excuse them or to let counsel inquire further; thus, counsel was forced to use eight of his ten peremptories to exclude them. The judge's failure to (1) allow individual voir dire, or (2) excuse jurors with opinions, rendered Boggs' trial fundamentally unfair.[22]

The preferred approach in the face of extensive pretrial publicity is to conduct individual voir dire. Cummings v. Dugger, 862 F.2d 1504, 1508-09 (11th Cir. 1989); Pietri, 644 So. 2d at 1351. ABA Standard 8-3.5(a) (2d edition 1980) provides that, "[i]f there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure shall take place outside the presence of other chosen and prospective jurors." The nature of the publicized facts is also of utmost significance. ABA Standard 8-3.5(b) provides in part:

> A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence. . . shall be subject to challenge for cause without regard to the prospective juror's testimony as to state of mind.

In Reilly v. State, 557 So. 2d 1365, 1367 (Fla. 1990), a prospective juror had heard that the defendant confessed to the murder. The confession was suppressed prior to trial. Although

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[22] Defense counsel also argued that issue at the motion for new trial hearing. (T. 2592-2606) The trial judge's response was that, in England, jurors were required to know the defendant, and he thought it should still be that way. He said, "it's a perversion of the entire jury system that no juror can have any concept, any knowledge whatsoever, of the defendant. To insist that every juror must be ignorant, illiterate or never read newspapers or never watch television I think is stupid." (T. 2618-19)

the juror gave all the right answers, this Court termed it unrealistic to believe he could disregard knowledge of the confession.

The same is true in this case. A number of prospective jurors read in the Tribune that Boggs had already been sentenced to death for this crime, and that a local judge found him competent but malingering. This extrajudicial evidence was extremely prejudicial. It included scathing remarks by a local judge that Boggs was trying to manipulate the judicial system. It is totally unrealistic to believe jurors could disregard such knowledge.

The judge had various options but chose none. He could have allowed defense counsel to conduct individual voir dire of those jurors who had read or heard about the case, but he refused to do so. He could have granted cause challenges as to jurors who had formed opinions concerning the case, as in Pietri, but he did not. He could have allowed counsel to question the jurors about what they had read in open court and risked a mistrial, but he did not choose this option either. The court's failure to elect any of these options denied Boggs his Sixth Amendment right to a fair and impartial jury. This Court should grant a new trial.

ISSUE IV

THE TRIAL COURT ERRED BY DENYING DEFENSE COUNSEL'S REQUESTS TO EXCUSE PROSPECTIVE JURORS FOR CAUSE AND TO GRANT COUNSEL'S REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES, IN VIOLATION OF BOGGS' RIGHT TO A FAIR AND IMPARTIAL JURY.

The accused has a constitutional right to a fair and impartial jury. "The purpose of voir dire is to remove prospective jurors who will not be able to impartially evaluate the evidence." Connors v. United States, 158 U.S. 408 (1895). The rule applied by this Court

was set out in Singer v. State, 109 So. 2d 7, 23-24 (Fla. 1959):

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

Accord Hamilton v. State, 547 So. 2d 630, 632 (Fla. 1989); Moore v. State, 525 So. 2d 870, 872 (Fla. 1988); Hill v. State, 477 So. 2d 553, 555 (Fla. 1985). The Singer rule must be read together with the test in Lusk v. State, 446 So. 2d 1038 (Fla. 1984):

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

Hamilton, 446 So. 2d at 1040; accord Irvin v. Dowd, 366 U.S. 717, 723 (1966); Parker v. State, 641 So. 2d 369 (Fla. 1994): Foster v. State, 614 So. 2d 455 (Fla. 1992). When there is a basis for any reasonable doubt about the ability of the juror to decide the case fairly and impartially, based solely on the evidence and the law submitted at trial, he should be excused. Singer, 109 So. 2d at 23-24; see also Hill, 477 So. 2d at 556; Chapman v. State, 593 So. 2d 605 (Fla. 4th DCA 1992) (prospective juror who would "try" to be impartial should have been excused for cause).

To preserve this issue, defense counsel must object to the jurors, exhaust his peremptories in removing them, request more peremptories which are denied, and identify an additional juror he would have excused if possible. See Trotter v. State, 576 So. 2d 691 (Fla. 1990); Floyd v. State, 569 So. 2d 1225 (Fla.1990); accord Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994). Here, counsel complied with each requirement and thus preserved the issue.

After the judge questioned the first group of jurors, defense

counsel pointed out that six of these jurors knew or had read about the case, and two had formed opinions. He believed these two were "already gone," but wanted to ask the other four what they remembered. Defense counsel suspected these jurors read in the Tampa Tribune[23] that Boggs was sentenced to death in an earlier trial, Judge Cobb's comments from his order finding Boggs competent, and the prosecutor's "eloquent prosecution," alleging that Boggs was malingering. (Issue III, supra.) The court refused. (T. 176-79)

Defense counsel repeatedly asked to individually voir dire jurors who had read or heard about the case, to no avail. He repeatedly challenged these and other jurors for cause, also to no avail. Six jurors had formed opinions or had feelings as to guilt, and two of them did not know whether they could put them aside and base their verdicts on the evidence. One of the potential jurors who had read about the case worked for the Pasco County sheriff's office. To others were or had been married to local law enforcement officers and knew some of the officers who were witnesses in the case. Still another was related to the prosecutor by marriage. Because the judge refused to excuse these potential jurors, the defense was forced to exercise peremptory challenges to excuse them for cause. When counsel had used all ten challenges, he requested more, specifying four more jurors he wanted to excuse, and the reasons therefor. One of these four jurors turned out to be the foreman. The judge erred by refusing to excuse at least five of these jurors for cause, and refusing to grant more challenges.

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[23] Six jurors said they had read the recent article in the Pasco County edition of the Tampa Tribune, as discussed infra. (See Def. Exh. B, and appendix to this issue.)

Prospective juror Nelson E. Smith worked at the Pasco County Sheriff's Office at the time of the trial. He was not sure whether he had had any personal contact with the attorneys or defendant. (T. 61) He knew all the officers on the witness list by name and some of them personally. (T. 64) He had worked at the sheriff's office since 1990. (T. 93) He had ridden with officers as back-up and worked in traffic control for three years, but for the past year-and-a-half, had been a full time dispatcher. (T. 119) He said this would not affect his decision in this case. (T. 61, 65, 93) Smith had a concealed weapons permit, for which he took a course, and was formerly an N.R.A. member. (T. 130-31) He had heard about the case on television, and read about it in the newspaper. (T. 54-55, 121) He had made a tentative decision as to Boggs' guilt but would put it aside and decide the case solely on the evidence presented, if contrary to his tentative decision. (T. 55)

The judge repeatedly refused to allow defense counsel to individually voir dire Smith or any other juror to determine what they had heard or read about the case, or what opinions they had formed. (T. 185, 243) Counsel moved unsuccessfully to excuse Smith for cause because he (1) had read about the case, and (2) was actively employed with the Pasco County Sheriff's Office which investigated the case. (T. 180) After unsuccessfully renewing his request for individual voir dire and cause challenge, defense counsel excused Smith by peremptory. (T. 185, 243)

Shirley Sayer read about the case in the Tampa Tribune the week before the trial, and had feelings about Boggs' guilt, but was willing to base her verdict on the evidence. (T. 58, 175) Her ex-husband was police officer Don Raulerson. She had contact with

some of the officers listed as witnesses about four years earlier. She "did not think" it would affect her judgement. (T. 63, 97) The judge denied defense counsel's request to conduct individual voir dire concerning Sayer's knowledge, and his motion to excuse her for cause. (T. 185) He was forced to exercise a peremptory. (T. 224)

Donna Johnson read about the case and had feelings as to guilt. She worked near the scene of the crime when it happened. She had formerly worked at an R.V. park. (T. 82, 103) When asked if she could base her verdict solely on the evidence, she said, "I don't know whether I could unbiasedly." When asked if she could put aside her feelings if the evidence so indicated, she said, "I'm not sure I can do that." (T. 58-59)

When the prosecutor asked if she could set aside her feelings and not let them play a part in the determination of her verdict, Ms. Johnson said she "would certainly try listening to the judge's explanations." The prosecutor attempted to clarify her responses:

> MR. VAN ALLEN: If you feel that's going to cause you a problem, we need to talk about it. If you think you can do it, that's fine too. Which is it?
>
> MS. JOHNSON: I think it would be very difficult to do, to be honest.

(T. 105) Defense counsel moved to excuse Ms. Johnson for cause based on her uncertainty as to whether she could set aside her preconceived opinions, but the judge denied it. He then used a peremptory challenge to excuse Johnson. (T. 179-80)

Betty Erbe read about the case in the Tampa Tribune the prior week, and also had feelings about guilt. She said she "would certainly try" to base her verdict on the evidence, and she "would try" to put aside her opinion if the evidence so indicated. (T. 59-

60, 159) Ms. Erbe was married to a Hillsborough County sheriff's deputy, with divorce pending. When the judge asked if this would affect her feelings as to police officers in general, she said, "I'll try not to be." She also had a daughter who was a Tampa police dispatcher. (T. 66) Ms. Erbe owned a handgun, belonged to the N.R.A., and had an N.R.A. sticker on her car. (T. 160

The judge denied defense counsel's cause challenge as to Ms. Erbe. (T. 179) Counsel unsuccessfully renewed his request for individual voir dire and his motion to excuse her for cause. He finally exercised a peremptory to excuse Ms. Erbe. (T. 185)

Ida M. Fried read about the case in the Tampa Tribune, but had not reached any decision as to guilt. She could render a verdict based on the evidence at trial. (T. 56, 142, 241) Her grandson was robbed and killed in Pasco County, while working in a convenience store fourteen years earlier. No one was prosecuted. (T. 146-47) The judge denied counsel's request to individually voir dire Ms. Fried, and his cause challenge. (T. 185) After renewing his challenge for cause, he exercised a peremptory challenge. (T. 242)

Olga Bunch had read about the case in the Tampa Tribune, but had no opinion. (T. 227-28) The judge refused to allow defense counsel to ask her what she remembered. His cause challenge was denied. (T. 242-43) When defense counsel later asked if anyone remembered anything else, Ms. Bunch volunteered that she thought she remembered more facts. Defense counsel again asked to question her individually, to no avail. When the judge denied his cause challenge, he excused her by peremptory challenge. (T. 324-27)

Sarah Donaldson read about the case in the Tampa Tribune a week earlier. Although she first said she had formed no opinion,

she later admitted she probably had an opinion when she read the article. (T. 304-05, 314-16) The judge refused defense counsel's request to question Ms. Donaldson individually. After he denied the defense request to excuse Ms. Donaldson for cause, counsel exercised a peremptory challenge. (T. 324-26)

Barbara Sweet read something in the paper -- probably the Tribune -- more than a year earlier. She had no opinion on guilt. (T. 245-46, 259) She knew the area where Colony Park was located and recalled hearing about the case. (T. 249) The judge declined to allow defense counsel to ask Ms. Sweet what she remembered. Defense counsel removed her peremptorily. (T. 264-65)

Jerry Carr knew the prosecutor, Phil Van Allen. His nephew, Blake, was married to Van Allen's stepdaughter. Defense counsel apparently knew Van Allen's stepdaughter, because he clarified that Carr was referring to "Tina." Carr had little contact with the prosecutor and **did not think** the relationship would affect his verdict. He also knew Ms. Sayer and Mr. Smith.[24] (T. 164-66)

Defense counsel pointed out that section 913.03(9), Florida Statutes, provides that any juror "related by blood or marriage within the third degree to . . . the attorneys of either party" is subject to challenge for cause. The judge said it would be so far removed he couldn't compute it. Defense counsel took the position that it was within the third degree, and Carr should be excused. The judge refused. (T. 225-26) Defense counsel renewed the cause challenge, to no avail. He removed Carr by peremptory. (T. 264)

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[24] It is noteworthy that Mr. Smith worked for the sheriff's department, and Ms. Sayer was formerly married to an officer. This suggests that Carr knew these jurors through law enforcement.

Theresa L. Craig was a witness for the state in a first-degree murder case six years earlier, but said this would not affect her judgement. (T. 75-76) Defense counsel specified her as one of the jurors he would excuse with a peremptory if the judge would give him additional peremptories. (T. 364) He noted that Ms. Craig could not remember the lawyers in the trial of Thomas Gillen, in which she was a witness, which was prosecuted by the same prosecutor and defended by the same two public defenders as this case. (T. 328) Craig served on the jury. (R. 2135)

Potential juror Sassaman heard about the crime around the neighborhood, but had no opinion about it. He had heard about the case through his wife. (T. 281) He said he would be able to put aside what he had heard and decide the case based on the evidence. (T. 268-69) Defense counsel unsuccessfully asked to question Sassaman individually. (T. 324-25) Sassaman served on the jury. (R. 2135) Defense counsel specified Sassaman as one of the jurors he would excuse if the judge granted more peremptories. (T. 327-28)

Angela Drago worked for the Tampa civil law firm of Lau, Lane, Pieper and Asti. (T. 65) She was previously a legal secretary for Attorney Bob Focht who practiced civil and criminal law. (T. 170-71) Mrs. Council's husband was a local attorney who practiced criminal and civil law. She worked in her husband's office. (R. 275) Both Council and Drago served on the jury. (R. 2135)

Defense counsel requested additional peremptory challenges because he had to use peremptories to excuse jurors exposed to pretrial publicity. He said if he had the peremptory challenge he used to excuse Ms. Johnson, who said it would be hard to put aside her preconceived opinion, he would excuse Mr. Sassaman who heard

about the case from his wife. (T. 327-28) If he had the peremptory he used on Ms. Erbe who was not sure she could set aside her opinion, he would have remove Ms. Craig, a witness for the State Attorney in a murder case which he and counsel Carballo defended and Mr. Van Allen prosecuted. He also asked to be allowed to request more peremptories after the next four potential jurors were examined. His requests were denied. (T. 329) He renewed his motion for more peremptories,[25] to exclude potential jurors Sassaman and Craig, and requested peremptories to excuse Mr. Wood, due to his knowledge of firearms, and Mr. Allen, who indicated a strong distaste for firearms. The judge refused. (T. 346) Sassaman, Craig, Wood and Allen served on the jury. Wood was foreman. (R. 2135)

After voir dire and prior to trial, defense counsel again unsuccessfully renewed his request for additional peremptories. He specifically identified jurors he would exclude. (T. 364) At the end of the guilt phase, the judge denied defense counsel's motion to dismiss the jury and empanel a new one for penalty phase, based on the denial of defense requests to question the jurors regarding their knowledge of the case, and the judge's denial of eight cause challenges as to jurors who had knowledge of the case. (T. 1180-81)

The trial judge clearly erred by failing to excuse for cause prospective jurors Johnson and Erbe who had preconceived opinions as to Boggs' guilt based on pretrial publicity, and were not sure they could disregard those opinions. Although Ms. Erbe said she **would try**, Ms. Johnson was less certain that she could, "unbiasedly," base her verdict on the evidence. Although she would try to

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[25] Fla. R. Crim. P. ©©3.350(e) gives the trial court discretion to grant additional peremptory challenges when appropriate.

listen to the judge's explanations, she thought it would be **very difficult to set aside her feelings, "to be honest."** The judge clearly erred by failing to excuse these two jurors for cause. See Hill, 477 So. 2d at 55-56, and cases cited therein.

The judge also erred by refusing to grant cause challenges for Mr. Smith who worked for the sheriff's department at the time of the trial, Mr. Carr who knew the prosecutor and was related to him by marriage, and Ms. Sayer who knew about the case and was formerly married to a police officer, which she **did not think** would affect her judgment. There were a number of other jurors who may have been candidates for cause challenges but whom defense counsel had no basis to challenge because the judge would not allow him to voir dire them as to pretrial publicity. (See Issue III, supra.)

When there is any reasonable doubt as to a juror's possessing the requisite state of mind to render an impartial verdict, the juror should be excused. Hill, 477 So. 2d at 555-56; Smith v. State, 463 So. 2d 542, 545 (Fla. 5th DCA 1985) (citing Singer, 109 So. 2d 7). "A juror is not impartial when one side must overcome a preconceived opinion in order to prevail." Hill, id. Jurors should be not only impartial, but beyond even the suspicion of partiality. If there is any doubt as to a juror's sense of fairness, he should be excused. Hill, 477 So. 2d at 556; Johnson v. Reynolds, 121 So. 793, 796 (1929); O'Connor v. State, 9 Fla. 215, 222 (Fla. 1860).

In Hamilton, 547 So. 2d at 632, this Court reversed because a juror had a preconceived opinion of Hamilton's guilt and indicated it would take evidence from Hamilton to convince her he was not guilty. Although she eventually said she could base her verdict on the evidence at trial, her responses viewed together showed she did

not presume Hamilton innocent. In this case, prospective jurors Erbe and Johnson never said they could base their verdicts on the evidence. The best they could do was try, and Ms. Johnson did not think she would be able to do so, although she did agree to listen to the evidence presented at trial.

Prospective juror Carr was related to the prosecutor. His nephew was married to Van Allen's stepdaughter, Tina. (T. 164) The judge thought they were not related in the third degree,[26] which would required that the jury be excused for cause pursuant to section 913.03(9), Florida Statutes, defense counsel took the position that it was within the third degree, and that the juror should be excused. The judge refused. (T. 225-26)

In Mobil Chemical Co. v. Hawkins, 440 So. 2d 378 (Fla. 1st DCA 1983), a juror was the second cousin of the appellant's wife. The court noted that Florida applies the common law rule to determine degrees of kinship, under which second cousins are related within the third degree. Similarly, in Walsingham v. State, 56 So. 195, 196 (Fla. 1911), a juror who was a second cousin of the decedent's wife was related to the decedent, by marriage, within the third degree. The Walsingham Court noted that, when the relationship is by marriage, the juror is not disqualified if neither the spouse nor her issue are living. Id. In our case, there was no evidence that the prosecutor's wife was deceased, and the testimony inferred that the stepdaughter and nephew who married were also living.

In O'Connor v. State, 9 Fla. 215 (Fla. 1860), a juror who thought he was the defendant's third cousin was found to be related

[26] The judge said the relationship would be so far removed he couldn't compute it. (T. 225-26)

within the third degree. This relationship, and the two discussed above in which second cousins related by marriage were related within the third degree, suggest that Carr's relationship to the prosecutor was also within the third degree. Mr. Carr was related to his nephew at least within the second degree. Carr's nephew, by marriage to the prosecutor's stepdaughter, was related to the prosecutor in the first degree.[27] In total, therefore, Carr and the prosecutor were related, by marriage, within the third degree.

A showing of prejudice is not required. In Mobil Chemical, 440 So. 2d at 380, the court noted that statutes precluding jurors related within the third degree were enacted upon the presumption that a party related within the third degree would know of the relationship and be prejudiced thereby. "[T]he public perception of our system of justice would hardly be enhanced by a rule which permitted a relative of a party to sit in judgment . . . ." Id.

In Polynice v. State, 568 So. 2d 1346 (Fla. 4th DCA 1990), the jury foreman was the stepfather of the arresting officer, a state witness at trial. The appellate court determined that it need not address whether the juror was related to the officer within the third degree, because he should have been excused for cause to satisfy the appearance of justice. Because jury impartiality is an absolute prerequisite to our system of justice, close cases should be resolved in favor of excusing the juror rather than leaving a doubt as to impartiality. 568 So. 2d at 1347.

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[27] In the case at hand, the prosecutor said stepdaughters did not count. In Grant v. Odom, 76 So. 2d 287, 289 (Fla. 1954), this Court found that a stepson takes as an heir and next of kin in cases in which there are no heirs prior in preference. See also Polynice v. State, 568 So. 2d 1346 (Fla. 4th DCA 1990) (reversed because jury foreman was stepfather of arresting officer).

In the case at hand, even if Mr. Carr were not related to the prosecutor within the third degree, he should have been excused. His relationship to the prosecutor left substantial doubt as to his impartiality. Although he might try to be fair, he would not want to face the prosecutor again if he voted to acquit Boggs.

Prospective juror Smith, in addition to having read about the case and formed an opinion, worked for the Pasco County sheriff's office. Prospective jurors Sayer and Erbe had not only read about the case, but were also married, or had been married, to local law enforcement officers. Both would "try" not to be prejudiced by these relationships. These three prospective jurors knew some or all of the officers who were witnesses in the case. Although Smith said his employment with the agency that investigated the case would not affect his verdict, he was part of the prosecution. He could not vote to acquit Boggs and return to work for the sheriff.

The judge's failure to excuse these jurors for cause reduced the number of peremptory challenges available to Boggs. He was, thus, unable to excuse other specified objectionable jurors. Such error cannot be harmless because it reduced the number of peremptories available to Boggs. This Court stated in Hill v. State, that

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

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

In this case, defense counsel twice requested additional challenges after exhausting his challenges. He specified four

jurors he would excuse. Because the court erred in failing to excuse jurors for cause and denying defense counsel's requests for additional challenges, Boggs was denied his right to a fair trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, section 16(a), of the Florida Constitution. The case must be remanded for a new trial.

ISSUE V

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

Prior to Boggs' first trial, defense counsel moved to suppress state witness Pat Spurlock's identification of Boggs, because her out-of-court identification resulted from an unduly suggestive photo display, and the State failed to prove her in-court identification was independent thereof. (R. 52-61) Judge Cobb denied the motion. (R. 1821-1897) Although the issue was raised in Boggs' first appeal, this Court reversed without reaching it. (R. 1977)

On the morning of the second trial, defense counsel advised Judge Swanson that he wished to review and renew all motions made at the first trial, including the motion to suppress Spurlock's identification. Because Judge Cobb presided over the first case, Boggs' counsel summarized the facts and argued that Spurlock's in-court identification was tainted, and the fruit of illegally suggestive pretrial procedures. (T. 22-25) Judge Swanson responded:

> In the absence of additional evidence to present at this time, this court would find the previous rulings by Judge Cobb on the evidentiary matters and motions presented reflecting law in the case will be and are reaffirmed.

(T. 26) At trial, defense counsel renewed his objection to the testimony of Detective Linda Johnson Alland concerning preparation of the photopack, and to Spurlock's identification. (T. 689-90) The judge denied his objection to the photo composite. (T. 695)

Pretrial identifications become "impermissibly suggestive" when the "totality of the circumstances" indicate that the resulting identification is unreliable. Neil v. Biggers, 409 U.S. 188 (1972); accord Manson v. Brathwaite, 432 U.S. 98 (1977); Willacy v. State, 640 So. 2d 1079 (Fla. 1994); Edwards v. State, 538 So. 2d 440 (Fla. 1989). A photo identification will be set aside if the procedure is so suggestive that it presents a substantial likelihood of misidentification. Simmons v. United States, 390 U.S. 377 (1968); accord Edwards, 538 So. 2d at 442. A two-prong test is used to determine the legality of an out-of-court identification: (1) Did the police employ unnecessarily suggestive procedures to obtain the identification; and (2) considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification? Coleman v. State, 610 So. 2d 1283, 1286 (Fla. 1992) (citing Neil).

Once the court determines that a pretrial identification procedure was impermissible suggestive, it is assumed that any in-court identification will be tainted. State v. Sepulvado, 362 So. 2d 324, 326 (Fla. 1978); see e.g., M.J.S. v. State, 386 So. 2d 323 (Fla. 2d DCA 1980). Before the in-court identification is excluded, however, the state must have an opportunity to show that the identification is reliable. Manson, 432 U.S. at 112-13; Neil v. Biggers, 409 U.S. at 199. Accordingly, in-court identification is admissible only if "found to be reliable and based solely upon

the witness' independent recollection of the offender at the time of the crime, uninfluenced by the intervening illegal confrontation." Edwards, 538 So. 2d at 442 (citations omitted).

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

Witness Pat Spurlock, who worked at Colony Hills Mobile Home Park, testified that a man called looking for someone named "Boggs" or "Rush." That afternoon, the man came into her office to get the address. At trial, Spurlock described him as 5'8" tall and 160 pounds, dressed like a hunter, wearing a baseball cap, glasses and mustache. (T. 512-14) At the time, Spurlock said the man was 60-65 years old. She could not remember whether he had a mustache. His hair had a little gray and a little curl. (T. 693)

Detective Wilber suggested that Spurlock sketch the man who was in her office. (R. 1849) When she went to the sheriff's office to do so, however, he told her she did not have to do the sketch because they had a suspect and were getting a picture from "up north." He said it was "a case of mistaken identity" and that they would show her a picture. (T. 517-18; R. 1850, 1852)

The first unnecessarily suggestive procedure was the photographic display prepared by Detective Linda Johnson Alland. She received an outdoor family photograph from "up north" depicting Boggs, his wife and granddaughter. (T. 690) She had Boggs' face enlarged. The resulting photo was grainy and unclear.[28] (T. 691)

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[28] In M.J.S. v. State, 386 So. 2d 323 (Fla. 2d DCA 1980), the police cut out the defendant's head from a photo, enlarged it, and pasted it on a different background leaving a corona effect around the head. The court reversed because of the suggestive pretrial procedure. In this case, Detective Alland made the same alterations except she left the original background with trees, making

Although Alland testified that she "did her best" to match photos with the one of Boggs, she looked no further than the sheriff's office. (R. 1841) The booking photographs had white backgrounds while Boggs' photograph had trees in the background. Unlike the other men depicted, Boggs wore a jacket over his shirt. The other men were in their twenties and thirties while Boggs appeared to be 60-65 years old. (T. 718) Boggs was the only older man wearing a jacket in a hunting-type setting with trees. (See State Exhibit 21)

The procedure was more suggestive because Detective Wilber had told Spurlock that the "suspect" was in the photo display. (T. 518) Pre-display statements by the police to the identifying witness that they have persons under suspicion hazard the integrity of the process. United States v. Allen, 497 F.2d 160, 163 (5th Cir. 1974). In State v. Classen, 590 P.2d 1198 (Ore. 1978), the court reversed, based in part on the officer's statement to the witness that the suspect was depicted in the photographic display. The court quoted the Supreme Court of Indiana as follows:

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

590 P.2d at 1205 (quoting from Sawyer v. State, 298 N.E.2d 440, 443 (Ind. 1973). Spurlock could easily pick out Boggs by the process of elimination. The other men were much younger than Boggs.[29]

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the photograph dissimilar to all the others.

[29] The man identified as Number 1 in the photo lineup looks about 25 years old. Number 2 appears to be 30-35 years old. The third man depicted looks 30-35 years old. His hair is fuller and

Moreover, Boggs' photograph was so different from the others that it would immediately draw her attention. It was clearly the one from "up north." Otherwise, Alland would not have included a blurry photo with trees. (See State Exhibit 21) Even then, Spurlock was only 75% certain of her identification. (R. 1842)

Even though Boggs was easily distinguishable from the others, Spurlock was only 75% certain that he was the man in her office. Uncertainty is an indicator that a witness has not retained the image of the person. United States v. Cueto, 611 F.2d 1056, 1064 (5th Cir. 1980). With the help of the sheriff's department which provided the picture to the press, and Detective Wilber who told her to watch the news to see if she picked the right man, the media confirmed Spurlock's suspicions. She saw the photo she picked on the television news and videotaped it. She kept a scrapbook of newspaper articles and photographs of Boggs. (R. 1854-59)

A few days later, Spurlock's identification was further aided by the news media. This time, she saw a different picture of Boggs in the newspaper, identifying him as the suspect. (R. 1846, 1868) Although she claimed that she was then 100% sure he was the man in her office, this identification was tainted by her previous viewing of Boggs' picture. He may have looked familiar because she had seen his photograph in the photo display and on television. Her certainty was probably heightened by the knowledge that she had tentatively picked the right suspect and he had now been arrested.

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his complexion darker than the others. He looks Hispanic. Number 4 is the oldest except for Boggs, and looks 35 to 38. Boggs is depicted as a 55 to 65-year-old man with hair resembling an "afro." He is wearing a jacket over his shirt. His eyebrows are full and bushy, unlike any other, except the man with the dark complexion.

By the time Spurlock went to Ohio to identify Boggs at the extradition hearing (the second unnecessarily suggestive procedure), her ability to distinguish between the man in her office and the man depicted in the photographs was negligible at best. Needless to say, when an identification is based upon a newspaper photo rather than the witness' perception, it should be excluded. People v. Barnett, 414 N.W.2d 378, 381 (Mich. App. 1986); People v. Prast, 319 N.W.2d 627, 635 (Mich. App. 1982). The same is true when identification is based on photos supplied by police.[30]

Before the hearing started, Spurlock sat near Detectives Linda Johnson Alland and Michael Coates. (R. 1881-82) Coates said Alland had a picture of Boggs which she showed the others. Boggs was brought in handcuffed to a black man and either Spurlock or Alland said, "That's him." (R. 1857, 1882-83) Boggs' appearance was different -- his hair was straighter and lighter and his mustache shaved. (R. 1872-73) The procedure was suggestive because no one else resembling Boggs was handcuffed. The photograph of Boggs was in front of Spurlock and in her mind.

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

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

(A) The opportunity of the witness to view the criminal at the time of the crime: Spurlock testified that the man came into

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[30] In Prast, the objectionable identifications were based on a newspaper photograph and there was no police misconduct. 319 N.W.2d at 636. In the instant case, the sheriff's office must have given the photo to the news media, because Wilber told Spurlock to watch the news to see if her identification was right. (R. 1854)

her office about 1:00 in the afternoon. She observed the man in her office for two to five minutes. (T. 512-14; R. 1831) She was talking on the telephone, however, while he waited. (R. 1862)

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

(C) The witness' prior description: Originally, Spurlock did not remember whether the man she saw had a mustache. (T. 693, R. 1831-33) In the photo display, Boggs had a mustache. When Boggs did not have a mustache at the extradition hearing, Spurlock noted that he had shaved it off. At trial, Spurlock testified that the man had a mustache.[31] (T. 512-14) Spurlock's trial "recollection" of the mustache was obviously based on Boggs' photograph.

(D) The level of certainty demonstrated by the witness at the identification procedure: Although Spurlock was only 75% sure originally, she became 100% certain when she saw a second photograph of Boggs in the newspaper. By this time, her identification was tainted from the first photo which the media identified as that of the suspect. The most positive witness is not always the most reliable. United States v. Johnson, 452 F.2d 1363 (D.C. Cir. 1971).

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[31] In United States v. Dailey, 524 F.2d 911, 914 (8th Cir. 1975), the defendant's photo on the day of the crime depicted him with a mustache. Although the witness signed a statement that the gunman did not have a mustache, he "inexplicably" changed his story at trial, recalling a mustache. The conviction was reversed.

(E) The length of time between the crime and identification: The length of time between Spurlock's view of the man in her office and her first identification of his photo on February 13, 1988, when she was 75% certain, was three days. She did not identify him in person until the May 9, 1988, extradition hearing, after she had seen newspaper and television photos. Her trial identification was four months after that, and seven months after she saw the man in her office. Her identification at this trial was six years later.

"The influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor -- perhaps it is responsible for more such errors than all other factors combined." United States v. Wade, 388 U.S. 218 229 (1967). Had Spurlock not been aided by suggestive pretrial identification, it is unlikely she could have identified Boggs. That she changed her testimony at trial, remembering that the man had a mustache, shows that the image in her mind was of Boggs' photo. Thus, there was a substantial likelihood of mistaken identification. Without her identification, Boggs could not have been arrested, nor his house searched. The State would have had no case. Thus, the error was not harmless.

ISSUE VI

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

Prior to Boggs' first trial, defense counsel filed a motion to suppress the evidence seized in the search of Boggs' house, which Judge Cobb denied at a pretrial evidentiary hearing. (R. 1897-1914)

Counsel alleged that the affidavit on which the search warrant was procured did not state sufficient probable cause to believe Boggs was engaged in the criminal activity alleged, or that the evidence to be seized could be found within Boggs' motor vehicle, boats, or residence. Judge Cobb denied the motion. (R. 1914) Although the issue was argued on appeal, this Court did not reach it. (R. 1977)

Prior to the second trial, defense counsel told Judge Swanson he had filed the motion to suppress attacking the sufficiency of the search warrant and the way it was obtained. He renewed his prior motion, and asked for a continuing objection. The judge said that, in the absence of new evidence, he found Judge Cobb's prior rulings to be "law in the case," and reaffirmed them. (T. 22-26)

At trial, defense counsel objected to the introduction of the affidavit, which contained hearsay, and the journal entry on the search warrant. The judge excluded the affidavit but refused to exclude the journal entry on the warrant itself, because it was part of the warrant.[32] Counsel also renewed his motion (made prior to Boggs' first trial) to suppress all tangible evidence seized. The judge denied it because Judge Cobb had ruled on it. (T. 843-47)

Resolution of this issue requires a two prong inquiry. This Court must determine (1) whether the affidavit submitted in support of the search warrant contained probable cause to support the magistrate's issuance of the warrant under the "totality of the circumstances" test adopted in Illinois v. Gates, 462 U.S. 213

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[32] The documents related to the search warrant are with the exhibits and are all marked as State's Exhibit ID "DD." Those which were admitted at trial are also marked as State Exhibit 25. Copies of the documents related to the search warrant are appended to the issue, to help clarify this confusing issue.

(1983). If not, the Court must determine (2) whether the evidence was admissible under the "good faith exception" to the exclusionary rule created in United States v. Leon, 468 U.S. 897 (1984).

(1) Probable Cause

Under the "totality of the circumstances test," the magistrate must decide whether, given all facts set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Illinois v. Gates, 462 U.S. at 233. An appellate court's review is limited to facts alleged within the "four corners" of the affidavit. Whiteley v. Warden, 401 U.S. 560, 565 n.8 (1971). In this case, "the four corners of the affidavit and warrant" showed no probable cause.

The search warrant was issued by a judge in Vermilion, Ohio, on February 15, 1988, upon the affidavit of Detective Roger Hoefs of the Pasco County Sheriff's Office. It specified, as items to be seized in the search, "all firearms, long black coat, black ski mask, black hat, and green short coat." The affidavit on the search warrant, signed by Hoefs, says nothing more than that, "the investigation reveals that John E. Boggs was in Florida on Thursday 2-11-88 when three people were shot with a .12 gauge shot gun and .22 caliber pistol." (See State Exhibit 25) That Boggs was in Florida when a shooting occurred is not probable cause.

The "Journal Entry" attached to the search warrant contains no probable cause but references Hoef's affidavit. Whether the reference is to the affidavit on the search warrant, a document called, "Affidavit and Journal Entry for Search Warrant," or the longer

affidavit, is unclear.[33] It seems most likely that it references the affidavit on the search warrant to which it is attached.

The longer affidavit signed by Hoefs is entitled "Affidavit in Support of Complaint for Arrest Warrant or Summons." (See appendix to issue) The copy in the record is certified as a true copy filed by the court clerk in Vermilion, Ohio, but contains no date stamp. The "Affidavit and Journal Entry for Search Warrant," to which it is attached, is also certified with no date stamp. The search warrant was stamped by the Municipal Court in Vermilion on February 16, 1988, and the attached journal entry was stamped as received by that office February 15, 1988. Because the documents do not reflect when they were filed, they may have been added later.

Whether the longer "arrest" affidavit was submitted to the judge is uncertain. No notation shows that it was part of the application for the warrant. It was not date stamped nor did the Ohio certification state that it was incorporated. (See appendix to this brief) It was not stapled to the search warrant.

Detective Roger Hoefs testified that he went to Ohio, met with the prosecutor there, and created the affidavit for the search warrant. Although Hoefs testified that he executed the affidavits in front of the judge, they are not signed by the judge as required by Ohio Criminal Rule 41(C). See State v. OK Sun Bean, 13 Ohio App. 3d 69, 468 N.E.2d 146, 150 (Ct. App. 1983). (R. 1901-02) He said they handed the judge all of the documents including the two-page

[33] That the trial judge excluded the longer affidavit because it contained hearsay is evidence that the affidavit was not sufficiently reliable for the issuance of a search warrant.

arrest affidavit.[34] (R. 1903-05)

It is clear that the affidavit included in the search warrant lacks probable cause. Even if the arrest affidavit was considered, it is insufficient. Facts were omitted, and those included were based on hearsay, unconfirmed information and conjecture. That Hoefs believed his statements to be true is not enough. The judge must be informed of the basis of his belief. See United States v. Ventresca, 380 U.S. 102, 118 (1965) (Douglas, J., dissenting).

The Short Affidavit

> The investigation reveals that John E. Boggs was in Florida on Thursday 2-11-88 when three people were shot with a 12 gauge shot gun and .22 caliber pistol.

(State Exhibit 25) (See copy appended to this issue).

"Investigation reveals" is not enough. The judge must know the source of the information. Moreover, that Boggs was in Florida when three people were shot is hardly enough to suggest that he committed the murder. Although the search warrant contains no further information, the "Affidavit and Journal Entry for Search Warrant, which may have been presented to the magistrate, includes a second line stating that John Boggs threatened to go to Florida and "blow Dean away." It does not tell who "Dean" is, when Boggs allegedly made the threat, or to whom. These two lines, without more, do not constitute probable cause for a valid search warrant.

The Two-Page Arrest Affidavit

The longer affidavit, marked as State's Exhibit ID "DD," and

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[34] Defense counsel pointed out that the two page affidavit was entitled "Affidavit in Support of Complaint for Arrest Warrant or Summons." Hoefs adamantly denied preparing the longer affidavit for the possible issuance of an Ohio arrest warrant, rather than for the search warrant. (R. 1905-06)

attached as an appendix to this issue, does not specify the source of Hoefs' knowledge of Boggs' threat against Dean Rush, allegedly made to Boggs' son. If Boggs' ex-wife provided the information, she was not a reliable source of information because she obviously wanted to get rid of Boggs. Even if the source were reliable, this threat was insufficient to constitute probable cause.

The second paragraph is no better. That Boggs' camper trailer was missing does not provide probable cause. The fifth paragraph is the only one that even arguably shows any cause for the search and this paragraph contains various false statements made, if not knowingly, at least with reckless disregard for the truth. It says that "they" learned, "during the course of the investigation," that "the defendant was at the office of the trailer park where the victims lived on 2-10-88 in the morning hours asking for his wife Gerry Boggs or Gerald Rush." Spurlock testified that the man was there in the afternoon, not the morning, and first asked on the phone for a "Boggs" or a "Rush," without specifying any first names. (R. 512-14) Thus, Hoefs was extremely careless and had little regard for the truth. Further, Hoefs did not "know" Boggs was at the trailer park. Although he stated that the park manager identified Boggs, he failed to note she was only 75% sure. (R. 519)

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

The final paragraph of the affidavit states that Boggs "then left Florida and returned to Ohio on 2-12-88 where he was seen

entering Vermilion, Ohio by Patrolman Sooy of the Vermilion Police Department." No one saw Boggs leave Florida or return to Ohio. Although Patrolman Sooy saw Boggs driving into Vermilion, he did not know whether he came from Florida or Ohio. (T. 809-13)

(2) The Good Faith Exception

In 1984, the Leon Court created the "good faith" exception to the exclusionary rule, permitting the use of evidence obtained when officers acted in reasonable reliance on a search warrant issued by a detached and neutral magistrate, although the search warrant was ultimately found not to be supported by probable cause. 468 U.S. at 916. Suppression is still appropriate, however, if the officers were reckless in preparing an affidavit or could not have harbored an objectively reasonable belief that probable cause existed. 468 U.S. at 926; see Franks v. Delaware, 438 U.S. 154 (1978) (inquiry required when false statement was included in affidavit intentionally or with reckless disregard for truth). Much of Hoefs' two-page affidavit (see appendix to this issue) is merely conjecture. If Hoefs did not intentionally provide misleading information, he was careless, and recklessly disregarded the truth.

Under the Leon "good faith" exception, a warrant must be suppressed if the magistrate was misled by information that the affiant knew was false or would have known was false except for his reckless disregard of the truth. Leon, 468 U.S. at 923. As noted above, some discrepancies were immaterial and indicated recklessness at best. The most distressing problems were Hoefs' failure to mention that Spurlock was only 75% certain Boggs was the man who came into her office, and his unsupported conclusion that Boggs was returning from Florida when he was seen entering Vermilion, Ohio.

"The problem is not what the affidavit said, but what it didn't say." Sotolongo v. State, 530 So. 2d 514, 515 (Fla. 2d DCA 1988). The reasoning of Franks v. Delaware, 438 U.S. 154 (1978), logically extends to material omissions from an affidavit. Id.; 2 W. LaFave, Search & Seizure § 4.4(b), at 194 (2d ed. 1978). Thus, the reviewing court should consider the affidavit as though the omitted facts were included. The Sotolongo court found that if the omitted facts had been included, there would have been no probable cause. Thus, the fruits of the search were excluded.

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

A law enforcement officer does not manifest objective good faith by relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render belief in its existence unreasonable. Leon, 468 U.S. at 923. If Hoefs was misled by other officers, this was no excuse. Just as officers may act on their collective knowledge, they are restrained by their collective ignorance. See United States v. Hensley, 469 U.S. 221 (1985).

Because Hoefs knowingly or recklessly misled the magistrate, the warrant should be found void and the evidence suppressed. If the long affidavit was not shown to the judge, which is probable, there was not even a pretext of probable cause.

ISSUE VII

THE TRIAL COURT ERRED BY FAILING TO GRANT A MISTRIAL WHEN A WITNESS MENTIONED THAT SHE WENT TO OHIO FOR BOGGS' EXTRADITION HEARING.

Defense counsel objected when Detective Linda Johnson Alland testified that she went to Ohio for Boggs' extradition hearing. The judge denied his motion for mistrial but offered to give a curative instruction. Defense counsel said that such an instruction would only emphasize the error, but he was required to request one to preserve the issue for appeal. Thus, the judge told the jurors to "strike from your minds totally the last response given by the officer." He told the jury that the reason the police officers went to Ohio was not relevant. (T. 704-07)

In Dailey v. State, 594 So. 2d 254 (Fla. 1991), this Court found that the fact that Dailey was living in California many months after the murder and exercised his right to resist extradition had no bearing on the issues of flight or consciousness of guilt; thus, the evidence should have been excluded. Evidence that Boggs fought extradition did not show consciousness of guilt, nor was it evidence of flight, because he lived in Ohio. Moreover, this Court held that "flight alone is no more consistent with guilt than innocence." Merritt v. State, 523 So. 2d 573, 574 (Fla. 1988). In Fenelon v. State, 594 So. 2d 292 (Fla. 1992), this Court held that it is error for the judge to even instruct the jury on flight.

The state may not penalize a defendant for exercising a legal right by using his exercise of that right as evidence against him at trial. See Doyle v. Ohio, 426 U.S. 610 (1976). In Wainwright v. Greenfield, 474 U.S. 284, 295 (1986), the Court found that Doyle barred the state from using evidence that the defendant exercised

his right to remain silent to rebut an insanity defense because Miranda warnings carry an implied promise that "silence will carry no penalty." If it is error to use a defendant's exercise of his right to remain silent against him, it is error to so use the exercise of his right not to waive extradition.

The judge's curative instruction made matters worse. It told the jurors that the reason the detectives went to Ohio was what they were supposed to forget. This undoubtedly caused the jurors to reflect on the significance of the extradition. If they were further convinced of Boggs' guilt because he fought extradition, or considered it a judicial determination of guilt, the error was not harmless. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986).

Even if this error was insufficient to mandate reversal, the cumulative effect of a number of errors can substantially prejudice a defendant, thus warranting a new trial. See Amos v. State, 618 So. 2d 157, 161 (Fla. 1993) (although each error might be harmless alone, Court unable to find errors harmless when considered collectively); Garron v. State, 528 So. 2d 353 (Fla. 1988). "While a defendant is not entitled to an error-free trial, he must not be subjected to a trial with error compounded upon error." Perkins v. State, 349 So. 2d 776, 778 (Fla. 2d DCA 1977).

ISSUE VIII

THE TRIAL COURT DENIED BOGGS THE RIGHT TO PRESENT A DEFENSE BY EXCLUDING EXTREMELY RELEVANT EVIDENCE CONCERNING A REQUEST BY AN UNIDENTIFIED MAN TO DELIVER AN UNFINISHED MESSAGE TO ONE OF THE VICTIMS AT THE HOSPITAL ON THE DAY OF THE CRIMES.

The right to develop and present a theory of defense is a fundamental constitutional right. Chambers v. Mississippi, 410

U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967). In Chambers, 410 U.S. at 294-97, the United States Supreme Court reversed because the appellant's right to confront and cross-examine witnesses, and to call witnesses in his behalf, were denied. In this case, the judge's exclusion of evidence that someone else may have committed the crime violated Boggs' right to present a defense and to call and cross-examine witnesses.

Just prior to trial, defense counsel told the judge that, a few days earlier, he received police reports from the prosecutor.[35] He found a police report entitled "suspicious incident." The report reflected that Melissa Williams, from East Pasco Medical Center, had contacted the sheriff to report that she was approached by an unknown white male at 6:00 p.m., on the day of the shootings. The man said he needed to see Betsy Ritchie. He said, "I have a message that needs to be completed. I haven't completed it yet. She doesn't know me, but I need to speak to her." (T. 1-6)

Defense counsel noted that the State withheld information concerning this incident for five years. The State also withheld information that two federal marshals visited Ritchie at the hospital to ask whether she or her mother had ever been in a witness protection program. (T. 921-33) Defense counsel tried to call Melissa Williams at the phone numbers on the report, and contacted persons at East Pasco Medical Center and at her last address, but were unable to locate her. If he had been given this information in 1988, he would have interviewed Williams (T. 6-8)

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[35] The defense was not entitled to police reports at the time of the first trial, but since then the discovery rules had changed; thus, the judge granted his motion to compel police reports. (T. 1)

Defense counsel had reviewed old depositions and found a reference in Linda Johnson Alland's deposition to a report that someone tried to visit Betsy Ritchie at the hospital. On March 2, 1988, Alland took a photo pack containing Boggs' photo to the hospital and the woman said the person who was at the hospital was not in the photo pack. Alland did not mention in her deposition that this was a suspicious incident or repeat the statement about an unfinished message to defense counsel. (T. 10)

This evidence was extremely important because the incident occurred on February 11th at 6:00 p.m. and Boggs was seen in Ohio on February 12th between 9:00 and 10:00 a.m. He could not have driven to Ohio in fifteen or sixteen hours. Moreover, Williams described the man as in his thirties with blonde/brown shoulder length hair. Boggs was nearly sixty with short curly hair. Moreover, Williams did not identify Boggs from the photo display.

Defense counsel asked the judge to: (1) dismiss the case because it was too late and the prejudice too great; or (2) grant a continuance of three to four weeks for defense counsel to locate and interview Melissa Williams; or, (3) if the defense should have discovered this evidence despite the State's failure to provide it in discovery, to grant relief based on Boggs' right to effective assistance of counsel. The judge denied the motion. (T. 12, 17)

Boggs' counsel attempted to get this information into evidence but was thwarted by the prosecutor and judge. He wanted to ask Linda Johnson Alland about the incident. The judge disallowed the questions as hearsay, despite having allowed the prosecutor to ask her about information she received from other detectives, such as what Spurlock told them. (T. 726-28)

Over defense objection, the judge allowed the State to recall Betsy Ritchie, after she had testified and was permitted to sit in on the proceedings, to rebut cross-examination concerning the visit by federal marshals. Ritchie testified that she was admitted to the hospital as Betsy Ritchie but had her name changed to Betsy Ross during the night while still in the emergency room. She had two visitors who identified themselves as federal agents and asked if she or her mother had ever been in a witness protection program or testified in federal court. (T. 926-33) The judge refused to allow the defense to ask her whether she told the staff that she was afraid whoever did this would come after her to finish the job, or whether she was told about a suspicious individual who inquired about her. When the defense asked to proffer the testimony, the judge said, "No, you will not. Objection granted." (T. 933-35)

At the end of the State's case, defense counsel asked to put on the record that he had intended to call Melissa Williams to testify, if he had been allowed to do so. He was offering the evidence for the truth of the matter and, without Ms. Williams, could not present it. The judge said, "so noted." (T. 1053)

At the motion for new trial hearing, defense counsel told the judge that they found Melissa Williams after the trial. She lived in Dade City, Florida, about ten minutes away. She provided an affidavit reiterating the statements in the police report. (R. 2246 -47) The defense made a diligent effort to find Williams and would have found her had the court granted a continuance. (R. 2590-92)

The judge said the statement by Melissa Williams would have been highly speculative and he would not have admitted it. He noted that the man could have been some unrelated person trying to

muddy the waters, or nothing more than a "deranged person." (T. 2617-18) The evidence was not speculative at all. The incident occurred so soon after the shootings that it was unlikely that an unrelated party or a deranged man would have heard about the crime.

"The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth." Astrachan v. State, 28 So. 2d 874, 875 (Fla. 1947). Applying this rule to the case at hand, the judge erred by excluding testimony that would have assisted the jury in determining the truth. See Guzman v. State, 644 So. 2d 996, 1000 (Fla. 1994) (judges should be extremely cautious when denying defendants the opportunity to present evidence on their behalf, especially where defendant on trial for his life); Rivera v. State, 561 So. 2d 536 (Fla. 1990); Moreno v. State, 418 So. 2d 1223, 1225 (Fla. 3d DCA 1982) (where evidence tends, even indirectly, to prove defendant's innocence, it is error to deny its admission),

A defendant may give evidence concerning a third party's involvement with the crime so long as the evidence directly connects the third party with the crime. Cikora v. Wainwright, 661 F. Supp. 813, 824 (S.D. Fla. 1987); Barnes v. State, 415 So. 2d 1280, 1285 (Fla. 1982) (Grimes, J., dissenting); Lindsay v. State, 68 So. 932 (Fla. 1915). The man who attempted to visit Betsy Ritchie "to complete a message" was clearly connected to the crime. Ritchie lived in Illinois and no evidence suggests she had any friends or family in the area other than her mother. The man inquired about

Ritchie on the day of the crime, before the newspapers could have published the story. The man said the sheriff told him Ritchie was there. (R. 2246-47) Ritchie originally suggested several possible suspects; perhaps this man was interviewed by the sheriff.

Again, the judge had several options, but chose none. His first and best choice was to allow the defense a short continuance to locate Melissa Williams. If he did not want to delay the trial, he could have allowed the defense to introduce the evidence through Detective Alland and Betsy Ritchie as part of the investigation. A third alternative was to grant the defense motion for new trial.

The trial judge compounded the problem by refusing to allow the defense to proffer the testimony of Betsy Ritchie. (T. 935) The judge may not refuse to allow a proffer necessary to preserve an issue. Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). Because this Court does not know what Ritchie's testimony would have been, it cannot find the error harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18 (1967); B.F.K. v. State, 614 So. 2d 1167 (Fla. 2d DCA 1993). Had Boggs been permitted to put this crucial evidence before the jurors, they might have found reasonable doubt that he committed the crimes. Thus, the error was not harmless. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

ISSUE IX

THE TRIAL JUDGE ERRED BY FAILING TO GRANT A CONTINUANCE UNTIL PAT CANTER, AND AMBER AND BRENDA BOGGS COULD COME FROM OHIO TO TESTIFY, AND ERRED BY ALLOWING THE STATE TO INTRODUCE PAT CANTER'S TESTIMONY FROM THE PRIOR TRIAL.

At a motion hearing January 19, 1994, defense counsel objected to the reading of state witness Pat Canter's testimony from Boggs'

prior trial, in lieu of live testimony, because she had just had a C-section. He asked for a continuance until Canter could testify in person. Judge Swanson said, "justice delayed is justice denied," and that he found it outrageous that this trial had gone on for so long -- five or six years. The judge said the case was going to trial next week no matter what. (R. 2325-26)

Just prior to trial, the prosecutor moved to introduce Pat Canter's testimony from the prior trial. He had a letter from her doctor that she delivered a baby January 11 and should not travel until after her post-partum depression. Defense counsel argued that the State should put on a witness to authenticate the letter and its contents. The judge denied the objection and said he would allow the Ms. Canter's entire testimony from the previous trial. (T. 35-36) At trial, counsel renewed his objection to the introduction of Canter's testimony from the first trial. (T. 754-55)

On the morning of penalty phase, defense counsel informed the court that Boggs' daughters, Brenda [Hartle] and Amber Boggs, were at the Cleveland, Ohio, airport with tickets in hand but their flight was canceled due to inclement weather. Thus, he moved to continue the penalty phase. The court denied the motion. (T. 1181-82) Defense counsel then asked to read Amber's prior testimony into the record, and the State did not object. Defense counsel said he would prefer to have her testify in person. The judge said he recognized that, and would find her unavailable and admit her prior testimony. Counsel said he did not want this to detract from his motion to continue until the witnesses arrived. (T. 1183)

Defense counsel requested that the jury be advised that Amber could not be present because her flight was canceled. The judge

refused but told the jurors that the reason for her absence was unimportant for them to know and beyond her control. (T. 1223-24)

Although the granting of a motion for continuance is generally within the sound discretion of the trial court, Jent v. State, 408 So. 2d 1024 (Fla. 1981), when the defendant is denied due process or effective assistance of counsel, reversal is mandated. See e.g., McDermott v. State, 383 So. 2d 712 (Fla. 3d DCA 1980) (allowed 55 day continuance to procure out-of-state witness). Because Canter's testimony was not crucial to the State's case, it should have been excluded. The testimony of Boggs' daughters is another story.

In Wike v. State, 596 So. 2d 1020, 1025 (Fla. 1992), this Court reversed because the trial judge refused to grant a one-week continuance prior to commencing the penalty phase, for the defense to procure three witnesses. Because the witnesses would have provided relevant information, the court's failure to grant a continuance was an abuse of discretion. The Court emphasized that the continuance was only for a short time and for a specific purpose.

The same is true in this case. The defense needed only a short time to procure live testimony. The Cleveland airport would not have been closed for more than a day or two, certainly, after which Amber and Brenda could have testified. Their testimony was very important to Boggs. He made an unintelligible verbalization which indicated his agitation over the matter. (T. 1183) The jury did not get to hear Brenda testify at all, and heard only Amber's prior testimony. The male defense attorney who read her testimony would not have conveyed the feeling that Amber Boggs conveyed. Also, she might have added more information at this trial. Third, despite the judge's instruction, the jurors may have believed that Boggs'

trial was not important enough for Amber to testify in person. Had the judge told them the airport was closed, it would have helped.

Boggs was facing the death penalty when the judge refused to continue the penalty phase for a day or two so that Boggs' two daughters could testify at his penalty phase. "Haste has no place in a proceeding in which a person may be sentenced to death." Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990).

* * * * *

The subject of former testimony is addressed in Florida Rule of Criminal Procedure 3.640(b), as follows:

> (b) Witnesses and Former Testimony at New Trial. The testimony given during the former trial may not be read in evidence at the new trial unless it is that of a witness who at the time of the new trial is absent from the state, mentally incompetent to be a witness, physically unable to appear and testify, or dead, in which event the evidence of such witness on the former trial may be read in evidence at the new trial as the same was taken and transcribed by the court reporter. Before the introduction of the evidence of an absent witness, the party introducing the evidence must show due diligence in attempting to procure the attendance of witnesses at the trial and must show that the witness is not absent by consent or connivance of that party. . . .

The burden is upon the party seeking to use the former testimony to demonstrate the unavailability of the witness. Jackson v. State, 575 So. 2d 181 (Fla. 1991). Florida Rule of Criminal Procedure 3.640(b) requires that the party introducing former testimony show due diligence in attempting to procure the attendance of witnesses.

"[A] witness is not 'unavailable' for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." Ohio v. Roberts, 448 U.S. 56, 74 (1980). Furthermore, "if there is a possibility, albeit remote, that affirmative measures

might produce the declarant, the obligation of good faith may demand their effectuation." Id. In this case, the prosecutor and the judge knew before the trial commenced that Canter would not be available to testify, and made no effort to arrange the timing of the trial to include her testimony.

It is questionable whether Canter's prior testimony qualified as admissible "former testimony." Section 90.804(2)(a), Florida Statutes (1993), provides for admission of prior testimony by an unavailable witness if the party against whom the testimony is offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." While the defense had an opportunity to cross-examine Canter when Boggs was tried before, they were not prepared for the prior trial because Judge Cobb refused to grant a continuance based on Boggs' demand for a speedy trial; thus, they were denied the opportunity to adequately cross-examine Canter at that time.[36]

The judge had several options, but chose none. He could have asked the prosecutor to contact Canter's doctor to find out when she would be able to travel. Alternatively, he could have excluded the testimony, because it was cumulative. Detective Alland and Gerry Boggs also testified about Canter's call to warn Gerry that Boggs' van was missing. Canter's only other testimony concerned Boggs' alleged threat against his wife and children which should have been excluded,[37] and Gerry also testified about this threat.

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[36] The defense was unable to depose 22 state witnesses prior to the first trial, due to lack of time to prepare. (R. 83)

[37] Over defense objection, the judge allowed Canter's prior testimony that, while she was talking with Gerry on the phone, Gerry put the phone down so Canter could hear Boggs. He allegedly

The court's denial of the defense motions for continuance was not harmless. Boggs had no way to vindicate his right to confront and cross-examine the witness when Canter testified by way of a written transcript. See Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989) (no opportunity to confront and cross-examine witness who "testified" via tape recording). The reading of Amber Boggs' prior testimony did not replace the live testimony of Boggs' two daughters. The court deprived Boggs of his rights to due process and confrontation under the Fifth and Sixth Amendments to the United States Constitution and Article I of Florida's Constitution.

ISSUE X

THE TRIAL JUDGE ERRED BY REFUSING TO ALLOW GERRY BOGGS TO TESTIFY THAT SHE BELIEVED JOHN BOGGS COULD TELETRANSPORT HIMSELF, AND DID SO.

Gerry Boggs said on deposition that John Boggs was able to teletransport his body. She said he teletransported himself to visit his mother and aunt while in Ohio. She had a feeling that, while Boggs was at the Pasco County Detention Center in 1988, he teletransported himself to her house and knocked on the door. The prosecutor objected to this evidence and, despite Defense counsel's argument that it went to Gerry Boggs' credibility, the judge found it totally irrelevant, and excluded it. (T. 785-87)

The evidence was relevant on two grounds. First, it impeached Gerry Boggs' credibility. Second, if Boggs believed he could tele-

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threatened to kill Gerry, the kids, the grandchild and himself, on Christmas day, 1987. (T. 730-32, 739-40) The evidence was not relevant because Boggs did not kill anyone Christmas day, and any probative value was outweighed by prejudice because the threat included children. The only purpose of the threat was to demonstrate Boggs' bad character.

transport his body, it indicated Boggs had mental problems, and may have been incompetent or insane. The judge should have considered this evidence in his ongoing duty to ascertain Boggs' competency.

All relevant evidence is admissible, unless prohibited by law. § 90.402, Fla. Stat. (1993). The judge nor the prosecutor cited any law excluding this evidence. Impeachment evidence is relevant. United States v. Bagley, 473 So. 2d 667 (1985). An abuse of discretion in curtailing cross-examination of a key state witness regarding matters germane to his or her testimony and plausibly relevant to the defense may "easily constitute reversible error," especially in a capital case. Coxwell v. State, 361 So. 2d 148, 152 (Fla. 1978). The judge erred by precluding cross-examination on an issue that affected the credibility of a witness.

As explained in DiGuilio, 491 So. 2d at 1135 (Fla. 1986), the harmless error test places the burden on the state to prove beyond a reasonable doubt the error did not contribute to the verdict. The United States Supreme Court accorded special recognition to the harmfulness of any curtailment of the right to effective cross-examination, stating that it "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Davis v. Alaska, 415 U.S. 308, 318 (1974).

ISSUE XI

THE TRIAL JUDGE ERRED BY DENYING THE DEFENSE MOTION FOR MISTRIAL BASED ON THE PROSECUTOR'S REMARKS AT A BENCH CONFERENCE.

During a bench conference, the prosecutor said loudly, "The last time we tried this case. . . " Defense counsel requested a mistrial because he believed that the jury could hear him. Defense

counsel requested that the judge poll the jury to see if any of the jurors overheard any of the conversation. The judge refused and denied the motion for mistrial. (T. 820-211)

This was not the first time the prosecutor's remarks may have been overheard. At and earlier bench conference, he said: "The situation we're faced with is what I have determined to be -- or yelled about being a malingerer who is sitting in court disheveled and in a wheelchair that he doesn't need." Defense counsel said he thought the jury could hear him. (T. 114) He later noted that the jury may have overheard the prosecutor say the defense was asking the court to perpetrate fraud on the jury. (T. 926-27)

Every case tried under our judicial system must be decided only upon evidence and argument in open court and not on outside influence. Patterson v. Colorado, 205 U.S. 454 (1907). If there is reasonable cause to conclude that the jury was affected by an unlawful cause, a new trial is appropriate. Florida Publishing Company v. Copeland, 89 So. 2d 18, 20 (Fla. 1956). Through our system of law, we have continuously endeavored to prevent even the possibility of unfairness. In re Murchison, 349 U.S. 133 (1955). There is a reasonable probability that the jury heard the prosecutor's remarks, which included extrajudicial evidence, and that it contributed to the verdict. See Chapman, 386 U.S. 18.

ISSUE XII

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

Defense counsel moved for a judgment of acquittal based on circumstantial evidence. (T. 1008-10) The only concrete evidence that tied Boggs to the crimes was the ballistics evidence. Al-

though the prosecutor introduced evidence that bullets from the crime were fired from Boggs' guns, he failed to show (1) chain of custody, or (2) that Boggs used the guns to kill the victims.

The State failed to show when the firearms were last in Boggs' possession. Defense counsel suggested a reasonable hypothesis of innocence -- that Boggs did not leave Ohio, and that the firearms were removed from his house and used by someone else. No one saw Boggs carry the firearms into his Ohio house, although he was under surveillance after he was seen entering Vermilion. During the hour between Boggs' arrest and the officers' search, the house was not under surveillance. (T. 907-14) Someone could have planted the guns at that time. Boggs' fingerprints were not found on them.

The only other evidence that Boggs was in Florida was Pat Spurlock's identification, of which she was only 75% certain, based on a clearly suggestive photo display. (See Issue V, supra.) Photos of tire tracks found at the entrance to the mobile home park did not match the tires on Boggs' vehicle. (T. 665) Boggs' boots and shoes did not match the footprint found. (T. 676) His fingerprints were not found in the trailer or on the crowbar. (T. 575, 625-26)

Various pellets and casing found at the scene were left in a locker in the evidence processing room from February 11 to 16, when they were taken into evidence by the property custodian. Only two persons had access to the processing room and only Detective Ferguson had a key to the locker, to the best of his knowledge. (T. 588-92) Some of the ballistic evidence was taken to New Port Richey on February 12, 1988, and examined by a Sergeant Gill. The bags were not sealed then. They were sealed at some time between February 12 and February 16, 1988, when entered into evidence. The

bags were not marked when they were handled by others. These items were admitted into evidence over defense objection. (T. 599-602)

Chain of custody is especially important because, if bullets in unsealed bags were mixed with others, the crime lab expert may have compared the wrong bullets to those found at the crime scene. Moreover, Detective Hoefs sent the Ohio evidence back to Florida by federal express, and could not tell by looking at the shotgun shells whether they were the same ones he found during the search. Defense counsel objected to the introduction of these shells. (T. 861) Although there is no proof the evidence was tampered with, there is no proof it was not. Moreover, it was the only concrete evidence connecting Boggs to the crime.

Because the State failed to exclude a reasonable hypothesis of innocence, the court should have granted an acquittal.

ISSUE XIII

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON THE COLD, CALCULATED AND PREMEDITATED (CCP) AGGRAVATING FACTOR, WITHOUT A LIMITING DEFINITION, BECAUSE THE STATUTORY LANGUAGE IS UNCONSTITUTIONALLY VAGUE.

Defense counsel asked the court to define the cold, calculated and premeditated ("CCP") aggravator if he was going to give it over defense objection. Although defense counsel specifically asked the trial judge to define "pretense" because the term was too vague, he refused. (T. 1196-97) He said he had given the standard instructions for twenty years and would not change his instructions until this Court told him he had to do so. (T. 1291)

The weighing of an invalid aggravator violates the Eighth Amendment. Espinosa v. Florida, 505 U.S. ___ , 112 S. Ct. 2926, 120

L. Ed. 2d 854, 858 (1992). An aggravator is invalid if it is so vague that it leaves the sentencer without sufficient guidance for determining the presence or absence of the factor. When the jury is instructed that it may consider a vague aggravator, it must be presumed that it found and weighed the invalid circumstance. Id.

Because the sentencing judge is required to give great weight to the jury's sentencing recommendation, the court then indirectly weighs the invalid circumstance. Espinosa, 120 L.Ed. 2d at 859. The result is error because it creates the potential for arbitrariness in imposing the death penalty. Id. The point of Espinosa is that the judge must inform the jury of the limiting construction of an otherwise vague aggravator, and that failure to do so renders the sentencing arbitrary and unreliable. See also Hitchcock v. State, 614 So. 2d 483 (Fla. 1993) (remanded for new penalty phase because court gave erroneous "heinous, atrocious or cruel" instruction).

In Jackson v. State, 648 So. 2d 85, 87-88 (Fla. 1994), this Court cited Espinosa, ruling that the "cold, calculated and premeditated" jury instruction which simply repeats the language of the statute is unconstitutionally vague because it does not inform the jury of the limiting construction this Court has given the CCP factor. In Jackson, this Court recognized that, under Florida's sentencing scheme which requires that the judge give great weight to the jury's recommendation, "the trial court indirectly weighed the invalid aggravator that we must presume the jury found." 648 So. 2d at 87-88 (quoting from Espinosa). Because the indirect weighing of an invalid aggravator created the same potential for arbitrariness as the direct weighing thereof, the result was error.

The Jackson Court barred claims that the CCP instruction was

unconstitutionally vague unless a specific objection was made at trial and pursued on appeal. Id. at S217; see also Sochor v. State, 619 So. 2d 285, 290-91 (Fla. 1993) (Espinosa claims barred unless defense objects to vagueness of instructions). Furthermore, this Court has distinguished an objection to the vagueness of the CCP aggravator from an objection to the jury instruction, although the language of both the statutory aggravator and the standard jury instruction is identical. Hodges v. State, 619 So. 2d 272 (1993).

In Castor v. State, 365 So. 2d 701, 703 (Fla. 1978), this Court stated that, to comply with the contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal. No magic words are necessary; it is enough that the record shows "clearly and unambiguously, that the request was made and that the trial court clearly understood the request and, just as clearly, denied that specific request." Thomas v. State, 419 So. 2d 634 at 636 (Fla. 1982). In this case, trial counsel objected at trial to the vagueness of the CCP jury instruction. He specifically requested that the judge define "pretense," which he described as unduly vague. He also requested that the judge give the instructions suggested by Judge Susan Shaeffer, in Pinellas County, for capital cases. (R. 1196-97) The judge said he would not give anything other than the standard instruction. (T. 1291) Thus, it is evident that he understood Boggs' vagueness objection directed to the jury instruction on the cold, calculated and premeditated aggravator. Defense counsel did everything required to preserve the question for appellate review.

This Court has held that the use of an unconstitutionally

vague instruction is harmless error when the facts of the case establish the presence of the factor under any definition of the terms and beyond a reasonable doubt. See Thompson v. State, 619 So. 2d 261, 267 (Fla. 1993); Hodges v. State, 619 So. 2d 272, 273 (Fla. 1993). This is not such a case. (See Issue XIV, infra) Under these facts, the court's failure to adequately inform the jurors of what they must find to apply the CCP aggravator clearly undermined the reliability of the jury's sentencing recommendation, which is a "critical factor" in determining whether the death penalty is imposed. It created an unacceptable risk of arbitrariness, thus violating Boggs' rights under the Eighth and Fourteenth amendments.

In conducting a harmless error analysis, the focus must be on where "the jury actually rested its verdict," "not whether, in a trial without the error, a guilty verdict would surely have been rendered." Sullivan v. Louisiana, 508 U.S. __, 113 S.Ct. 2078, 124 L.Ed. 2d 182, 189 (1993). Applying this to the case at bar, the jurors received no guidance as to what was necessary to establish the aggravator. They were not given the benefit of any of the definitions and limiting constructions which this Court has adopted to clarify the cold, calculated and premeditated aggravator. Thus, we can only guess whether the jury applied the aggravator properly. Cf. Godfrey v. Georgia, 446 U.S. 420 at 439 (1980).

ISSUE XIV

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON AND FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Over defense objection (T. 1303-04), the judge instructed the

jury on the cold, calculated, and premeditated ("CCP") aggravator. § 921.141(5), Fla. Stat. (1993). (R. 2232-33) In his written findings, the judge found and weighed the CCP aggravator. He set out a lengthy description of what he surmised was in Boggs' mind and the actions he believed Boggs took before and after committing the murders. (R. 2250-52) It seems likely that the judge put a lot more thought into Boggs' planning than Boggs did.[38]

If Boggs believed he was killing his ex-wife and her lover, as the judge apparently concluded, the shooting was the result of passionate obsession, which does not support a finding of CCP. Even if the theory of transferred intent applied, the crime would still be domestic and the result of a passionate obsession.[39]

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[38] The judge described how Boggs drove to Florida to do "something to his former wife." (R. 2250) His conclusion that Boggs had no reason to see his former wife except to do her harm was mere speculation. He may have planned to bed her to come home. He probably had no idea what he would do when he found her. Although the judge stated as fact that Boggs parked his auto at least one-fourth mile from what he thought was his former wife's house, no evidence supported this conjecture. Photos of tire tracks at that site did not match those of Boggs' camper. (T. 665) Boggs' shoes did not match the footprint found. (T. 676) The judge speculated that, "[c]learly [Boggs'] 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. . . ." (R. 2251) Surely, the judge could not read Boggs' mind.

The judge opined that, after returning to Ohio, Boggs tried to cover his tracks. "Because the shotgun was so distinctive, the Defendant may well have thought that hiding it made more sense than throwing it away where it could be found and traced to him." (R. 2251) What Boggs did after the crime has no bearing on CCP. Moreover, the judge's speculation as to why Boggs hid the guns rather than throwing them away is another example of his attempt to read Boggs' mind or perhaps to attribute his own reasoning to Boggs.

[39] This Court has rejected the theory of transferred intent for purposes of finding CCP. In Amoros v. State, 531 So. 2d 1256 (Fla. 1988), Amoros threatened his former girlfriend. While she was reporting the threat to the police, Amoros broke into her home and killed her current boyfriend. No evidence suggested Amoros knew the boyfriend was in the house. This Court rejected the theory that Amoros' threat to the girlfriend could be transferred to the

If Boggs realized he was killing the wrong people while he was doing it, as the prosecutor argued,[40] he obviously did not kill them "by careful plan or prearranged design." See Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). The shooting was spontaneous.

The judge obviously determined that Boggs did not know he was killing the wrong people; furthermore, he suggested that Boggs might have been morally justified had he killed his former wife. He stated that,

> By performing the murder 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.

(R. 2251) CCP is based on the perpetrator's intent; "calculated" and "premeditated" clearly reflect the perpetrator's planning. If Boggs thought he was killing his wife and her lover, and this was a pretense of moral justification, then he had the pretense even though he shot the wrong people. His intent was the same.

"Cold" and "calculated" are connected to "premeditated" by the

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

[40] There was no evidence that Boggs knew he was shooting the wrong people. Betsy Ritchie, 51, was 5'4" tall and 133 pounds. Her mother was several inches taller, and weighed about 130 pounds. (T. 406-08, 1206-08, 1298) Over defense objection, the judge allowed the prosecutor to bring Gerry Boggs into the courtroom to show that she was much shorter. The medical examiner said Harold Rush was 5'10" tall and about 220 pounds. (T. 1209-11) In 1988, Dean Rush, 51, was about 5'8" tall, and weighed 200 pounds. (T. 800, 804)

Betsy Ritchie hid on the floor behind a dresser during the shooting; her mother emerged and was shot. Boggs may have believed it was the same person. He had not seen Dean Rush for twenty years, and had only seen him twice then. He would not know that Harold Rush was not Dean Rush twenty years later. It was dark and he had little time to observe the occupants before he shot them.

connector "and" rather than "or" as in "heinous, atrocious, or cruel." See § 921.141(5)(h),(i) Fla. Stat. (1993). This means that, to establish this aggravator, the homicides must meet each element of the definition. See e.g., Farinas v. State, 569 So. 2d 425 (Fla. 1990) (crime not "calculated"); Christian v. State, 550 So. 2d 450 (Fla. 1989) (although murder was cold and calculated, defendant had pretense of legal justification). Accordingly, this aggravator may only be weighed if the murder was "cold, calculated, and without pretense of legal or moral justification." The defendant's state of mind is the essence of the cold, calculated, and premeditated aggravator. Dr. Szabo believed Boggs may have been out of contact with reality. He thought Boggs was probably unstable all his life and lapsed into psychoses. (R. 2372-75) The other doctors gave up in frustration because Boggs would not talk.

The CCP aggravator was intended to separate the ordinary defendant convicted of premeditated murder from the cold, vicious person who has not the least bit of excuse, not the least bit of moral explanation, not the least bit of emotional reason for the killing. It is reserved primarily for execution or contract murders or witness elimination killings. Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987). Boggs was not an unemotional person or cold-blooded killer; he had no significant criminal history in his nearly sixty years. John Boggs was a human being who worked hard and tried to be a good father and husband for thirty-one years. Unable to bear the loss of his wife to her old boyfriend, he mentally snapped and, overcome by emotion, did a terrible thing.

We do not know exactly what went through his mind. We do know, however, that he was not the same person he had been before

his wife left him. He lost weight, obsessed, and cried all the time after she told him she was divorcing him. (T. 1238-47) But for the fact that he mistakenly shot the wrong people, this crime was no different than other domestic crimes which this Court has found were not cold. See e.g., Santos v. State, 629 So. 2d 838 (Fla. 1994); White v. State, 616 So. 2d 21 (Fla. 1993); Maulden v. State, 617 So. 2d 298 (Fla. 1993); Douglas v. State, 575 So. 2d 165 (Fla. 1991); Farinas v. State, 569 So. 2d 425 (Fla. 1990); Garron v. State, 528 So. 2d 353 (Fla. 1988). Although perhaps the result seems worse because the victims were innocent, Boggs' intent was the same as if he had killed Gerry Boggs and Dean Rush.

In Santos v. State, 591 So. 2d 160 (Fla. 1991), on remand after resentencing, 629 So. 2d 838 (Fla. 1994), the defendant was obsessed with the woman with whom he had lived for many years, and threatened to kill her. He caught up with her on the street and killed the woman and their two-year-old daughter. Despite the fact that Santos bought a gun in advance and made death threats, and the "execution-style" manner of the homicides, this Court found that the homicides were not "cold," because they arose from a domestic dispute which severely deranged Santos. 591 So. 2d at 163.

Similarly, Boggs was deeply depressed over the loss of his wife to another man. Dr. Szabo suggested that Boggs may have lost contact with reality and lapsed into psychosis. (R. 2372, 2489) His mental condition may have been as serious as that of Santos. Boggs never talked to the mental health experts. The judge's opinion that Boggs was malingering was based on evidence that Boggs was able to talk, not that he was capable of rational thinking.

In Maulden, 616 So. 2d 298, the defendant awoke one night,

went to his ex-wife's apartment to ascertain she was there, drove to where he buried his gun, retrieved it, returned to his ex-wife's apartment, climbed through a window, and shot and killed his ex-wife and her lover who were sleeping. This Court found that Maulden's passionate obsession with his former wife, whom he loved very much, negated the otherwise cold aspect of the crime.

In Douglas, 575 So. 2d 165, this Court rejected the judge's finding that the murder was CCP despite the fact that the defendant procured a gun, hunted down his former girlfriend and her new husband and bludgeoned and shot the husband to death. Id. at 166. This Court characterized its finding in Douglas as follows:

> The sheer duration of this torturous conduct, in another context, might have supported beyond a reasonable doubt a conclusion that the killing met the standard for cold, calculated premeditation established in Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), i.e., that it was the product of a careful plan or prearranged design. The opinion in Douglas, however, rested on our conclusion that the killing arose from violent emotions brought on by the defendant's hatred and jealousy associated with the love triangle. In other words, the murder in Douglas was a classic crime of heated passion. It was not "cold" even though it may have appeared to be calculated. There was no deliberate plan formed through calm and cool reflection, see Rogers, only mad acts prompted by wild emotion.

Santos, 591 So. 2d at 163.

The evidence also fails to show a "careful plan" to murder the victims as required by Rogers, 511 So. 2d at 533. Boggs did not plan to kill the victims at all. Although he apparently intended to kill his ex-wife and perhaps her lover, he killed the victims by mistake. As in Santos, Douglas, and Maulden, Boggs formed no deliberate plan through calm cool reflection, but committed mad acts prompted by uncontrollable passion and emotion. The scenario of an emotionally devastated older man searching for his ex-wife,

breaking into the wrong trailer, and shooting everyone in sight is best described as "random," "tragic," and "pathetic."

"Heightened premeditation" requires more than the premeditation needed for a first-degree murder conviction. Douglas, 575 So. 2d at 166; Jent v. State, 408 So. 2d at 1032. It is not based on the amount of time the defendant thought about committing the murder before doing so. Even if time were significant in establishing this aggravator, no evidence shows when Boggs decided to commit the crimes. If Boggs decided to kill his ex-wife when he left Ohio, which is the worst case scenario, two days is not a long time to conceive of and carry out a shooting, when compared to contract killings or even "passionate obsession" killings that have been found not CCP. See e.g., Santos, 591 So. 2d 160 (threatened to kill victim two days before murder and prior thereto).

The judge stated that, if Boggs "had any moral justification for killing his former wife, he certainly had absolutely no moral justification for killing the persons he did." The judge applied the wrong standard. Only a pretense of justification is required. A pretense is "alleged or believed on slight grounds: an unwarranted assumption." Banda v. State, 536 So. 2d 221, 224 n.2 (Fla. 1988) (quoting Webster's Third New International Dictionary). It does not matter that Boggs killed the wrong people; his pretense of moral justification was that he believed he was killing his ex-wife and lover who had wronged him. A pretense of justification is "any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." 536 So. 2d at 224; see also Christian v. State, 550 So. 2d 450 (Fla. 1989). If Boggs

had a pretense of moral justification, it was based on his erroneous belief that he was shooting Gerry and Dean Rush.

Speculation regarding a defendant's unproven motives cannot support the "cold, calculated and premeditated" aggravating factor. Thompson v. State, 456 So. 2d 444 (Fla. 1984). The burden is on the state to prove, beyond a reasonable doubt, affirmative facts which establish the heightened degree of premeditation necessary to sustain this factor. Thompson, 456 So. 2d at 446; Peavy v. State, 442 So. 2d 200, 202 (Fla. 1983). See also Hamilton v. State, 547 So. 2d 630 (Fla. 1989) (CCP not supported by judge's speculation).

Most of the judge's "findings" were unsupported by evidence, as discussed earlier, and others constituted nonstatutory aggravating factors. For example, he wrote that:

> 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.

(R. 2252) He erred to the extent he based his finding of CCP on the attempted murder instead of the murders for which the death penalty was imposed. Also, his conclusion that Boggs was malingering has no bearing on the CCP aggravator. He concluded as follows:

> 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. 2252) Even if Boggs were malingering, what he did years after the shooting has no bearing on anything.

Boggs' ex-wife made a fool of him in front of their children and the community, and left him for her high school sweetheart. Despite her offenses, Boggs was passionately in love with his wife;

yet, he could do nothing to induce her to return to him. The result was rage and frustration. "A rage is inconsistent with the premeditated intent to kill someone." Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988). If Boggs killed Maeras and Rush because he was so angry with his ex-wife and her lover that he lost control, the CCP aggravator is not supported by the evidence. If Boggs realized at the last minute that he was in the wrong house and started shooting when Harold Rush yelled and threw a chair, the killings were not CCP because his intent was spontaneous.

The trial judge erroneously relied on the inapplicable CCP aggravator to impose the death penalty. Thus, the judge improperly applied Florida's death penalty law. This misapplication renders Boggs' sentence unconstitutional. See Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So. 2d 1 (Fla. 1973).

ISSUE XV

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

The trial judge found three aggravators -- the prior violent felony (attempted first-degree murder of Betsy Ritchie) aggravator, while engaged in a burglary aggravator, and the CCP aggravator. (R. 2249-52) Although the judge instructed on five mitigators,[41]

[41] The five mitigators were that (1) Boggs had no significant history of prior criminal activity; (2) the crime was committed while he was under the influence of extreme mental or emotional disturbance; (3) his capacity to appreciate the criminality of his conduct or conform it to the law was substantially impaired; (4) his age; and (5) any other aspect of his character or record or other circumstance of the offense. (R. 2233)

including the two statutory mental mitigators, he found only one -- that Boggs had no significant history of prior criminal activity. He found no non-statutory mitigation. (R. 2254) Unrebutted and believable testimony clearly established the "extreme mental and emotional disturbance" mitigator, and substantial nonstatutory mitigation. The same evidence showed that Boggs' capacity to appreciate the criminality of his conduct was impaired.[42]

In his written sentencing order, the judge's concluded that "there was no expert testimony presented at trial or at the penalty proceeding attesting to any mental or emotional disturbance suffered by Defendant when he committed these murders." Similarly, he rejected the "impaired capacity" mitigator because (1) no expert testimony was presented at trial or penalty phase attesting to Boggs' mental or emotional condition; and (2) the expert opinions of Drs. Szabo, DelBeato, Fellows and Gonzalez, in the court file, were "somewhat conflicting." He found, however, that "this court," through another judge, had previously ruled on Boggs' competency, and "this court" accepted that ruling. (R. 2253) The judge erred by failing to consider the entire record, including competency hearings; confusing mitigation and incompetency; and relying on another judge's competency finding to reject the mitigation.

In Hitchcock v. Dugger, 481 U.S. 393 (1987), and Skipper v. South Carolina, 476 U.S. 1 (1986), the Court held that the Eighth Amendment is violated if the sentencer refused to consider any

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[42] In Cheshire v. State, 568 So. 2d 908 (Fla. 1990), this Court found that the state may not restrict consideration of mitigation solely to "extreme" emotional disturbance. The same is true of "nonsubstantial" impaired capacity. Logic suggests that Boggs' extreme emotional disturbance impaired his capacity to appreciate the criminality of his actions and conform them to the law.

relevant mitigating evidence. In Farr v. State, 621 So. 2d 1368 (Fla. 1993), this Court found reversible error in the judge's failure to consider the psychiatric evaluation and presentence investigation in the record, despite the defendant's decision not to present a case in mitigation. The Farr Court noted that, "[w]e repeatedly have stated that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. Id. at 1369. Accordingly, the trial judge committed reversible error by failing to consider the entire record, including the competency hearings.

Although, in this case, the mental health experts disagreed concerning the nature of Boggs' problems, none suggested that he was not emotionally distressed over his divorce. Drs. Fellows, Gonzalez, and Szabo believed Boggs definitely had mental problems. Dr. Szabo thought he was psychotic. The staff at F.S.H. could not determine whether he was competent or malingering, but did not attempt to diagnose Boggs. One doctor suggested he might suffer from extreme denial and depression. (See SR 14) Dr. Delbeato, the only expert convinced that Boggs was malingering, diagnosed him as having borderline personality disorder with antisocial tendencies. Borderline personality "disorder" is a mental problem. Thus, even Dr. Delbeato believed Boggs had a mental problem. Had the court considered this evidence, he would have found mental mitigation.

The judge also confused competency with emotional and mental stability. Many defendants who are competent to stand trial are seriously mentally and emotionally impaired, and qualify for application of the mental mitigators. See e.g., Santos v. State, 629 So. 2d 838 (Fla. 1993); White v. State, 616 So. 2d 21 (1993);

Klokoc v. State, 589 So. 2d 219 (Fla. 1991). In Knowles v. State, 632 So. 2d 62 (Fla. 1993), this Court noted that, "[t]he rejection of Knowles' insanity and voluntary intoxication defenses does not preclude consideration of statutory and nonstatutory mental mitigation. Id. at 67; Morgan v. State, 639 So. 2d 6, 13-14 (Fla. 1994) (error to rely on jury verdict to reject factors in mitigation); Campbell v. State, 571 So.2d 415 (Fla. 1990) (finding of sanity does not eliminate consideration of mental mitigators). Judge Swanson erroneously relied on Judge Cobb's competency finding to reject the mental mitigation.

The judge's third and related error, was relying on the prior competency finding. Mitigation has nothing to do with whether Boggs was competent four months before trial. Dr. Meadows believed Boggs had serious mental problems and was incompetent when he saw Boggs in September, 1988, much closer to the time of the homicides. (R. 85) Judge Tepper found Boggs incompetent in 1992. (R. 2038-39) Even Judge Swanson found Boggs incompetent in 1991. (R. 2015-18)

Moreover, these doctors were not attempting to obtain information relevant to mitigation. None of them attempted to discuss Boggs emotional problems prior to and at the time of the homicides. Boggs' daughter and son testified that their father was not the same person they had known all their lives; that he was obsessed and cried all the time after his wife left him. This Court has held repeatedly that it is reversible error for the judge to refuse to consider unrebutted mitigation. See e.g., Morgan, 639 So. 2d at 13-14 (although trial judge found no mitigation, this Court found eight mitigators and reduced sentence to life); Knowles, 632 So. 2d at 67; Nibert v. State, 574 So. 2d 1059, 1962 (Fla. 1990).

The judge found that Boggs' feigned incompetence rebutted any mental or emotional distress, or other mitigation:

> Defendant's actions during the trial and pre-trial certainly suggest that he could be under extreme emotional distress, but in proceedings before the trial, this court found that his present condition is the result of malingering and feigned incompetence. Consequently, his present condition is more likely caused by his fear of death in the electric chair, rather than any remorse for his actions or emotional distress at the time of the killings.

(R. 2253) The judge's reasoning shows that he did not understand mitigation. That Boggs' condition (mutism?) was likely caused by fear of the death penalty is a grossly unfounded conclusion. His rejected alternative, that Boggs' "present condition" resulted from remorse, was not suggested by the defense. The judge's hypothesis shows that he based his death sentence partly on Boggs' alleged lack of remorse.[43] This Court has held repeatedly that lack of remorse cannot be considered in aggravation, nor used to rebut mitigation. See Nowitzki v. State, 572 So. 2d 1346, 1356 n.7 (Fla. 1990); Hill v. State, 549 So. 2d 179 (Fla. 1989); Trawick v. State, 473 So. 2d 1235 (Fla. 1985); cf. Dragovich v. State, 492 So. 2d 350 (Fla. 1986) (can't get inadmissible evidence in through back door); see also Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987); Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977) (unauthorized

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[43] The judge again cited Boggs' alleged lack of remorse and "feigned incompetence" to rebut nonstatutory mitigation:

> Defendant's total lack of remorse for killing the wrong people also suggests that his alleged good record as a parent, husband, provider, and veteran should not be used in mitigation, for a good person as Defendant is alleged to be should demonstrate at least some concern for his acts. Defendant's feigned incompetence shows him to be a selfish, ego-centered person without any concern for the harm he caused innocent people, which effectively rebuts his alleged good character as a mitigating circumstance. (R. 2254)

aggravator may tip scales in favor of death).[44]

In any event, Boggs' alleged lack of remorse and malingering do not rebut the mitigation. That Boggs did not admit to the crime or publicly express remorse does not mean he was not remorseful. He was not malingering or feigning incompetence at the time of the shootings. The mental distress described by his children was not erased by alleged malingering years later. Boggs did not feign incompetence prior to the first trial; he insisted he was competent and demanded a speedy trial. (R. 2104)

To make matters worse, Judge Swanson based his conclusions on Judge Cobb's competency finding, rather than his own reasoning. In Corbett v. State, 602 So. 2d 1240 (Fla. 1992), the trial judge was killed in a plane crash between the guilt and penalty phases. This Court held that a judge who did not preside at the penalty phase cannot sentence the defendant to death. Similarly, because Judge Swanson did not preside at Boggs' competency hearing, and did not consider the testimony from that hearing, he should not rely on Judge Cobb's determination that Boggs was malingering to reject the mitigation. Before rejecting mitigation, the judge is required to consider all evidence, and to make his own findings. He cannot rely on another's judge's opinion. See Farr, 621 So. 2d 1368.

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[44] The judge allowed the prosecutor to introduce the "witness elimination" aggravator through the back door, over the objection of defense counsel. (T. 1188-89) Det. Ferguson showed a drawing of the premises and where the bodies and bullets were found. (T. 1198-1201) The State brought Gerry Boggs into the courtroom during Betsy Ritchie's penalty phase testimony (repeating details of the crime) to demonstrate that Gerry was much shorter. (T. 1208-16) The prosecutor argued that the physical characteristics of Gerry Boggs, Betsy Ritchie, and Nigel Maeras, and Dean and Harold Rush, were vastly different, and that when Boggs found himself in the wrong house, he decided to kill the occupants anyway. (T. 1330-31)

Judge Swanson also found that Boggs did not suffer from mental or emotional disturbance because nothing in his divorce was so unusual as to cause such an extreme reaction, or to justify homicide. Of course, no divorce justifies homicide. Nevertheless, the trial judge was in no position to decide whether Boggs' divorce was "so unusual or odd" as to cause an extreme reaction. Evidence showed that Boggs cried all the time and obsessed over his wife. As Dr. Szabo suggested, Boggs may have been unstable all his life and this was the final straw. If Boggs reacted to his marital problems in an extreme fashion, it makes no difference whether his reaction was rational. The result was extreme mental and emotional disturbance -- an established mitigator.[45]

Despite the testimony of Boggs' children and other defense evidence, the trial judge found no nonstatutory mitigation.[46] He said that the evidence that Boggs was a good husband for 31 years,

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[45] The judge concluded that "the long drive from Ohio to Florida and the phone calls made by Defendant once in Florida are not the actions of an extremely emotionally disturbed person." (R. 2252) An 18-hour drive to seek violent revenge is not a rational reaction to divorce, nor is a phone call during which the caller says only, "I seek, I seek, I seek." Gerry certainly did not think it was normal behavior because she called the sheriff. (R. 763-65)

[46] Defense counsel submitted as mitigation that Boggs (1) was a caring parent; (2) suffering from depression; (3) suffering emotional turmoil; (4) a good father; (5) committed the crime for emotional reasons; (6) had a good employment history; (7) was a good provider; and was in the military service. (T. 1356) This Court has found time and again that these factors are mitigating and must be considered by the judge in sentencing. See e.g., Parker v. State, 643 So. 2d 1032 (Fla. 1994) (capacity to form loving relationships with family); Harmon v. State, 527 So. 2d 182, 189 (Fla. 1988)(good father); Masterson v. State, 516 So. 2d 256 (Fla. 1987) (honorable military service); Rogers, 511 So. 2d at 535 (good husband, father and provider); Kampff v. State, 371 So. 2d 1007, 1010 (Fla. 1979) (emotional disturbance).

a good provider, a good parent and a veteran, failed to show the "Defendant as a unique person deserving a special dispensation from the legal prohibition against homicide." (R. 2254) Obviously, the judge did not understand that the purpose of mitigation is not to justify homicide; otherwise, the accused would be found "not guilty by reason of special dispensation." It merely helps to tip the scales of the weighing process in favor of life rather than death.

The judge found no other mitigation, nor did he discuss any other mitigation urged by the defense. In Campbell, 571 So. 2d 415, and its progeny, this Court held that the judge must expressly evaluate in his written sentencing order every statutory and non-statutory mitigator proposed.[47] If the evidence reasonably establishes a given mitigator and the factor is mitigating in nature, the judge must weigh it against the aggravators. The written findings in this case are a classic example of the court's failure to follow these requirements. Because the judge failed to properly discuss and weigh the mitigators, the sentence must be vacated.

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[47] The judge denied defense requested instructions on specific nonstatutory mitigators. They were that Boggs (1) was a caring parent; (2) was suffering from depression; (3) was suffering from emotional turmoil; (4) was a good father; (5) committed the crime for emotional reasons; (6) had a good employment history; (7) was a good provider; and (8) had been in the military service (added to list orally). (T. 1308-11) When defense counsel argued that the jurors could base a life recommendation on the fact that Boggs was a good provider, worked at a steel mill for years, and was in the military service, the judge sustained the prosecutor's objection. (T. 1356) Thus, the jury was led to believe they could not consider established nonstatutory mitigation. Failure to properly inform the jury as to what it must consider in making a sentencing recommendation violates the Eighth Amendment. Hitchcock v. Dugger, 481 U.S. 393 (1987); Lockett v. Ohio, 438 U.S. 586 (1978); cf. Lucas v. State, 568 So. 2d 18 (Fla. 1990) (defense must identify nonstatutory mitigators). The "catchall" has a denigrating effect when contrasted with the specific instructions on aggravators.

ISSUE XVI

A SENTENCE OF DEATH IN THIS CASE IS DISPROPORTIONATE WHEN COMPARED TO OTHER CAPITAL CASES IN WHICH THIS COURT HAS REDUCED THE PENALTY TO LIFE IN PRISON.

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

The sentencing judge found three aggravators. One of them (CCP) was erroneously found. If this Court does not find CCP invalid, it should not be given much weight because of Boggs' mental state and his obsession with his ex-wife. That the homicide was committed during a burglary is not deserving of much weight because the burglary was incidental. That Boggs was convicted of another violent felony, is admittedly deserving of great weight. Nevertheless, it is insufficient to outweigh the extensive mitigation shown, which the judge should have considered and weighed.[48]

Although the judge instructed the jury on five mitigators, he found only that Boggs had no significant history of prior criminal

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[48] There are many cases in which the defendant's sentence was reduced to life where there was another victim killed or seriously injured in conjunction with the capital felony. See e.g., Santos, 629 So. 2d 838 (defendant shot former girlfriend and two-year-old daughter); Garron, 528 So. 2d 353 (defendant killed wife and her thirteen-year-old daughter); Holsworth v. State, 522 So. 2d 348 (Fla. 1988) (defendant burglarized home of mother and daughter and stabbed both, killing the daughter); Wilson v. State, 493 So. 2d 1019 (Fla. 1986) (defendant killed father and five-year-old nephew while trying to kill stepmother); Amazon v. State, 487 So. 2d 8 (Fla. 1986) (double murder of mother and eleven-year-old daughter).

activity. As discussed in Issue XV, supra, he erroneously failed to consider the evidence presented at the competency hearings which supported extensive mental mitigation. Also, Boggs' children's testimony at the penalty phase established extreme mental and emotional distress and extensive nonstatutory mitigation. Boggs' wife of 31 years left him for her high school sweetheart with whom she had an affair while married to Boggs. She went to Florida and made love with him in front of the Boggs' 21-year-old daughter. The Boggs children testified that Boggs was not the same father they had known. (T. 1244-46, 1258) The judge's reasoning was obviously clouded by his belief that Boggs was malingering, and by his frustration with what he believed to be a willful delay of justice. Had the judge correctly considered and weighed the evidence, he would have found both mental mitigators. The death penalty has been upheld in very few cases where both mental mitigators were found. See e.g, Santos v. State, 629 So. 2d 838 (Fla. 1994); Klokoc v. State, 589 So. 2d 219 (Fla. 1991).

This Court has traditionally found the death penalty proportionately unwarranted in murders committed because of "passionate obsession." See e.g., Santos, 629 So. 2d 838; White, 616 So. 2d 21; Klokoc, 589 So. 2d 219; Douglas, 575 So. 2d 165; Farinas, 569 So. 2d 425; Blakely v. State, 561 So. 2d 560 (Fla. 1990); Amoros v. State, 531 So. 2d 1256 (Fla. 1988); Garron, 528 So. 2d 353); Irizarry v. State, 496 So. 2d 822 (Fla. 1986); Wilson v. State, 493 So. 2d 1019 (Fla. 1986); Ross v. State, 474 So. 2d 1170 (Fla. 1985); Blair v. State, 406 So. 2d 1103, 1105 (Fla. 1981); Kampff v. State, 371 So. 2d 1007 (Fla. 1979). Although Boggs inadvertently shot the wrong people, the shooting was not "cold."

The defendant in Kampff v. State, 371 So. 2d 1007 (1979), had brooded over his divorce for three years and begged his wife to return to him. He finally bought a gun, and shot her five times the following day. This Court found the death penalty disproportionate and directed the judge to vacate the death sentence recommended by the jury and sentence Kampff to life. Id. at 1010.

In Irizarry v. State, 496 So. 2d 822 (Fla. 1986), the defendant murdered his ex-wife with a machete and attempted to murder her lover. The judge found four aggravators and two mitigators. On appeal, this Court found that the jury may have reasonably believed that Irizarry's crimes resulted from a passionate obsession, adding that "the jury recommendation of life imprisonment is consistent with cases involving similar circumstances." 496 So. 2d at 825.

In Blair v. State, 406 So. 2d 1103 (Fla. 1981), Blair decided to murder his wife, apparently because she accused him of making advances toward her daughter. He purchased a weapon, had his son dig a grave in the yard, and arranged for the children to be gone. He killed his wife and buried her in the backyard during the night. The jury recommended death. Nevertheless, this Court found death disproportionate and remanded for a life sentence. Id. at 1109.

Even if this Court should find the CCP aggravator applicable (see Issue XIV, supra), the death penalty is not warranted under the facts of this case. In Klokoc v. State, 589 So. 2d 219 (Fla. 1991), which somewhat resembles this case, the defendant also suffered from mental problems and was obsessed with the return of his estranged wife. He tried to find her through their grown children. He threatened to kill the children if he could not find her. One night, he fatally shot their daughter while she slept. Id.

The trial judge found that the crime was cold, calculated and premeditated because the killing was "a dispassionate and calm execution of the victim to achieve emotional gain for Defendant in knowing he had and would hurt his estranged wife . . . . " Id. Although this Court found that the facts justified the finding of "CCP," it still found the death penalty proportionately unwarranted. The killing in Klokoc, as in this case, is somewhat different than the usual domestic situation. Rather than killing his wife, with whom he was displeased, Klokoc killed his daughter to spite his wife. In this case, Boggs also killed someone other than the wife with whom he was displeased. Unlike Klockoc, however, he did it by mistake. Here, as in Klokoc, the substantial mitigation clearly outweighed the aggravators, making death disproportionate.

Boggs' moral culpability is simply not great enough to deserve a sentence of death. His uncontrolled rampage shows a distorted thought process resulting from a domestic situation which left him emotionally devastated and totally deranged. This is not one of the "unmitigated" first degree murder cases for which death is the proper penalty. Cf. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973).

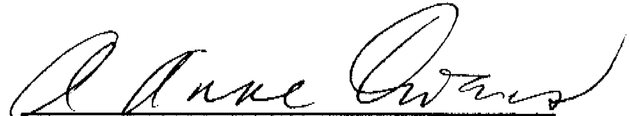
CONCLUSION

For the reasons discussed in Issues I through XIII, Appellant's conviction should be reversed and a new trial granted. If a new trial is not granted, then the death penalty should be vacated and Appellant should be sentenced to life in prison pursuant to Issue XVI, or the Appellant should be granted a new sentencing proceeding with a newly empaneled jury, based upon Issues XIII through XV.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to the Office of Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 30th day of May, 1995.

Respectfully submitted,



JAMES MARION MOORMAN
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Assistant Public Defender
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Bartow, FL 33830

AAO/ddv

APPENDIX TO ISSUE III

Front page article and photo from
St. Petersburg Times, Pasco edition
January 25, 1994

A1

Article from Sunday front page of
Tampa Tribune, Pasco edition
January 16, 1994

A2-3

...ed Collins said. "I don't trust ..."

...ncerns could be enough to sink,

...and his partner, builder Gary Resmondo, no longer have an active connection with Resource Management Technologies, or Rem-

man Ann Hildebrand said Monday that the settlement agreement might need to be

Please see BON-BAR Page 3

Times photo — JACK ROWLAND

...n Edward Boggs is wheeled from circuit court Monday. In October, ...pite his behavior he was ruled competent to stand trial.

Defendant is silent as second trial opens

■ John Edward Boggs was convicted of murdering two people, but the verdict was overturned by Florida's Supreme Court.

By RICK GERSHMAN
Times Correspondent

DADE CITY — John Edward Boggs didn't appear too worked up for the first day of his second murder trial for a 1988 home invasion and shooting spree.

Instead, he spent the day in his usual state: silent, slumped and staring at the floor. He did this throughout the proceeding, with one exception. That occurred early on, prompted by two words from Circuit Judge Maynard Swanson.

The words were "death penalty."

Swanson was asking potential jurors if they had any objection to capital punishment. Boggs lifted his head and looked toward the jury box, briefly, then his eyes returned to the carpet for the rest of the day.

Jury selection took the entire day. Nine women and three men were chosen, with no alternate juror.

Swanson did not explain why an alternate would not be chosen and was not available for comment after court recessed. Assistant Public Defender William Eble said he did not know the reason for the decision.

The jury will decide whether Boggs is guilty of two counts of first-degree murder and one count of attempted first-degree murder.

Boggs was convicted of those charges in September 1988 and subsequently sentenced to death by Circuit Judge Wayne L. Cobb.

In February 1991, the state Supreme Court threw out the conviction, ruling Cobb failed to provide a proper mental competency hearing.

Four months later, Boggs suddenly stopped responding to anyone, including his attorneys, and began to stare at the ground constantly.

On Monday, Boggs was brought in

Please see TRIAL Page 3

Trial from Page 1

and out of court in a wheelchair, though he has walked to previous hearings, always with a severe stoop.

He is charged with breaking into a Zephyrhills mobile home in February 1988 and shooting Nigel Maeras, 70; Harold Rush, 69; and Maeras' daughter, Betsy Ritchie, 51.

Maeras died that evening; Rush died about six weeks later of a stomach wound. Betsy Ritchie survived five gunshot wounds.

Sheriff's detectives said Boggs had planned to murder, but not the people he shot. They said he traveled from Ohio intending to kill his ex-wife Jerry Boggs and then-boyfriend Dean Rush — they now are married. Boggs instead went to the wrong mobile home park and broke into the home of Maeras and Harold Rush, they said.

Despite his strange behavior, Boggs was ruled competent to stand trial in a hearing last October. Cobb decided that Boggs is malingering — faking illness to avoid prosecution.

Cobb said that Boggs "has apparently concluded that the only way he can escape some rather severe temporal punishment is to feign insanity, and up to now, it has been working wonderfully."

The trial resumes at 9:30 a.m. today. It is expected to last through Friday.

Pasco Pc...
Sheriff's ...

Bobsled from Page 1

take a spin down at the Olympic bobsled course.

They arrived at the mountain after dusk, and rode in a truck with the sled to the top of the course.

The four-man bobsled could only take two amateurs at a time, with professionals steering and braking the sled.

Stewart decided to take the plunge with James Campbell, a fellow New Port Richey lawyer. Charles Savio, a lawyer from Hudson, teamed up with Ken Emery, the husband of New Port Richey lawyer Mary Ellen Emery.

"I spent a lot of the time yelling . . . ."
— James Campbell

"The brakeman gives you a ...y shove and you're off," said ...io. "Gravity does the rest."

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CASE # 88-381CFAES

DEFENDANT'S EXHIBIT

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As he drove, he noticed a dead soft shell turtle on the side of the road. He stopped to get a better look.

"It was just such a beautiful turtle, it really bothered me that it would rot away on the side of the road like that," he recalls. "So ... g up the turtle's skull, DeLorey used it as a prop for a program on turtles he gave to a group of children.

"It captivated the kids," he says. "That's when I realized how valuable skulls are as teaching tools."

While attending the University ... Busch Gardens.

There, he says he nearly blew up a building while using a propane torch to burn the meat off a giraffe from which he planned to make a mold.

DeLorey began his career in Pasco County five years ago at Pasco Middle School. After two ... frigerator shared by teachers — DeLorey transferred to Weightman Middle.

In addition to teaching, DeLorey shares his talent with museums, nature centers, universities and zoos throughout the country. At Lowry Park Zoo in Tampa, education director Pat Yarnot credits DeLorey with providing the ba- ... Chris came in and gave us extras of stuff he had, helped prepare stuff we were able to get and has conducted workshops for our educational volunteers on how to use skulls to teach. He has been invaluable to us."

Yarnot admits being skeptical

See TEACHER, Page 6

John Boggs, shown above at a 1988 pretrial hearing, faces murder charges at a trial Jan. 24. His defense attorneys say he's insane — often hunched over and mute — much like his demeanor at a 1992 pretrial hearing, left. Prosecutors say he's faking.

Tribune file photos

Murder suspect: acting or insane?

By NOAM M. M. NEUSNER
Tribune Staff Writer

> "[John Boggs] has apparently concluded that the only way he can escape some rather severe temporal punishment is to feign insanity, and up to now, it has been working wonderfully."
>
> WAYNE COBB
> Circuit court judge on finding Boggs competent to stand trial

DADE CITY — John Edward Boggs walks in a slow shuffle, bent crooked at the waist so his knuckles nearly touch the floor. His salt-and-pepper hair, now shoulder length, sticks to his prison blues.

He responds to instructions to move only when a prison guard nudges him. He won't talk to psychiatrists. He won't talk to judges. He won't talk to the lawyers who are pledged to defend him against first-degree murder charges at his trial, which begins Jan. 24.

John Boggs, some maintain, is a sick man who needs help.

Yet mental hospital staff members say Boggs, 61, can talk when he wants and can stand straight when he wants. They say his bedraggled appearance is a put-on. Based on that testimony, a Pasco circuit court judge says Boggs is competent to stand trial and is "malingering," or faking insanity, in order to avoid the wrath of the law.

Is John Edward Boggs betting his life on his acting ability?

The stakes are high. In September 1988 a Pasco jury convicted Boggs and a judge sentenced him to die for the mistaken-identity killings of a couple in a Zephyrhills mobile home park.

But the Florida Supreme Court struck down the conviction and sentence in 1991. The court said a judge should have made sure Boggs was competent to stand trial.

In February 1988, prosecutors charge, Boggs drove from his home in Ohio to Zephyrhills, looking for his ex-wife and her lover. Boggs thought he found them, but broke into the wrong

See BOGGS, Page 4

fendant's Exhibit
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3oggs found competent to stand trial

From Page 1

obile home. In a hail of gunfire, 'o people were killed and a third ounded. The victims, however, ere not Boggs' intended targets.

Because of Boggs' appearance id demeanor, prosecutors say a ju- ' might look at him now and re- se to believe he was sane at the ne of the shootings

The state attorney's office says 's faking. Testimony indicates he is a history of pulling off ruses.

His ex-wife, Jerry Boggs, said in 1988 deposition she helped Boggs illect $40,000 in workman's com- ensation insurance even though he asn't ill or injured. She said the heme was so developed, Boggs ent three years in pajamas, gave r the right to cash his Social Secu- ty checks and wouldn't leave ome, fearing company-hired inves- gators.

Before visiting his doctor, Boggs ould deliberately wear a smelly, d shirt and grow an unkept beard. e would pop depressants all day to ok his very worst, his ex-wife testi- ed.

"He told me there was nothing rong with him," she said. "He was oing to sit back and enjoy it for a hange, that he had worked ever ince the day he was born, he was azy and never should have orked."

Prosecutors contend Boggs still malingering.

"His wife has consistently said e's faking the whole [workman's ompensation claim]. True or no? I on't know," said Assistant State At- orney Phil Van Allen. "But it has een the opinion of this office that e's been acting all along. This hole thing is a charade."

The charade, however, has little o do with the crime Boggs is harged with committing.

Vrong victims

In 1988, a jury convicted him of gunning down three people, two fa- ally, in an apparent attempt to kill his ex-wife and her lover, Gerald 'Dean" Rush.

According to court documents and testimony, this is how Boggs went from being a steel worker on workman's compensation to a mur- der suspect:

A month after his divorce, he called his ex-wife, who had moved to a mobile home in Zephyrhills with Rush, her childhood sweet- heart. When she answered the tele- phone, Boggs said: "I seek, I seek, I seek."

In February 1988, he traveled more than 1,000 miles to Zephyr- hills to find his wife. He called sev- eral mobile home parks, since he knew his wife lived in one. When he asked the manager of the Colony Hills mobile home park whether a Rush or a Boggs lived there, she said yes. But she identified the wrong Rush.

Boggs went to a mobile home owned by Harold Rush on Feb. 11, 1988. He didn't stop to make sure he had the right victim. At about 2 a.m., he broke into the mobile home with a crowbar, and with a sawed- off shotgun and a .22-caliber pistol, he fired at Harold Rush, his girl- friend Nigel Maeras and her daugh- ter, Betsy Ritchie. Maeras, 70, died instantly and Rush, 69, died several weeks later from the severe injuries suffered in the shooting. Only Rit- chie, who was in town to take a cruise with her mother and Rush, survived.

Ritchie, at Boggs' first trial, testi- fied the killer came in wearing all black and as he fired away at her mother and mother's boyfriend, he made a sound like "grrrr." Hiding behind a bedroom dresser, Ritchie was shot five times, in the legs, arm and neck.

"I had no idea what was happen- ing," she said. "I felt so alone. I felt so trapped."

The killer fled.

While investigating the mysteri- ous shooting, deputies focused on two pieces of information: Jerry Boggs had told deputies previously about her ex-husband's threats and her connection to a man named Rush; and, the Colony Hills manag- er told investigators about the man who called her looking for a Boggs or a Rush.

John Boggs became the prime suspect in the case, less than 48 hours after the shooting.

When he was arrested in Ver- milion, Ohio, police found several maps in his truck, including a AAA "trip-tik" which had a bright yellow line marking a direct route from his home in Vermilion to Zephyrhills. Detectives also found the guns used in the attack in his home.

Predicting death

During depositions for the case, witnesses painted a picture of a man driven by jealousy and super- stitions. His ex-wife, Jerry Boggs, said he had threatened her several times after she told him she wanted a divorce. She also said Boggs had vowed to kill Gerald "Dean" Rush more than once.

Jerry Boggs, now Jerry Rush, declined to speak about the specif- ics of the case.

"You can't go on living normally after something like that," she said. "But our problems are mild com- pared with what poor Miss Ritchie went through."

The depositions fueled concern among defense attorneys that Boggs may not have been in touch with reality. His ex-wife said he would occasionally lock himself in a clos- et, trying to "teleport" his spirit from his body. She said he tried to predict the deaths of his family members, including himself. Neigh- bors said he would sit happily on his motorcycle during rainstorms.

Before he was tried, Boggs' pub- lic defender demanded the appoint- ment of a psychiatrist to see if Boggs was competent to stand trial. The psychiatrist examined Boggs and said he was not competent and would need hospitalization.

Circuit Court Judge Wayne Cobb did not agree with the psychiatrist.

At a hearing before the 1988 tri- al, Cobb asked Boggs, "Mr. Boggs, do you know why you are here in court today?"

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

Boggs got what he wanted. The trial began on Sept. 20, 1988. Four days later, a jury recommended the death sentence. Cobb concurred.

When the Florida Supreme Court reviewed the case on appeal, it said Boggs deserved a true com- petency hearing. The decision, made in 1991, struck down death sentence and conviction.

Later that year Boggs was e ated by court-appointed psy trists. They found him unfit to s trial and he spent the next years in Florida State Hospit Chattahoochee.

A fake mute?

In September, Boggs had a er competency hearing prom by reports from Chattahoochee cials. During that hearing, hos staff and a psychiatrist said B who appears to be mute, can s when he wants. They said he sp on the telephone frequently talks to "jail house lawyers."

They also said he stands str when he wants to, like whe combs his hair, takes a show reaches for a cigarette lighter ledge.

Still, two other mental healt perts said Boggs is insane.

Cobb found Boggs compete ter the weeklong hearing, sayi "has apparently concluded tha only way he can escape some er severe temporal punishment feign insanity, and up to now, been working wonderfully."

State prosecutors say B guilt can be proved with fact his appearance may sway a ju go easy on him. And unless B public defenders bring up the with an insanity defense — they have not filed — the jur hear no testimony on his m condition.

"It's natural for them to lo what he did, driving 1,000 mi shoot two people and say 'A who could do something lik has to be crazy,' " said Van "Like it or not, they'll consid appearance and what they pe his mental capabilities to be.

"But his appearance today an issue — at least not legally

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APPENDIX TO ISSUE VI

State Exhibit 25 (admitted)

Journal Entry

A1

Search Warrant

A2-3

Excluded State Exhibit ID "DD" (1)

Arrest Affidavit

A4-5

and attached Affidavit and Journal Entry

A6

MUNICIPAL COURT
VERMILION, OHIO

FEB 15 2 59 PM '88

I HEREBY CERTIFY THIS TO BE A TRUE COPY OF THE ORIGINAL FILED IN THIS OFFICE.

Marguerite M. Ayers
MARGUERITE M. AYERS,
CLERK OF COURTS
VERMILION MUNICIPAL COURT

Vermilion Municipal Court,
Vermilion, Ohio

In the Matter of the Search of
850 Vermilion Road

No. ....

JOURNAL ENTRY

This matter came on for consideration this 15, *day of* February, 19 88, *on the affidavit of* Roger Hoefs *for a search warrant and the evidence, and it appears to the Court that there is probable cause that the following persons or things, to-wit:*

all firearms, black long coat, black ski mask, black hat, and green short coat

are concealed in 805 Vermilion Road and out building on the property, vehicles 77 Ford Pickup Camper Ohio registration N 488AZ. 82 Ford Mustang Ohio Registration 221 ARB and boat in Yard....

; that the offense described in the affidavit has been committed; that the premises and things to be searched are within the jurisdiction of this Court; [1]

that there is an urgent necessity to search the premises in the night season.

It is therefore ordered that a search warrant issue accordingly, and that the Sheriff make return thereof not later than three days from the issuance of said warrant.

Joseph T. Ryan
Judge

1. If applicable, insert: "that there is urgent necessity for search of said premises in the night season"—otherwise, the warrant will issue for service in the daytime.

1991

No. ....
Doc. .... *Page* ....
Record .... *Page* ....
Journal .... *Page* ....
.... Municipal Court,
.... Court
In the Matter of the Search of

AFFIDAVIT and JOURNAL ENTRY for SEARCH WARRANT

Filings: Initials
Aff. filed ...., 19
Entry filed ...., 19

COLUMBUS BLANK BOOK CO., COL., O.

States Exhibit "DD" #25 ID 1-26-94

A1

MUNICIPAL COURT
VERMILION, OHIO
FEB 16 10 45 AM '88

I HEREBY CERTIFY THIS TO BE A TRUE COPY OF THE ORIGINAL FILED IN THIS OFFICE.
Marguerite
MARGUERITE M. MYERS,
CLERK OF COURTS
VERMILION MUNICIPAL COURT

SEARCH WARRANT

Rev. Code, Sec. 2933.23, .24, .25

Vermilion Municipal Court,

Vermilion, Ohio

No.

The State of Ohio, Erie County, ss.

To Any Police Officer (Name and Title), GREETINGS:

Whereas there has been filed with me an affidavit, of which the following is a copy:

The State of Ohio, Erie County, ss.

Before me Roger Hoefs

personally appeared

who being duly sworn according to law, deposes and says that on or about the 15th *day of* February *19* 88, *at the County of* Erie, *one* John E. Boggs *had and still has in* his *possession, the following personal property for which search authorization and seizure is sought, to-wit:* all firearms, black long coat, black ski mask, black hat and green short coat

knowing the same John E. Boggs

and that said complainant believes and has good cause to believe that said property, or some part thereof, is concealed in 805 Vermilion Road and out buildings and or vehicles 1977 Ford pick up with camper Ohio reg. N488AZ and 1982 Ford Mustang, Ohio reg. 221ARB and boat in yard.

Complainant further avers the facts upon which such belief is based are:

The investigation reveals that John E. Boggs was in Florida on Thursday 2-11-88 when three people were shot with a 12 gauge shot gun and a .22 caliber pistol.

Det. Roger Hoefs
Affiant

Sworn to before me and subscribed in my presence this 15th *day of* February *, 19* 88.

Sgt Norman Hendricks – Deputy Clerk

These are therefore to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the daytime/ night time into home of the said John E. Boggs of the Township of Vermilion in the County aforesaid, and there diligently search for the said goods

1992

A2

MUNICIPAL COURT
VERMILION, OHIO

FEB 15 2 59 PM '88

I HEREBY CERTIFY THIS TO BE A TRUE COPY OF THE ORIGINAL FILED IN THIS OFFICE.
Marguerite M. Myers
MARGUERITE M. MYERS,
CLERK OF COURTS
VERMILION MUNICIPAL COURT

and chattels, or articles, to wit: guns, pistols, personal clothing, black long coat, ski mas, and green coat

and that you bring the same or any part thereof, found on such search [3] and also the body of John E. Boggs forthwith before me, or some other judge or magistrate of the county having cognizance thereof to be disposed of and dealt with according to law.

Given under my hand, this 15th day of February, 19 88.

Clerk

By Sgt Norman Hendrikson Deputy Clerk

1. Here name or describe the person or place to be searched.
2. "daytime" or "nighttime" as the case may be.
3. If applicable, insert "and also the body of ."

RETURN

Vermilion, Ohio, Feb 16, 1988

Received this writ on the 15 *day of* Feb, 1988 *at* 3:15 PM *o'clock* P*M., and pursuant to its command I executed the same on the* 15 *day of* Feb 19 88, *by searching the premises therein described for the person and/or things therein set forth in the* [1] Day t Night *time of said day*

MUNICIPAL COURT
VERMILION, OHIO
FEB 16 10 45 AM '88

whereupon I did seize the following things and/or persons, to-wit:

See attached

and now have them before the Court.

FEES	
Service and Return	
Mileage ..... miles at	
Total	

Chief of Police—Bailiff

By Lt [illegible] Mayer *Deputy*

1. "day" or "night."

No. ....
Doc. ...... Page ......
Record ...... Page ......

Municipal Court, ..., Ohio

In the Matter of the Search of

SEARCH WARRANT

Returned and Filed ...., 19 ....

.... Clerk

By .... Deputy Clerk

(Sign on Copy to be Served only)
I certify this to be a true copy of the original notice and of the endorsements thereon.

.... Chief of Police—Bailiff

By .... Deputy

COLUMBUS BLANK BOOK CO., COL., O.

1003

A3

IEREBY CERTIFY THIS TO BE A
TRUE COPY OF THE ORIGINAL
FILED IN THIS OFFICE.
Marguerite M. Myers
MARGUERITE M. MYERS,
CLERK OF COURTS
VERMILION MUNICIPAL COURT

AFFIDAVIT IN SUPPORT OF COMPLAINT FOR
ARREST WARRANT OR SUMMONS

AFFIDAVIT

Roger Hoefs, being duly sworn, says that on or about
(Affiant's Name)

February 15 1988, within Erie Vermilion,
(county / city / township / etc.)

Ohio, John E. Boggs
(Defendant's Name)

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 contacte the Pasco County Sheriff's Office and an information report #88-13585 was completed.

On 2-11-88 the Zepherhills Police Department received a call from one Harold Frank Rush of 35053 McCulloughs Leep, Zepherhills, Florida requesting assistance as he and other people in his residence had been shot.

Units of the Pasco County Sheriffs Office responded to the residence to find that one Nigel Maeras white/female 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. [illegible] Rush at that time told deputies on the scene that a man wearing a mask, dressed all in black had broken into his residence and shot everyone.

Deputies then found one Betsy Richey, white/female d.o.b. 7-21-37 hiding behind a dresser in the bedroom. Ms. Richey was alive and had bullet wounds

Roger A. Hoefs
(Affiant's Signature)

Sworn to and signed in my presence this 15th day of February 1988.
at Vermilion Ohio.

Clerk- Vermilion Municipal Court

Sgt Norman Hendrickson
Dep. Clerk- Vermilion Municipal Court

1988

Affiant's Telephone No. (813) 8425878
Affiant's Address: 8700 CITIZENS DR
NEW PORT RICHEY FL 34654

A4

AFFIDAVIT IN SUPPORT OF COMPLAINT F[illegible]
ARREST WARRANT OR SUMMONS

I HEREBY CERTIFY THIS TO BE A
TRUE COPY OF THE ORIGINAL
FILED IN THIS OFFICE.
Marguerite M. Myers
MARGUERITE M. MYERS
CLERK OF COURTS
VERMILION MUNICIPAL COURT

AFFIDAVIT

Roger Hoefs, being duly sworn, says that on or about
(Affiant's Name)

February 15 19 88, within Erie Vermilion,
(county / city / township / etc.)

Ohio, John E. Boggs
(Defendant's Name)

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 victim's 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

Sgt Roger a Hoefs
(Affiant's Signature)

Sworn to and signed in my presence this 15th day of February 1988.
at Vermilion Ohio.

Clerk- Vermilion Municipal Court

Sgt Norman Fredrickson
Dep. Clerk- Vermilion Municipal Court

1989

Affiant's Telephone No. (813) 847-5878

Affiant's Address: 8706 CITIZENS DR
NEW PORT RICHEY FL 34654

A5

I HEREBY CERTIFY THIS TO BE A T E COPY OF THE ORIGINAL FILED IN THIS OFFICE.
Marguerite M. Myers
MARGUERITE M. MYERS, CLERK OF COURTS

COLUMBUS BLANK BOOK CO., COL., O.

AFFIDAVIT and JOURNAL ENTRY for Search Warrant

Rev. Code, Secs. 2933.21, .22, .23

Vermilion Municipal Court

Vermilion, Ohio

In the Matter of the Search of

805 Vermilion Road

Vermilion, Ohio

No.

AFFIDAVIT

The State of Ohio, Erie County, ss.

Before me

Roger Hoefs *personally appeared*

who being duly sworn according to law, deposes and says that on or about the 15th *day of* February *19*88,

at the County of Erie, *one* John E. Boggs

had and still has in h *possession, the following personal property for which search authorization and seizure is sought, to-wit:* [1] shotguns, pistols, personal clothing, black hat, ski mask, black long coat, green short coat

knowing the same [2] Aggravated murder

[3]

and that said complainant believes and has good cause to believe that said property, or some part thereof, is concealed in [4] 805 Vermilion Road, out buildings, 1977 Ford pickup camper Ohio reg. N488AZ, 1982 Ford Mustang Ohio reg. 221ARB, and boat in yard

Complainant further avers the facts upon which such belief is based are:
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.

[5]

x TBD Roger a Hoefs
Affiant

1990

Sworn to before me and subscribed in my presence this 15th *day of* February, *19*88

Sgt Norman [illegible] Deputy Clerk

1. Sec. 2933.21, R. C.
2. Allege the offense committed.
3. If applicable, name the person or persons to be seized.
4. Describe the house or place to be searched.
5. If search is made in the nighttime, insert, "Complainant further says there is urgent necessity for a search in the nighttime for the reason............".

1-26-94
State's Exhibit
ID "OO" (1)

A6