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IN THE SUPREME COURT OF FLORIDA

JOHN EDWARD BOGGS, :

Appellant, :

vs. : Case No. 83,409

STATE OF FLORIDA, :

Appellee. :

______________________________ :

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

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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## PRELIMINARY STATEMENT

Appellant relies on the argument in the Initial Brief as to Issues V, VI, VII, IX, X, XI, and XII. This in no way indicates that Appellant agrees with Appellee's arguments but, rather, that (1) Appellee's arguments were anticipated and any reply necessary was covered in Appellant's Initial Brief, or that (2) Appellee's arguments are spurious and no response is needed.

## STATEMENT OF THE CASE AND FACTS

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

In its brief in this case, Appellee has indicated no disagreement with Appellant's statements of the case or facts. The summary of "facts" in Appellee's brief consists of an extremely abbreviated description of the State's evidence, containing inflammatory language, and without sufficient detail for the Court to adequately understand the evidence presented in this more than 4000 page record. In an apparent attempt to minimize the mitigation, Appellee excluded the defense evidence and omitted the penalty phase of the trial altogether. If Appellee is offering its statement of facts as an alternative to Appellant's statement of facts, we wish to make clear that Appellee has presented a one-sided and misleading picture of the trial.

## ARGUMENT

### 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.

Appellee correctly points out in footnote 1 that no testimony was presented at the July 23, 1992, hearing before Judge Tepper. Appellee fails to mention, however, that four experts submitted reports which were available at the July 23rd hearing. (SR. 2023-36) Defense counsel represented that three experts found Boggs incompetent and one believed that he was malingering. The staff at FSH had done no psychological testing. (R. 2288) Accordingly, Judge Tepper found Boggs incompetent and ordered him returned to Chattahoochee for testing. (R. 2286-94)

Appellee argues that the competency hearing at which Judge Cobb found Boggs competent to stand trial was not scheduled by the prosecutor in violation of Florida Rule of Criminal Procedure 3.212(c)(5), because the hearing was based on the March 26, 1992, competency finding by FSH,[1] despite the intervening hearing and order of incompetency by Judge Tepper. Appellee makes this argument because the prosecutor and trial judge had to rely on the March 26, 1992, letter rather than the March 3, 1993, letter (SR

[1] On page 5 of the FSH report attached to the letter finding Boggs competent, its author stated that, "[a]dmittedly, there is no positive evidence of competency to proceed." (SR 5)

14) (stating that Boggs was <u>not</u> competent to proceed), to justify holding the hearing scheduled by the prosecutor without statutory authority.

Appellee argues that the trial judge was correct in denying the defense motion to continue the hearing because the defense allegedly could have and should have discovered the State's witnesses without the State providing their names. (See brief of Appellee, p. 14) Defense counsel is not required to anticipate the State's witnesses and depose them before the State provides their names in compliance with Florida Rule of Criminal Procedure 3.220(b)(1)(A). Furthermore, because defense counsel was not provided Boggs' medical records until just before the hearing, he was unable to use them to prepare for cross-examination, or to find other witnesses with evidence favorable to the defense. Without the medical records, the defense had no means of "anticipating" the State's witnesses prior to receiving the witness list.[2]

Because the prosecutor and the trial court failed to follow the rules of criminal procedure, Boggs was denied due process and a fair competency hearing.

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[2] Defense counsel was not complaining about the experts who were appointed and testified before, as suggested by Appellee, but about the witnesses from FSH who had not previously been involved in the case. Had defense counsel been given hospital records, which he had subpoenaed but not received, he might have found witnesses with evidence showing Boggs' incompetence to stand trial; for example, the jailhouse lawyer who apparently helped Boggs prepare the habeas corpus discussed in Issue II.

## 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.

Appellee relies largely on examples given by witnesses at the competency hearing of occasions when Boggs was seen (not heard) talking and standing. At least one witness actually heard him talk a couple times. None of this provides evidence that Boggs met the statutory standards for competency. Dr. Delbeato made a gigantic leap from his conclusion that Boggs was malingering physically to his unsupported conclusion that Boggs had (1) sufficient present ability to consult with counsel with a reasonable degree of rational understanding, and (2) a rational, as well as factual, understanding of the pending proceedings, as required to determine competency to stand trial. See Fla. R. Crim. P. 3.211(a)(1); Dusky v. United States, 362 U.S. 402 (1960); Hill v. State, 473 So. 2d 1253 (Fla. 1985).

Dr. Delbeato's conclusion that Boggs' request for a notary evidenced volitional thought does not prove that Boggs met the standards for competency. Volitional thought is not the statutory requirement for competency. Delbeato's assertion that he coerced Boggs into talking was based on an interview in 1991. During his second interview in April of 1992, Boggs was non-responsive. Delbeato had not seen Boggs for a year and a half prior to the competency hearing. (R. 2507-10) He could not specify anything

he relied on to determine that Boggs met either criteria for competency. (R. 2528-29)

Appellee's speculation that Boggs was malingering because "the stakes were very high," is nothing more than that -- speculation. That Boggs consistently put his shoes on the wrong feet to appear incompetent is more speculation. Perhaps he was more comfortable with his shoes on the wrong feet. If he was an expert malingerer as Dr. Delbeato and the trial judge opined, he would surely know better than to always put his shoes on the wrong feet.

Prior to the first trial, before Boggs ceased talking, he told the judge he was competent, refused a psychiatric evaluation, and demanded a speedy trial. The stakes were high then too. Boggs had no ostensible defense and his attorneys had not had time to depose witnesses and prepare his case. Nevertheless, Boggs demanded to go to trial immediately. See Boggs v. State, 525 So. 2d 1274 (Fla. 1991). He did not attempt to feign incompetency.

Even after the first reversal of this case, Boggs spoke in court at the May 24, 1991, pretrial conference, and asked the judge to appoint Larry Shearer, a private defense lawyer in Lakeland, and Austin Maslanik, an assistant public defender in Polk County, to represent him. Boggs also requested that the judge appoint two psychiatrists and HRS to evaluate his competency. (R. 1983-89) He in no way indicated that he was incompetent or wanted a delay; instead, he appeared to want to comply with this Court's decision and get on with the second trial. It is inconsistent to think that

he suddenly decided to fake incompetency through mutism because he had "all the time in the world." (See brief of Appellee, p. 19)

Following Dr. Delbeato's lead and ignoring the other three experts' opinions, the trial judge ruled that Boggs had the ability to talk to counsel and to assist counsel in planning his defense, but was choosing not to do so. No expert testimony supported his conclusion. Although Delbeato agreed with it, he was unable to cite anything that he relied on to determine that Boggs met either criteria for competency. (R. 2528-29)

Appellee infers that Boggs "refused" to cooperate by not talking during psychiatric evaluations. (Brief of Appellee, pp. 24-25) This assumes that Boggs was intentionally mute, rather than that his mutism was caused my a mental problem. Boggs did not talk with his lawyers either. If he talked at all, it was on rare occasions. Why he did not (or does not) remains a mystery. It is reasonable to believe, however, that Boggs became mute as a result of a psychiatric problem. It is possible that his mutism was not total and that he was sometimes able to talk despite the problem. Although the trial judge found that Boggs "refused" to talk, what the experts actually said was that Boggs either "would not or could not" talk to them. (e.g., R. 2497, 2507) If Boggs was rendered mute at times because of a psychiatric problem, he was not being uncooperative by refusing to talk.

Appellee argues that Judge Swanson was not required to hold a competency hearing because nothing had changed since Judge Cobb's competency determination. Because both Florida and federal law

require that a person be competent to stand trial, however, the trial judge has a duty to make such a determination if he observes behavior which would suggest incompetency, despite another judge's prior competency determination. The behavior need not be different so long as it evidences possible incompetency. The judge cannot continue the trial of a defendant who appears arguably incompetent, without inquiring into the matter, and, if appropriate, holding an evidentiary competency hearing. See Nowitzki v. State, 572 So. 2d 1346, 1349 (1990) (trial court has ongoing duty to assure that defendant is competent to proceed, and should have ordered competency hearing despite earlier determination of competency).

Appellee attempts to compare this case with Jones v. State, 449 So. 2d 253, 259 (Fla. 1984), and Waterhouse v. State, 596 So. 2d 1008, 1014 (Fla. 1992), in which each defendant tried to make the courts "dance to his tune." (Brief of Appellee, p. 23) Both cases are clearly distinguishable. In Jones, as noted by Appellee, the defendant "leaped back and forth" between self-representation and appointed counsel. Similarly, in Waterhouse, the defendant refused to cooperate with several previous lawyers and demanded that his lawyer argue "residual doubt" as his penalty closing argument. No competency issue was involved in Jones or Waterhouse. Although Boggs appeared to be displeased with counsel, he was represented by the same two public defenders at both trials.

Boggs did not attempt to control the court's docket; instead, he said nothing at all. Despite the court's frustration with a defendant who stands mute for whatever reason, an incompetent

defendant cannot be accused of or punished for attempting to control the court's docket by his incompetency. Boggs was clearly incompetent to stand trial because the State presented no evidence that he met the statutory criteria for competency. 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).

## ISSUE III

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

Appellee asserts that the twelve jurors selected "either had not read or heard anything about the case or formed no opinion on guilt or innocence and could decide the case on the evidence. . ." (Brief of Appellee, p. 28) This argument is misleading, and totally irrelevant. Although the twelve jurors selected had not heard about the case, with the exception of Mr. Sassaman,[3] defense counsel was forced to use eight of his ten peremptory challenges to excuse other potential jurors who had heard or read about the case, because he was not permitted to find out what they knew and what opinions they had formed. Six of these jurors had formed opinions or had feelings as to guilt, and two of them did not know whether they could put their opinions aside and base their verdicts on the evidence. When defense counsel had used all ten challenges, he requested more, specifying four jurors he wanted to excuse, to no avail. Thus, he was forced to settle for a jury with at least four jurors (including the foreman) he would have excused had he not been forced to use nearly all of his peremptories to excuse jurors who had read or heard about the crime. This rendered the trial fundamentally unfair. See MuMin v. Virginia, 500 U.S. 415 (1991);

[3] Juror Sassaman had heard about the crime around the neighborhood and from 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 was not permitted to question Sassaman as to what he knew. (T. 324-25) He named Sassaman as one of the jurors he would excuse if the judge would grant him additional peremptory challenges. (T. 327-28)

Pietri v. State, 644 So. 2d 1347 (Fla. 1994).

In Pietri, this Court held that the trial judge did not abuse his discretion by failing to conduct individual voir dire because his ruling did not result in a trial that was fundamentally unfair, Appellee's parenthetical failed to mention that, unlike the case at hand, the judge in Pietri excused all prospective jurors who had formed opinions. In the instant case, although a number of the 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. The trial court's failure to (1) allow individual voir dire, or (2) excuse jurors who had formed opinions, rendered Boggs' trial fundamentally unfair.

In Reilly v. State, 557 So. 2d 1365, 1367 (Fla. 1990), this Court found that the trial court committed reversible error by failing to excuse a prospective juror for cause because it was unrealistic to believe the juror could disregard his prior knowledge of the defendant's confession, which was suppressed. The same is true in this case. A number of prospective jurors read that Boggs had previously been sentenced to death for this crime and that a local judge found him competent but malingering. The article included scathing remarks by the judge that Boggs was trying to manipulate the judicial system. All of this information was excluded at trial. It is unrealistic to believe that jurors could disregard such pretrial knowledge.

Appellee attempts to distinguish Reilly because none of the jurors who actually served in Boggs' jury had read about the case.

In Reilly, however, the objectionable juror was also excused by defense peremptory challenge after the trial judge denied the cause challenge.[4] Moreover, at least four of the jurors who served on Boggs' jury served only because defense counsel was compelled to use nearly all of his peremptory challenges to excuse prospective jurors who had read pretrial publicity.

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[4] As in this case, Reilly's lawyer exhausted his peremptories and unsuccessfully asked for more. He specified three jurors he would exclude if he were granted more peremptories. Thus, as in this case, he preserved the issue for appeal. 557 So. 2d at 1366.

## 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.

As in the last issue, Appellee again attempts to confuse the issue by asserting that all the jurors who actually served were "properly selected." Even if this were true (and it is not), it would be irrelevant to this issue. The issue in this case is not whether the twelve jurors who served should have been excused, but that defense counsel was denied the use of at least half of his ten peremptory challenges because he was compelled to use them to excuse prospective jurors who clearly should have been excused by the judge for cause. Thus, Boggs was compelled to go to trial with jurors who would have been excluded if defense counsel had not been forced to use most of his peremptory challenges to excuse jurors who should clearly have been excused for cause.

Of the twelve jurors who served, defense counsel objected on the record to five of them -- Wood, Sassaman, Craig Allen and Council,[5] and said he would have excused them if he had not had to use his peremptories on jurors who should have been excused for cause. (T. 346, 365) During trial, while moving for mistrial when a witness referred to Boggs' extradition, defense counsel reminded

[5] Although peremptory challenges can be exercised for any reason, defense counsel even told the judge why he wanted to excuse these four jurors. Juror Sassaman had heard about the crime from his wife and neighbors; Juror Craig had been a witness for this prosecutor in a murder case in which he and his co-counsel had defended; Juror Wood, who was the foreman, knew too much about guns; and Juror Allen had a strong distaste for guns. (T. 346)

the judge that at least two of the jurors would know what an extradition hearing was. One of the jurors had been a legal secretary for a criminal defense lawyer (Juror Drago), and one was the legal secretary and wife of another local attorney who practiced criminal law (Juror Council). He reminded the judge that he had been denied an additional peremptory challenge to strike the second of these two jurors. (T. 708) Accordingly, the jurors who served were not all "properly selected, qualified impartial jurors."

Appellee argues that the trial judge correctly denied the defense cause challenge to prospective juror Smith, because Smith said he could be fair and unbiased despite the fact that he was employed by the Pasco County Sheriff's Office. (Brief of Appellee, pp. 33-34) Although Appellee asserts that Nelson had had no contact with the defendant, Nelson actually said that 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) Smith had also heard about the case on television (T. 54-55) and read about it in the newspaper recently. (T. 121) He indicated that he had made a tentative decision as to whether the defendant was guilty but was willing to put it aside and decide the case based on the evidence presented, even if that was contrary to his tentative decision as to guilt. (T. 55)

The judge repeatedly refused to allow defense counsel to individually voir dire Smith to determine what he had read about the case, or what opinion he had formed. (T. 185, 243) Defense

counsel moved 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 and prosecuted the case. (T. 180) The judge's refusal to grant the cause challenge (T. 185, 243) was clearly error for both reasons. An employee of the sheriff's department which investigated and gave evidence in the case cannot be impartial. Moreover, Smith had made a tentative decision as to guilt, based on pretrial publicity. Despite his alleged willingness to disregard his knowledge and opinion and be fair, it would have been virtually impossible for him to do so. See Singer v. State, 109 So. 2d 7 (Fla. 1959) (juror's statement that he can and will return verdict based on the evidence and law provided at trial is not determinative).

Appellee asserts that defense counsel did not seek to excuse prospective juror Sayer for cause. (Brief of Appellee, p. 34) Defense counsel asked to conduct individual voir dire concerning Sayer's knowledge of the case to no avail. (T. 185) Perhaps he believed he had asked for a cause challenge on Sayer, or assumed the judge would not grant it. Sayer read the Tampa Tribune article and had feelings about Boggs' guilt, but said she would put them aside. (T. 58, 175) Her ex-husband was a police officer, and she had contact with some of the officers listed as witnesses. She "did not think" it would affect her judgement. (T. 63, 97)

Appellee asserts that prospective juror Johnson denied that anything about the nature of the crime would cause feelings strong enough to affect her ability to be fair and impartial. (Brief of

Appellee, p. 34) Although this may be true, when asked if she could base her verdict solely on the evidence, Johnson, who had read about the case and had feelings as to guilt, 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." When the prosecutor attempted to clarify whether she could set aside her opinion and base her verdict solely on the evidence, she said it would be very difficult, "to be honest." (T. 105)

Accordingly, although Johnson may not have had strong feelings due to the nature of the crime, **she** did not believe she could base her verdict solely on the evidence. This is precisely the standard for determining juror competence:

> 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.

Lusk v. State, 446 So. 2d 1038, 1040 (Fla.), cert. denied, 469 U.S. 873 (1984). The trial court's denial of this cause challenge was clearly reversible error.

Appellee noted correctly that the trial judge is in the best position to evaluate the demeanor of prospective jurors. In this case, however, there is no way that the statements, "I'm not sure I can do that" [base her verdict on the evidence at trial] (T. 58-59), and "it would be very difficult [to set aside her feelings and

base her verdict solely on the evidence], to be honest." (T. 105) can be interpreted to mean the exact opposite, no matter what the demeanor of the declarant suggested.

Appellee next notes that prospective juror Erbe said she would "try" to base her verdict entirely on the evidence at trial, and that her marriage to a Hillsborough County sheriff's deputy would not affect her judgement. (Brief of Appellee, p. 35) Actually, when the judge asked if her marriage to a law enforcement officer would affect her feelings as to police officers in general, she said only that, "I'll try not to be." She also had a daughter who was currently a Tampa police dispatcher. (T. 66) Although Erbe said she "would certainly try" to base her verdict on the evidence, and "would try" to set aside her feelings about guilt, she never said she had any reason to believe she would be successful in so doing. She had read about the case in the Tampa Tribune article the prior week, and had feelings about guilt. (T. 59-60, 159) These were clearly grounds for a cause challenge. See Chapman v. State, 593 So. 2d 605, 606 (Fla. 4th DCA 1992) (prospective juror who would "try" to be fair and impartial should have been excused).

Based on language in Lucas v. State, 376 So. 2d 1149, 1152 (Fla. 1979), Appellee argues that defense counsel did not preserve his objection to prospective juror Carr, who knew and was formerly related to the prosecutor by marriage, because counsel did not cite any authorities to the trial court. We are aware of no law or rule that requires counsel to cite caselaw, especially when the basis of the objection is well recognized. Defense counsel did, of course,

object to Carr, citing Florida Statute § 913.03(9), which disqualifies a juror who is related to either party in the case within the third degree. He objected to Carr, took the position that he was related within the third degree, and wanted him excused for cause. (T. 25-26) Even if defense counsel had not objected, the judge had a duty to excuse the juror:

> [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.

Singer v. State, 109 So. 2d 7, 23-24 (Fla. 1959) (emphysis added); accord Hamilton v. State, 547 So. 2d 630, 632 (Fla. 1989); Moore v. State, 525 So. 2d 870, 872 (Fla. 1988).

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

Appellee attempted to distinguish Polynice because the witness was excused to satisfy the appearance of justice, and the trial court did not actually address whether the stepfather was related within the third degree. To satisfy the appearance of justice, however, is the precise reason Carr should have been excused for

cause. Despite whether he was related within the third degree, he had known the prosecutor for five years (T. 102), and it would seems that this association, and the former relationship, would affect his judgment in the case.[6] In any event, Carr might be perceived to be biased. For this reason, it is irrelevant whether the statute applies to stepchildren.[7]

Appellee submits that Carr was no longer related to the prosecutor because his nephew was divorced from the prosecutor's daughter in 1991, as shown by judicial notice Appellee submitted to this Court. (Brief of Appellee, p. 39) Oddly, this fact was not mentioned by the prospective juror or the prosecutor in this case. The trial judge was not aware of the divorce when he refused to excuse Carr for cause. This Court cannot base its decision on information that was not made available to the judge when he ruled on the issue. In any event, it really does not matter because the

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[6] Appellee attempts to distinguish Walsingham v. State, 56 So. 195 (Fla. 1911), because, in this case, the questionable juror did not actually serve, and "must have been peremptorily challenged." (Brief of Appellee, p. 38) Because the judge refused to grant the defense cause challenge, however, defense counsel was forced to use a peremptory challenge which he needed to use to excuse one of the objectionable jurors who did serve on the jury, thus rendering the trial fundamentally unfair.

[7] Appellee cited a 1954 case in which this Court held that a statute referring to children does not include stepchildren. See Grant v. Odom, 76 so. 2d 287 (Fla. 1954). In Polynice, however, the court excluded the stepfather of the arresting officer. It really does not matter whether Carr was related within the third degree, however, because the purpose of the statute is "based upon the presumption that a party related within the third degree would know of the relationship and be prejudiced thereby." Mobil Chemical Co. v. Hawkins, 440 So. 2d 378, 380 (Fla. 1st DCA 1983). In this case, the prospective juror (and the prosecutor) knew of the relationship; thus prejudice must be presumed.

purpose of the statute was met. The prospective juror and the prosecutor had known each other casually for five years, and knew of the former relationship; thus, the juror would likely be prejudiced by it. See Mobil Chemical Co. v. Hawkins, 440 So. 2d 378, 380 (Fla. 1st DCA 1983). When there is a basis for any reasonable doubt about a juror's ability to decide the case fairly and impartially, based solely on the evidence and law submitted at trial, he must be excused. Singer v. State, 109 So. 2d 7, 23-24 (Fla. 1959); 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). Jurors should be not only impartial, but beyond even the suspicion of partiality. Hill, 477 So. 2d at 556.

For the above reasons, and those in Appellant's Initial Brief, Boggs was denied a fair trial by the trial court's failure to grant cause challenges as to several prospective jurors. This error mandates reversal for a new trial.

## 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.

Appellee argues that the trial judge did not err by failing to allow the defense to present evidence that a suspicious individual asked to see Betsy Ritchie at the hospital on the day of the crime, and that a hospital employee was shown a photo display and did not identify Boggs as that individual. Appellee reasons that the evidence was too speculative to be relevant. It was extremely relevant because it suggested that someone other than Boggs committed the murder. Betsy Ritchie was visiting from Illinois and knew few people in the area. It was too soon for "a deranged person" to hear about the crime through the news media, as the judge suggested. The evidence might have created reasonable doubt.

Appellee also argues that the trial court did not err by failing to allow a proffer of Betsy Ritchie's testimony, because whether she was advised that a suspicious individual inquired about her was irrelevant. Appellee notes, however, in footnote 14, that, in the prior trial, Ritchie testified that Harold Rush's son had been a suspect just after the homicide. This suggests that the man who inquired about Ritchie might have been Harold Rush's son, who might have been involved in the murder. In any event, the trial court may not refuse to allow a proffer to preserve a point on appeal. Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988).

## 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.

Appellee alleges that defense counsel failed to preserve this issue. This is not true. Defense counsel requested that the judge define "pretense," because it was unduly vague. He asked the judge to give the jury instructions recommended by Pinellas County Judge Susan Shaeffer for capital cases. (R. 1196-97) The judge would not consider giving anything other than the standard instruction. (T. 1291) Thus, it is evident that the judge understood Boggs' vagueness objection as directed to the jury instruction on the cold, calculated and premeditated aggravating circumstance, and ruled on the objection. See Castor v. State, 365 So. 2d 701, 703 (Fla. 1978) (contemporaneous objection must be sufficiently specific to apprise trial judge of error and to preserve issue for intelligent appellate review); Thomas v. State, 419 So. 2d 634, 636 (Fla. 1982) (record only needs to show "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." Accordingly, defense counsel did everything required to preserve the question for appellate review.

## 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.

In footnote 20, Appellee attempts to distinguish Amoros v. State, 531 So. 2d 1256 (Fla. 1988), in which this Court stated that transferred intent was inapplicable for the purpose of establishing CCP. Appellee noted that, in Amoros, the defendant did not even know that the victim was residing in his former girlfriend's house when he entered her apartment. In this case, Appellee asserts that Boggs planned to kill both his ex-wife and Dean Rush, based on prior threats. Although there is no evidence that Boggs definitely intended to kill his wife, or Dean Rush, when he drove to Florida, circumstantial evidence indicates this may have been his plan. Nevertheless, this does not distinguish the case from Amoros because the alleged transferred intent was not from the ex-wife to Dean Rush, but from the ex-wife (and perhaps Dean Rush) to Nigel Maeras and Harold Rush. As in Amoros, Boggs was not aware that Maeras and Harold Rush were living in the trailer when he broke in; he thought that Gerry and Dean Rush were living there. Thus, this case is exactly like Amoros and transferred intent is not applicable for the purpose of establishing CCP.

As noted in the Initial Brief, if transferred intent cannot be used to establish CCP, CCP does not apply at all, because there was certainly no plan to kill the real victims. Boggs entered their home by mistake and immediately started shooting. It is unclear at

what point, if ever, he realized that the persons in the mobile home were not his intended victims.[8]

Appellee asserts that Dr. Szabo's opinion that Boggs was out of contact with reality related only to the time of the examination in 1991, and had no bearing on CCP. Although Szabo's opinion was made for competency purposes several years later, it at least suggested that Boggs **may have been** out of touch with reality when he committed the murders. His actions certainly suggest that he may have been. On the other hand, Dr. Delbeato's opinion that Boggs was malingering was **definitely** relevant only to the time of the 1991 interview because Boggs had nothing to malinger about in 1988 when the crime was committed. The malingering, and Delbeato's opinion that Boggs' conduct was a matter of choice, referred only to his mutism and physical symptoms which Delbeato attributed to Boggs' fear of the death penalty prior to his second trial. Thus, Delbeato's opinion is clearly not relevant to the issue of whether Boggs' actions in 1988 were cold, calculated and premeditated.

Appellee alleges that this homicide was more cold, calculated and premeditated than that in Walls v. State, 641 So. 2d 381 (Fla. 1994). We disagree. Appellee overlooked the "cold" element in making this comparison. Walls had no former relationship with the victims. He entered their house to commit a burglary, intentionally awoke the victims, and torturously killed them. Thus, his crime was not a crime of passion. Despite the fact that Boggs drove 1000

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[8] As in the Initial Brief, for the purpose of this issue, we are assuming, without admitting, that Boggs committed the crime.

miles to commit the crime, his motive was still a passionate obsession. His obsession with his wife of more than 30 years was not a passing emotion, but a long-term festering obsession. He tried unsuccessfully to persuade Gerry to stay married to him, and to return to him, for many months prior to the homicides, during which time he exhibited bizarre behavior. (See Statement of Facts in Initial Brief) For this reason, the shooting was not "cold."

Nor did it involve "heightened premeditation," as in Walls. Walls did not immediately shoot the victims, as did Boggs, but first forced the woman to tie up her boyfriend; took her to another room where he bound and gagged her; returned to the boyfriend; struggled, stabbed and shot him; then returned to the woman who was crying; wrestled with her and ripped off her clothing while she was screaming, and shot her twice. 641 So. 2d at 387. This Court affirmed the finding of "heightened premeditation" because "this was not merely a murder resulting from the specific and preexisting intent to kill . . . ." It was a drawn-out deliberately torturous and ruthless crime. Id.

When Boggs broke into the victims' home, thinking it was the home of Gerry and Dean Rush, he did not "toy" with his victims, as did Walls, nor did he torture them. He immediately started firing. Maeras was killed instantly. Boggs could not have known nor predicted that Harold Rush would not die immediately. Thus, Boggs had no heightened premeditation to kill the victims.

Boggs' crime was no more cold, calculated or premeditated than Santos v. State, 591 So. 2d 160 (Fla. 1991), in which Santos

stalked his victims for at least two days, bought a gun in advance, made death threats, and finally killed his victims in an "execution-style" manner. See also Douglas v. State, 575 So. 2d 165 (Court rejected finding that murder was cold, calculated and premeditated despite fact that the defendant procured gun, hunted down former girlfriend and bludgeoned and shot her new husband to death in front of her). These homicides were not "cold," because they arose from domestic disputes. Likewise, Boggs' crime was clearly a crime of passion. Had it resulted from a "deliberate plan formed through calm and cool reflection," Boggs would not have made the mistake of breaking into the wrong house and killing the wrong people. He was so enraged by his inability to reclaim his ex-wife's affection, that he recklessly left his home in Ohio, drove to Florida, attempted to locate Dean and Gerry Rush, and, in the end, shot three persons who bore little resemblance to his intended victims. This misadventure was definitely not "carefully planned."

## 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.

Appellee first asserts that the trial court rejected the mental mitigators because it "found that [Boggs'] present condition is the result of malingering and feigned incompetence." Whether Boggs' "present condition" was a result of malingering is irrelevant. He was not malingering and feigning incompetence at the time of the shootings. The mental mitigators describe the defendant's mental condition at the time of the homicide; not at the time of sentencing. The behavior described by Boggs' children showed his extreme emotional distress prior to and at the time of the crime.

Appellee also argues that "denial" is not a mitigating factor. We disagree. Denial is a symptom of mental illness, which is a statutory mitigator. Appellee's assertion that denial is the opposite of remorse suggests that Appellee misunderstands the use of the term "denial." Dr. Szabo did not mean that Boggs denied committing the crime to others, but that his mind would not allow him to believe that he committed the crime. Thus, he believed himself innocent despite his guilt.

The trial judge's assertion, noted by Appellee (brief of Appellee, p. 81) that, rather than depression, Boggs' condition was "more likely caused by his fear of death in the electric chair" is nothing more than gross speculation. There is no way that the trial judge, or Appellee, can know what was in John Boggs' mind

Appellee notes that the trial judge also rejected the non-statutory mitigation because he believed that Boggs was malingering, and thus was an evil person. The sentencing judge did not even make his own determination of Boggs' mental state. Instead, he relied on Judge Cobb's prior competency determination. (R. 2253) Although he commented that the competency experts' reports were conflicting, he apparently did not consider them when examining the record for mitigation, because he stated more than once that the defense presented no mental health testimony at penalty phase. In Farr v. State, 621 So. 2d 1368 (Fla. 1993), this Court reversed due to the trial court's failure to consider the psychiatric evaluation and presentence investigation in the record, despite the defendant's decision not to present mitigation at penalty phase. Accordingly, Boggs' trial judge erred by failing to consider the entire record, including the competency hearings.

Despite Judge Cobb's finding that Boggs was malingering and was competent to stand trial, it is obvious from the record and penalty phase lay testimony that Boggs had serious mental problems. As discussed in Issue II, supra, neither Dr. DelBeato nor Judge Cobb used the statutory standards to determine Boggs' competency. Both made their decisions based on "gut feeling." It seems fairly obvious that both Judge Cobb and Judge Swanson were frustrated by Boggs' mutism and its effect on the judicial proceedings, and were concerned that Boggs was taking advantage of the system, as the prosecutor apparently believed. Because of this frustration, neither judge was willing to consider the possibility that Boggs'

mutism was caused by psychiatric problems.[9] Although it is understandable that a judge would not want to be taken advantage of, it was far worse to try and convict an incompetent defendant, and sentence him to death.

Finally, Appellee suggests that, should a new sentencing proceeding be required, "HAC might well apply to the murder of Harold Rush who did not die promptly but languished, suffering in the hospital for days prior to expiring." (Brief of Appellee, p. 83) To make such a finding would require that Boggs be punished more severely by not "finishing him off" at the scene. Although it is certainly sad and unfortunate that Mr. Rush suffered for an extended period of time prior to his death, this Court has held consistently, in the context of capital sentencing proceedings, that acts perpetrated after the homicide cannot be considered to establish aggravating factors. See e.g., Halliwell v. State, 323 So. 2d 557, 561 (Fla. 1975); cf. Czubak v. State, 570 So. 2d 526 (Fla. 1990) (gory photographs showing decomposition and that dogs had eaten part of victim's body must be excluded because what happened after homicide was not relevant); Davis v. State, 517 So. 2d 670, 673 (Fla. 1987) (defendant's failure to assist husband after shooting him was not valid departure reason because act occurred subsequent to criminal act and, thus, did not make the act more cruel).

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[9] When defense counsel asked for a continuance to procure the attendance of a defense witness, Judge Swanson said that, "justice delayed is justice denied." He found it outrageous that Boggs' trial had gone on for five or six years. (R. 2325-26)

Moreover, death by shooting, without more, is not "heinous, atrocious or cruel." In Clark v. State, 609 So. 2d 513 (Fla. 1992), the Court cited several cases in which the victim did not die immediately after being shot, because "there was no indication that the crime was committed in such a manner as to cause unnecessary and prolonged suffering to the victim." 609 So. 2d at 514-15; see Brown v. State, 526 So. 2d 903, 906-07 (Fla. 1988) (HAC improperly found where victim shot in arm, begged for his life, was then shot in head); Lewis v. State, 377 So. 2d 640, 646 (Fla. 1979) (HAC not appropriate where victim shot in chest, attempted to flee, was then shot in back). Similarly, in Wickham v. State, 593 So. 2d 191, 193 (Fla. 1991), where the defendant shot a motorist in the back and twice in the head while he pled for his life, the Court found that the defendant did not show a desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. The same is true in Boggs' case.

The evidence indicates that Boggs entered the home and began shooting non-stop. He did not taunt or torture the victims. The State has argued consistently that Boggs sole intent was to kill the victims, whom he believed to be his ex-wife and her lover.[10] If this is true, he clearly did not intend to inflict a high degree of pain, or that Harold Rush languish and suffer in the hospital. Thus, HAC would be inappropriate and invalid.

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[10] Although Boggs shot three people rather than two, he may have believed that both Ritchie and Maeras were his ex-wife because they were not in the same room at the same time. (See Statement of Facts in Initial Brief of Appellant.)

## 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.

Appellee attempts to compare this case to Porter v. State, 546 So. 2d 1060, 1063-64 (Fla. 1990). The distinguishing factor is Boggs' mental health problems. The trial court failed to consider the evidence presented at the competency hearings which supported extensive mental mitigation. Every expert witness believed that Boggs had mental problems. Drs. Fellows, Gonzalez, and Szabo testified that Boggs was incompetent. Dr. Szabo thought he was psychotic. One doctor at FSH suggested that Boggs might suffer from extreme denial and depression. (See SR 14) Dr. Delbeato, the only expert convinced that Boggs was malingering, diagnosed him as a borderline personality disorder with antisocial tendencies. Borderline personality "disorder" is a mental problem. Thus, even Dr. Delbeato believed Boggs had some sort of mental problem. Had the court considered this evidence, he would have been forced to find and consider mental mitigation.

Additionally, the testimony of Boggs' children at penalty phase established extreme mental and emotional distress, as well as extensive nonstatutory mitigation. Boggs' wife of 31 years left him for her old high school sweetheart with whom she had an affair while married to Boggs. She made love with him in front of Boggs' 21-year-old daughter. The Boggs children testified that Boggs was not the same father they had known, and that he cried all the time. (T. 1244-46, 1258) He was obsessed with his wife's return. The

trial judge's reasoning was affected by his belief that Boggs was malingering. Had he correctly considered and weighed the evidence, he would have found both mental mitigating factors, and substantial nonstatutory mitigation.

This case is much more similar to Santos v. State, 629 So. 2d 838 (Fla. 1994), and Klokoc v. State, 589 So. 2d 219 (Fla. 1991). Like Boggs, both Santos and Klokoc were obsessed with the return of their wives[11] They made threats and procured murder weapons prior to the murders. Like Boggs, both Santos and Klokoc had longer established relationships with their wives, and both were mentally ill. Porter had a relatively short-term, stormy relationship with one of the victims -- he was formerly her live-in lover. His desire to kill her seemed more a matter of anger than of passionate obsession. No evidence showed that Porter suffered from mental problems. Thus, Boggs' case is more similar to Santos and Klokoc, because of the mental mitigation and the truly domestic nature of the killings.

Brown v. State, 565 So. 2d 304 (Fla. 1990) is distinguishable for the same reason. Brown was not involved with the victim, but had been previously involved with her mother. He shot the victim and her roommate, who was not killed, because he believed that the victim was telling lies. Thus, this was not a case of passionate obsession. Although Brown was under stress from working to support the victim's mother and children, no mental or emotional problems

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[11] Santos was not legally married to the woman he killed, but had lived with her in a common law marriage and had a child by her.

were shown. Accordingly, Brown is not comparable to this case. Likewise, as discussed at length, supra, this homicide was not more cold, calculated and premeditated than Walls v. State, 641 So. 2d 381 (Fla. 1994), as again asserted by Appellee, because Walls was not a domestic case. (See discussion at pages 24-25, supra.)

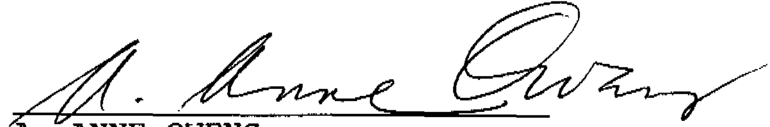
Contrary to Appellee's assertion (brief of Appellee, p. 88), all of the cases cited in our Initial Brief were not jury override cases. See e.g., Penn v. State, 574 So. 2d 1079 (Fla. 1991); Blakely v. State, 561 So. 2d 560 (Fla. 1990); Wilson v. State, 493 So. 2d 1019 (Fla. 1986). Although Boggs did not present expert mental health testimony in his penalty phase, he was mentally unable to assist his lawyers in preparing his case. Additionally, because the trial court had ruled that Boggs was malingering, the prosecution would have brought this out in rebuttal to any expert testimony. Nevertheless, the trial court was required to consider the expert testimony from the competency hearings, and the penalty phase testimony of Boggs' children, which showed extensive mental problems. See Farr, 621 So. 2d 1368 (trial court must consider entire record in sentencing).

Accordingly, death is a disproportionate sentence in this case. If a new trial is not granted, the sentences should be reduced to life.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 14th day of November, 1995.

Respectfully submitted,



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