IN THE SUPREME COURT OF FLORIDA

CASE NO. 62,098

FREDDIE C. JONES,

Appellant

vs.

THE STATE OF FLORIDA,

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

* *

BRIEF OF APPELLEE

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INTRODUCTION

The appellant was the defendant in the court below. The appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appeared in the trial court. The symbol "R" will be used to designate the record on appeal. The symbol "T" will be used to designate the trial transcript. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE

The State accepts the defendant's Statement of the Case as being a substantially true and correct account of the proceedings below.

STATEMENT OF THE FACTS

On October 7, 1981, Miguel Mendez was employed by the Blue Ribbon Meat Company (hereafter referred to as the Company) as a shipping Foreman. (T. 1055). The Company is located at 2340 Webster Avenue, Hialeah, Florida (T. 1059). The victim was a truck driver, working under his supervision. (T. 1055).

Between 8:30 and 9:00 a.m. on the date in question Mendez supervised the loading of frozen meat into the victims truck. (T. 1050-57). The truck was loaded with meat worth approximately $25,000 to $30,000. After the truck was loaded, the rear door was sealed and locked, to prevent thefts. (T. 1058) Prior to leaving the Company, the entire truck was washed. (T. 1073).

The victim, who was the assigned driver, was destined to the company's Okeechobee office. (T. 1058) The victim drove the truck out of the company at around 9:00 a.m. He left the parking lot and turned left to 23 Street, and than turned right on 4th Avenue. (T. 1059). It takes approximately 5 minutes to go from the company to 29th Street and West 4th Avenue. (T. 1074). The next time Mendez heard about the truck was at 1:30 in the afternoon. (T. 1060).

Cecil Jones the defendant's father, owned a .38 caliber handgun, which he kept in his house. On October 16, 1981, when requested by Hialeah Police officers, he looked for the gun but could not find it. (T. 1203-04). Mr. Jones owned, on the day in question a brownish color cadillac, with an antenna on the trunk. (T. 1205). It's license plate number was GBS-732 (R. 1749-50). On the day in question Mr. Jones was at work, he left the car and its keys at home. (T. 1209-10). The defendant had free access to Mr. Jones's home.

(T. 1211). The defendant drove his father's car whenever he wanted to. (T. 1213).

Robert Horton, one of defendant's accomplices, knew the defendant prior to October 7, 1981. On said day, the defendant along with the other accomplice, Carlton Adderly, picked up Horton at his house. (T. 1216). Defendant was driving a 4 door Cadillac, brown or rust colored. (T. 1217).

The defendant drove to the Company arriving between 7:00 and 8:00 a.m.. They stayed there, waiting, for about two hours. (T. 1218). With Horton driving, they left the company and followed a meat truck. The truck made a left turn out of the company parking lot. No other traffic was between the truck and defendant's car. (T. 1220).

When the truck stopped at a red light, the defendant's car stopped right behind it. The defendant and Adderly exited the Cadillac and approached the truck. The defendant exited from the front passenger side. (T. 1248). The defendant, who was bigger than Adderly, went to the driver's side, while Adderly went to the passenger side of the truck. Only the defendant had a gun. (T. 1221).

They reached the truck, and entered and started to drive off. Adderly continued to follow the truck. (T. 1222)

The defendant, who was driving the truck, had difficulty in getting the car to move when the light changed. Once the truck started to move, defendant drove straight for a few blocks and then turned right. Horton followed right behind. (T. 1223).

After turning right, defendant stopped on the side of a big tree. (T. 1223). Horton was directed by the defendant to drive ahead a little bit and then stop. When Horton received said instructions, he saw the victim between defendant and Adderly. (T. 1226). Horton did not see the defendant exit the truck. A few minutes after Horton stopped he heard two shots. He then saw the defendant get back into the truck. (T. 1224). Defendant had a gun in his hands when he reentered the truck. Adderly was not seen outside the truck. (T. 1225).

After the defendant entered the truck, he told Horton to go. Horton started to drive the car away when he saw the truck pull out behind him. Thereafter the truck pulled in front of Horton and Horton followed it to a warehouse in Opa-Locka. (T. 1226).

After approximately thirty minutes, the truck and car arrived at the Opa-Locka warehouse, where only the defendant exited the vehicle and entered the warehouse. (T. 1227).

Defendant was observed talking to someone. The truck was parked with the rear inside the warehouse. (T. 1228).

After they left the warehouse, the truck was driven by defendant to a street with a dump on it where it was left. Horton was still driving the car, with Adderly as a passenger, turned over the driving to defendant. (T. 1229-30). Defendant drove Adderly home and Horton also exited at that time. (T. 1230).

Thereafter, Horton met his friend Melvin Williams. Horton, Adderly and Williams, then returned to where they left the truck. Williams and Adderly entered the truck and with Williams driving went to an apartment house parking lot, located at 47th Avenue and 183rd Street in Carol City. Williams and Adderly unloaded some meat, but were unsuccessful in their attempt to sell it. (T. 1231-33). Thereafter, they left the scene in the car and left the truck. This occurred at about 12:30 p.m. (T. 1233-34). Upon leaving a man in a white pickup was observed talking to the police. (T. 1234).

Francisco Diaz, a resident of Hialeah, did not go to work on October 7, 1981, due to stomach problems. Diaz and his wife, before lunch, decided to visit their son, who also lived in Hialeah. Diaz was not sure when he left his house

but estimated it was between 10:00 and 11:00 a.m. (T. 896-898).

Diaz, while driving on West 4th Avenue, stopped at a red light, at 29th Street. In front of him was a normal size brownish or dark orange colored 4 door car with an antenna on top of the center of the trunk. In front of said car was a truck with the Company's logo on it. (T. 900-901).

Diaz then saw two black men get out of the brownish colored car and approach the truck. The bigger man went to the driver's side of the truck. The smaller man approached the passenger's side of the truck. The larger man opened the truck door and entered the truck. After they went into the truck, it started to move, but only after it had trouble getting started. (T. 902-03).

Meanwhile, the light changed and Diaz passed the truck, which was still stationary. The car directly in front of Diaz, the brownish colored one, did not pass the truck. Said car stayed behind the truck. Diaz, while looking in his near view mirror, saw the truck and car turn right towards 29th Avenue. (T. 904-906).

Ligia Diaz, Francisco's wife, left home with Francisco, between 10:00 and 11:00 a.m. to visit their son. (T. 931). Mrs. Diaz, when stopped at the red light; observed a white truck and a brownish car in front of them. She saw two black men exit the car and approach the truck and get in. (T. 932-935, 943). Mrs. Diaz took down the license plate number of the car. (T. 935). When she arrived at her son's house, she wrote the number down on a piece of paper. The number was GBS-732 (T. 936-37). The number was left at her son's house and was eventually given to the police. (T. 938).

Maria Diaz, the son's wife, testified that Ligia Diaz, wrote the license number in her presence and she left it at her house. (T. 950-952). Thereafter, Maria Diaz found out about what happened to the Company, and turned over the license plate number to the police. (T. 954-955). She also stated that her in-laws arrived between 10:00 a.m. and noon. (T. 957).

Dulsey DeArmus, lives at 237 East 33rd Street, Hialeah. At approximately 10:00 a.m. on the day in question, DeArmus, while talking on the phone, heard two shots. She lives across from Hialeah Race Track. (T. 959-961).

Victor Anchipolousky, a patrolman for the Hialeah Police Department, was dispatched, at about 10:00 a.m. on the day in question to 161 East 33 Street Hialeah, with

reference to a possible dead body lying on the side of the road . He arrived at 10:30 a.m. Upon arrival, there was a dead body covered by a sheet lying by the side of the road. (T. 965). The officer uncovered the body and observed a middle aged white male with his head crushed and with tire marks on his back. He preserved the scene. (T. 967).

Larry Williams, a patrol officer for the City of Hialeah Police Department was a traffic homicide investigator assigned to the accident investigation unit. It was not known how the victim died. (T. 971). He arrived on the scene at 11:10 a.m. (T. 977). He guessed that the death occurred at approximately 9:45 a.m. (T. 979, 984).

Richard Gallagher, I.D., Technician for Hialeah Police Department, arrived on the scene at approximately 10:26 a.m., and took crime scene pictures. (T. 993-995).

Steve Williams, a patrol man for the Metro Dade Department, was dispatched to N.W. 47th Avenue and 183 Street concerning a suspicious meat truck parked in an apartment building parking lot. He met one Griffith, who told him that he saw two black males park said truck. Williams then observed a large meat truck belong to the Company. The Company was contacted. Robbery unit was called. Williams went to the back of the truck an observed that the rear door

was opened and the seal broken. The scene was preserved. (T. 1003-1007).

Douglas Stephens, a robbery detective for the Metro Dade Police Department, responded to N.W. 47th Avenue and 183 Street. (T. 1011). The meat truck was processed for fingerprints. Fifty three latent prints were lifted. (T. 1014). One print was lifted from the outside of the driver's door. (T. 1016). The fingerprint cards were turned over to the Hialeah police. (T. 1017). A blue handbag was found and the contents checked. Thereafter it was turned over to Mr. Kranz, an owner of the Company. (T. 1021). A driver's license belonging to the victim was in the bag. (T. 1023).

Ed Griffith observed the company truck in the apartment parking lot and contacted the Company. Thereafter, the police and representatives of the Company responded to the scene. (T. 1048-49).

Miguel Mendez, on behalf of the Company responded to the scene of the truck. It was determined that driver of the truck was supposed to be the victim. The lock and seal was missing. Mendez recognized the blue purse with the victims personal belongings, as that of the victims. He recognized the victims driver's license. (T. 1061-1064). Mendez discovered 200 pounds of meat worth $300 was missing from the truck. (T. 1072).

Leslie Assali, an ID clerk for the City of Coral Gables, issues civilian identification cards. Part of said job includes photography and fingerprinting civilians applying for cards. An ID card was issued to the victim, he was photographed and fingerprinted. A standard fingerprint card was made of the victims fingers and put on file. He identified the victim's prints and photograph from his card. (T. 1079-1083).

Isreal Urra, a crime technician, attended the victims autopsy to fingerprint the victim. He fingerprinted the victim for identification. (T. 1101-1103). The prints were turned over to the latent section for identification. (T. 1105). He also took pictures of the truck and observed one tire had different treads than the others, located at the right rear side of the truck. The pattern was similar to the one on the victims back. (T. 1108).

John P. Lazzaretto, Crime Technician, supervisor, with the City of Hialeah Police Department is a fingerprint composition expert. (T. 1115, 1118). He compared the victims prints taken at the autospy with those on the Coral Gables ID card and determined that the victim was Tomas DeVillegas. (T. 1124-25). He compared the standard prints of the defendant with the latent lifted off the outside the drivers side of the truck door and they both belonged to the defendant.

(T. 1134-1137). Defendants prints were left on the truck after the truck was washed in the morning. (T. 1148).

Carl Mitchell, the Medical Examiner, an expert in forensic pathology, performed the autopsy on the victim. (T. 1113) He responded to the scene, next to Hialeah Race Track and thought death was caused by gunshot. (T. 1154). An autopsy was performed on the deceased and cause of death was gunshot wound and crushing injuries, it could have been either. (T. 1170). His findings also showed stipplings on the victims face (T. 1162); soot on his left hand (T. 1169) both of which indicated the victim was in a defensive position, attempting to ward off the shot when killed. (T. 1170). The gun was discharged between 4 inches and two feet from the victims head. (T. 1165). A projectile was found (T. 1173).

Robert Kennington a criminalogist with the Dade County crime law; an expert in the field of firearms and identification of ballistics (T. 1177), determined the bullet found by the Medical Examiner was a .38 caliber, most probably of the brand name F.I.E. (T. 1124-85). Cecil Jones' gun was a .28 caliber F.I.E. (R. 1747).

POINTS INVOLVED ON APPEAL

I.

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT?

II.

WHETHER THE TRIAL COURT ERRED IN ADMITTING RELEVANT PHOTOGRAPHS?

III.

WHETHER THE PROOF WAS AT VARIANCE WITH THE INDICTMENT?

IV.

WHETHER THE TRIAL COURT WAS CORRECT IN DENYING DEFENDANT'S MOTION TO DISMISS THE JURY PANEL, WHERE SAID MOTION DID NOT MEET THE REQUIREMENTS SET FORTH IN SWAIN v. ALABAMA, AND WHERE THE DEFENDANT MAY NOT USE THE SIXTH AMENDMENT OF THE U.S. CONSTITUTION TO CHALLENGE THE STATE'S USAGE OF ITS PEREMPTORY CHALLENGES?

V.

WHETHER THE STATE'S CLOSING ARGUMENT WAS FUNDAMENTALLY INFLAMMATORY TO PERMIT THE ISSUE TO BE RAISED FOR THE FIRST TIME ON APPEAL?

VI.

WHETHER THE TRIAL COURT ERRED IN REFUSING THE JURY INSTRUCTIONS AS TO THE PENALTIES OF THE LESSER INCLUDED OFFENSES?

VII.

WHETHER THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT WHERE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATING FACTORS?

VIII.

WHETHER THE TRIAL COURT PROPERLY APPLIED FLORIDA STATUTE §921.141 IN FINDING AGGRAVATING CIRCUMSTANCES?

IX.

WHETHER THE TRIAL COURT ERRED IN CONSIDERING ALL OF THE MITIGATING FACTS, BUT CHOSE NOT TO GIVE ANY WEIGHT TO ONE OF THE NON-STATUTORY MITIGATING FACTS?

X.

WHETHER DEATH IN A DISPROPORTIONATE SENTENCE IS A PROPER ISSUE ON APPEAL IN THE CASE SUB JUDICE?

I.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT.

There are three elements of the corpus delecti in homicide cases: (1) the fact of death, (2) the criminal agency of another, and (3) the identity of the deceased. Meeks v. State, 339 So.2d 186 (Fla. 1976). The State submits the aforesaid elements were met and therefore the evidence was sufficient to support the verdict.

The Defendant, along with his accomplices, hijacked the Company's meat truck. (T.1218-1223, 896-906). The victim Tomas DeVillegas, was the driver of the hijacked truck. (T.1061-1064). The victim was shot and killed by the Defendant. (T.1223-1225, 1101-1105, T.1134-1137). The victim was identified as Tomas DeVillegas. (T.1079-1083, 1124-1125, 1153-1173). Cause of death was determined as gunshot or crushing injuries. (T.1170).

The State takes exception to the following statement:

> The more logical explanation of the evidence is that the state entered into agreement with Horton and Adderly who in exchange for lenient sentences agreed to place the blame for the kidnapping and killing on the defendant.
>
> Defendant's Brief at p.16

Any inference, unsupported by record cites, that the state willfully and knowingly uses perjured testimony should not be taken lightly.

II.

THE TRIAL COURT DID NOT ERR IN ADMITTING RELEVANT PHOTOGRAPHS.

The trial court has broad discretion in regard to the admissibility of evidence, and his rulings on admissibility will not be disturbed unless an abuse of discretion is shown. Booker v. State, 397 So.2d 910 (Fla. 1981). Allegedly gruesome and inflammatory photographs are admissible in evidence if relevant to any issue which must be proven and their relevancy is to be determined without regard to their gruesome or offensive nature. Adams v. State, 412 So.2d 850 (Fla. 1982); Jackson v. State, 359 So.2d 1190 (Fla. 1978). Such photographs are admissible if they accurately depict factual circumstances relating to the crime and are relevant in that they help the jury in finding the truth. Booker v. State, supra.

Photographs used in connection with testimony regarding the causes of death, Henniger v. State, 251 So.2d 862 (Fla. 1971); the nature and extent of the "force and violence" used to perpetuate the crimes, Alford v. State, 307 So.2d 433 (Fla. 1975), cert. denied 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976); and the premeditated and cold-blooded intent of the defendant. Foster v. State, 369 So.2d 928 (Fla. 1979) cert. denied 444 U.S. 885, 100 S.Ct. 172,

62 L.Ed.2d 116 (1979); are relevant and admissible. Where photographs are clearly gruesome, the test of admissibility is whether they are relevant to an issue in the case, not whether they are necessary to prove a fact in dispute. Foster v. State, supra.

Defendant contends that as to State's Exhibit 24 (R.1742) and Exhibit 25 (R.1743), there was no necessity, nor justification for the admission of photographs taken at the morgue after substantial reconstruction of the victim's face and skull. (Defendant's Brief at page 22). The Defendant does not contend that said photos were irrelevant.

The State submits that said photographs were relevant inasmuch as they were used in connection with testimony concerning the cause of death. Exhibit 24 is a reconstruction of the victim's head, which was used to show the entry of the bullet wound. (T.1161). Exhibit 25 is also a reconstruction of the victims head showing the stipplings at the entry point. (T.1165). Exhibit 25 not only is relevant as to the cause of death, but the presence of the stipplings showed that the gun was fired at a close range and therefore is relevant to show the cold-blooded intent of the defendant.

The Defendant does not give any reasons why State's Exhibit 26 (R.1744) and Exhibit 27, (R.1745), should not have been admitted into evidence. Exhibit 26 and 27, depicted the victim's hands which were covered in powder and soot marks. (T.1171). Said photos were relevant to show the premeditated and cold-blooded intent of the Defendant, inasmuch as supporting testimony of the Medical Examiner established that the powder marks and soot on the victim hands showed that the victim was shot while he was in a defensive position, consistent with one pleading for mercy. (T.1170).

The Defendant next contends that State's Exhibit 5 (R.1722), Exhibit 6 (R.1723), Exhibt 7 (R.1724), Exhibit 8 (R.1725), Exhibit 9 (R.1726) and Exhibit 10 (R.1727), were irrelevant and their only purpose was to inflame the jury. (Defendant's Brief at page 23). Said contention is totally without merit inasmuch as said photos were taken at the crime scene, prior to the reconstruction of the victims head, and therefore showed the true nature and extent of the force and violence used to perpetuate the crime.

Exhibit 5, portrayed the untouched crime scene. (T.996). Exhibit's 6, 7, and 8 depicted what the victim looked like at the scene, therey showing the violent nature of the injury. Further, said photos laid a predicate for

the photos showing the reconstruction of the victims head. Exhibit's 9 and 10 depicted the victim with his shirt off. in order to show the full nature and extent of the force and violence used to commit the crime. Such photographs also depicted the cold-bloodedness of the Defendant.

The Defendant is really complaining, not of the relevancy, but of the gruesome nature of the photographs. In Henniger v. State, supra, the defendant alleged that photographs were irrelevant and because of their gruesome nature were used to inflame the jury. The photographs objected to consisted of one showing the back of the victim at the crime scene, one showing the knife wounds, and one showing the upper portion of the victim's body with the head partially severed and panty hose wrapped around the neck. After finding that said photographs were relevant the court stated:

> There is no question tht the three photographs of the victim in the instant case are gruesome. The crime itself is so revolting that it would have been impossible to take pictures of the scene or the victim that were not gruesome. As we have indicated, however, the pictures in question were relevant and properly admitted into evidence.
>
> 251 So.2d at 865.

Further, in Straight v. State, 397 So.2d 903 (Fla. 1981), photographs of a victims decomposed body recovered from the river 20 days after death were found admissible to corroborate how death was inflicted. Autopsy photographs have also been held admissible to establish the corpus delecti in homicide cases--the fact of death, criminal agency of another and identity of the deceased, Meeks v. State, 339 So.2d 186 (Fla. 1976); Courtney v. State, 358 So.2d 1107 (Fla. 3d DCA 1978), cert. den. 365 So.2d 710 (Fla. 1978).

In the case sub judice, Defendant cannot complain that the photographs were gruesome. If he were so concerned at the time the crime was committed, as he is now, as to the gruesome nature of the crime scene, this senseless murder may not have occurred. Since relevancy was established, Defendant should not now complain as to the condition that he caused. Therefore, although certain of the photograph might be classified as gruesome, their relevancy outweighs all other effects therefrom.

III.

THE PROOF WAS NOT AT VARIANCE WITH THE INDICTMENT.

Proof at trial must substantially conform to the allegations of the charging document, in order that the defendant not be misled and thereby prejudiced, and to insure against reprosecution for the same offense. Robinson v. State, 69 Fla. 521, 68 So. 649 (1915). Only fundamental defects will render the variance challengable for the first time on appeal. Marshall v. State, 381 So.2d 276 (Fla. 5th DCA 1980). However, where a variance between the allegations and proof is not such as to have misled the defendant or subject him to a substantial possibility of reprosecution for the same offense, the variance is immaterial and does not preclude conviction. Grissom v. State, 405 So.2d 291 (Fla. 1st DCA 1981).

The Defendant contends that he was misled by the State testimony concerning the head crushing. However, Defendant does not refer to, nor could he refer to, any record references to show that he was misled into believing that the charge was murder by head crushing. If the Defendant was misled, surely he would have objected, due to the seriousness of the charge vis-a-vis the variance. The State submits that it was necessary in order to identify the victim to delve into the head crushing. Since the victim

face was destroyed, he could not be easily identified. The pictures were necessary for identification purposes. The pictures were also necessary to show that the head had to be reconstructed to define relationship of the gunshot to the head.

There was no fundamental defect, in fact there was no variance at all, and therefore this issue cannot be raised for the first time on appeal.

IV.

THE TRIAL COURT WAS CORRECT IN DENYING DEFENDANT'S MOTION TO DISMISS THE JURY PANEL, WHERE SAID MOTION DID NOT MEET THE REQUIREMENTS SET FORTH IN SWAIN v. ALABAMA, AND WHERE THE DEFENDANT MAY NOT USE THE SIXTH AMENDMENT OF THE U.S. CONSTITUTION TO CHALLENGE THE STATE'S USAGE OF ITS PEREMPTORY CHALLENGES.

Defendant relies exclusively on the Sixth Amendment of the U.S. Constitution. However, the Fourteenth Amendment, equal protection clause[1] will be discussed in the instant brief.

The leading decision on this issue is Swain v. Alabama, 380 U.S. 202 (1965), in which the Court, following an extensive discussion of the essential nature, history and purpose of the peremptory challenge, concluded that:

> With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white Protestant and Catholic, are alike subject to being

[1]It is clear that the Defendant did not meet the standard set forth in Swain v. Alabama, 380 U.S. 202 (1965) and its progeny, including State v. Simpson, 326 So.2d 54 (Fla. 4th DCA 1976).

challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, pro tanto, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at the hearing afterwards. The prosecutor's judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. And a great many uses of the challenge would be banned.

In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at

> odds with the peremptory challenge system as we know it. Hence the motion to strike the trial jury was properly denied in this case.
>
> 380 U.S. 221-223.

The Court went on to hold that in order to establish that the prosecution had systematically used its peremptory challenges to prevent minorities from serving on juries, a defendant must "show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." Id. 380 U.S. at 237.

At least two Florida Appellate Courts have expressly adopted the Swain test as the prevailing rule of law in this State. Pitts v. State, 307 So.2d 473 (Fla. 1st DCA 1975); State v. Simpson, 326 So.2d 54 (Fla. 4th DCA 1976), and it is the prevailing rule in the majority of State jurisdictions. e.g. State v. Robinson, 386 So.2d 1374 (La. 1980); Pippin v. State, 151 Ga.App. 225, 259 S.E.2d 488 (1979); State v. Grady, 93 Wis. 1, 286 N.W.2d 607 (1979); State v. Stewart, 225 Kan. 410, 591 P.2d 166 (1979); State v. Eaton, 568 S.W.2d 541 (Mo. 1978); State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980); Commonwealth v. Henderson, 438 A.2d 951 (Pa. 1981); Drew v. State, 589 S.W. 562 (1979); Jason v. State, 589 S.W.2d 447 (Texas 1979); Lawrence v. State, 444 A.2d 478 (Md. 1982).

The Defendant is asking this Court to adopt a new procedure for determining when the prosecution is improperly exercising its peremptory challenges, which was established by the California Supreme Court in People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978) and which was refined by an Illinois intermediate court in People v. Payne, 106b Ill.App.3d 1035, 436 N.Ed.2d 1040 (Ill.App.Ct. 1982).

The procedure in Wheeler is as follows:

> If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, as in the case at bar, he should make a complete record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias.

The refined version enunciated in Payne, and which Defendant requests this court to adopt states as follows:

Accordingly, we hold that when it reasonably appears to the trial court, either by its own observation or after motion by the defendant, that the prosecuting attorney is using peremptory challenges to systematically exclude Blacks from the jury solely because they are Blacks, the court should require the prosecutor to demonstrate, by whatever facts and circumstances exist, that Blacks were not being systematically excluded from the jury solely because they were Blacks. At this stage, the burden of demonstrating that the Constitution was not being violated is upon the prosecution. Also, at this stage, the trial court should not employ any presumption that the Constitution is not being violated. Once it reasonably appears to the trial court that the accused is being affirmatively denied an impartial jury as required under the Sixth Amendment, there is no reason to presume that the State is not affirmatively violating the accused's constitutional entitlement.

If the trial court finds that as to any of the questioned challenges the State has not sustained its burden of demonstrating that it was not excluding Blacks from the jury solely because they were Blacks, the court must then conclude that the jury as constituted at that point fails to comply with the fair cross section requirement of the Constitution, and it must dismiss the jurors thus far selected. Also, it must quash any remaining venire, since

> the accused is entitled to a random draw from an entire venire, not one that has been partially or totally stripped of a cognizable group by unconstitutional means. Upon such dismissal, a different venire should be drawn and the jury selection process may begin again. (footnotes omitted).

The decision in Wheeler has since been adopted by the Supreme Court of Massachusetts, Commonwealth v. Soares, 387 N.Ed.2d 499 (Mass. 1979), and an intermediate Appellate Court in New York. People v. Thompson, 79 App.Div.2d 87, 435 N.Y.S.2d 739 (2d. Dept. 1981). Other states have considered the Wheeler decision without actually deciding whether to follow it. State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980); Mallott v. State, 608 P.2d 737 (Alaska 1980); Saunders v. State, 401 A.2d 629 (Del. 1979). The Illinois Courts were originally split. People v. Fleming, 413 N.Ed.2d 1330 (Ill.Ct.App. 1980); People v. Payne, 106 Ill App.2d 103 436 N.Ed.2d 1046 (Ill.Ct.App. 1982); People v. Teaque, 108 Ill. 3d 891, 439 N.E.2d 1066 (Ill.Ct.App. 1982). See People v. Davis, 447 N.E. 2d 353 (1983), where the Illinios Supreme Court rejected the Wheeler doctrine. New York has also refused to adopt it. People v. McCray, 57 N.Y.2d 542, 457 N.Y.2d 441 (Ct.App. 1982).

Defendant, argues that his right to jury chosen from a representative cross section of the community is thwarted if

the State uses is peremptory challenges to systematically exclude blacks from the petit jury. In support of this argument he strongly relies on People v. Payne, 106 Ill.App.3d. 1034, 436 N.Ed.2d 1046 (Ill.App. Ct. 1982). Payne, it is argued, extended the Sixth Amendment protection provided during the venire selection to the voir dire. Id. at 1048. The court reasoned that the "very purpose of refusing to tolerate racial discrimination in the composition of the venire is to prevent the State's systematic exclusion of any racial group in the composition of the jury itself, if we were to hold otherwise, the constitutioanl right to a jury drawn from a fair cross section of the community could be rendered a nullity through the use of peremptory challenges." Id. at 1048.

Payne clearly is not the law in this jurisdiction, nor should it be. Payne is not even the law in Illinois, (1983). In People v. Davis, supra the Illinois Supreme Court was presented with the issue as to whether the State's use of peremptory challenges to allegedly obtain an all-white jury deprived defendant of his right to a fair and impartial jury. The Court, without mentioning the conflicting holdings on the issue in the State's intermediate appellate courts, held as follows:

> However, we are not disposed to depart from the principle enunciated in Swain. "Peremptory challenges, are arbitrary and perhaps even irrational challenges to the seating of a juror. They are totally subjective and not subject to scrutiny.
>
> Davis, 447 N.E. 2d at 360.

The State submits that the test proposed in Wheeler and Payne should be rejected because it is seriously flawed in several respects, not the least of which is the defective Constitutional analysis which forms the underpinning for the decision.

Simply stated, Wheeler takes the right established by Taylor v. Louisiana, 419 U.S. 522 (1975), to have a jury selected from a representative cross-section of the community and extends it so as to create the new right to have "a petit jury that is as near approximation of the cross-section of the community as the process of random draw permits." People v. Wheeler, supra, 22 Cal.3d at 277, 148 Cal.Rptr. at 903. In effect, this creates a quota system[2] with the prosecution being pressured to accept a requisite number of minority jurors merely because of their membership in the group, regardless of whether the prosecutor

[2]See State v. Silva, 259 So.2d 153 (Fla. 1972) where Dade County's quota system for jury panel selection was found violative of the Sixth Amendment.

subjectively believes they can be fair. The underlying premise of these cases, that such diversity in the jury room is necessary to ensure the integrity of the jury process, simply is not supported by sufficient empirical data or experience so as to rationally justify such a judicially legislated "affirmative action program." See, Note Peremptory Challenges and the meaning of Jury Representation, 89 Yale L.J. 1977 (1980); Note, The Defendant's right to object to prosecutorial misuse of the peremptory challenge, 92 Harv.L.Rev. 1770 (1979). Moreover, this holding is directly contrary to the view expressed in Taylor, that defendant's are not entitled to a petit jury of any particular composition and reflect the various distinctive groups in the population. Id. 419 U.S. at 538. See also City of Mobile Alabama v. Bolden, 446 U.S. 55, n. 24 at 77 (1980).

In fact, the California and Massachusetts Courts' "fair cross section" constitutional analysis has placed them into an interesting paradox. Since the right to trial by a representative jury must be provided to the State as well as to the defendant, these courts have held that the prosecution has the same power to thwart any defense attempt to strike minority group members from the panel. People v. Wheeler, supra, 22 Cal.3d at 282, n. 29, 148 Cal.Rptr. at 906-907; Commonwealth v. Soares, 387 N.Ed.2d at 517, n. 35;

Commonwealth v. Whitehead, 400 N.Ed.2d 821 (Mass. 1980). Yet this proscription upon a defendant's exercise of peremptory challenges clearly runs afoul of the constitutional right to exercise peremptory challenges, a right which may not be abridged. Meade v. State, 85 So.2d 613 (Fla. 1956); Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981); Pointer v. United States, 151 U.S. 396 (1894); Lewis v. United States, 146 U.S. 370 (1892). As observed by Court in Francis v. State, 413 So.2d 1175 (Fla. 1982) at 1178-1179:

> The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant. Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed.2d 208 (1894); Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed.2d 1011 (1892). It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or official

> action, such as the race, religion, nationality, occupation or affiliations of people summoned for jury duty. Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 14 L.Ed.2d 759 (1965).

Both Florida and federal courts recognize that a juror's race, religion, nationality and occupation are perfectly legitimate considerations upon which to base the exercise of a peremptory challenge. Francis v. State, supra; Swain v. Alabama, supra. As pointed out in Swain, it is well-known that these factors are widely explored during the voir dire. Rosales-Lopez v. United States, 451 U.S. 182 (1981); Aldridge v. United States, 283 U.S. 308 (1931). Accordingly, Swain recognized a presumption that the prosecutor is using the State's challenges to obtain a fair and impartial jury and not solely for the purpose of excluding jurors of a particular racial or ethnic group.

The only justification for abandoning this presumption urged by the defendant is that it places a difficult burden on a defendant to require him to make a showing of discrimination over a substantial period of time. However, this burden is essentially no different than that required for a defendant to establish a prima facie case of discrimination during other stages in the jury selection process, Bryant v. State, 386 So.2d 237 (Fla. 1980); Rojas v. State, 288 So.2d 234 (Fla. 1973); Castenda v. Partida,

430 U.S. 482 (1977), and is certainly not insurmountable, See, State v. Brown, 371 So.2d 751 (La. 1979); State v. Washington, 375 So.2d 1162 (La. 1979), especially where the prosecutor is available and able to be questioned concerning his past conduct. Swain v. Alabama, supra; United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971).

The major problem with the Wheeler approach is that, as pointed out in Commonwealth v. Henderson, supra at 955-956, it is unworkable. As this Court held in Francis v. State, supra at 1179, the exercise of peremptory challenges is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. Its purpose is to eliminate jurors whom a party, for purely subjective reasons, believes cannot be fair. There simply exist no objective standards whereby a trial judge, let alone an appellate court which has before it only a cold record, can evaluate a lawyer's subjective evaluation of prospective jurors. To paraphrase Swain, how is it possible for a prosecutor to offer an explanation for "the sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another." This Court should follow the lead of the Wisconsin Court in State v. Grady, supra and refuse to undertake such an alteration of the very nature of the peremptory system as that suggested by the defendant.

It is interesting to note that the Third District Court of Appeal of Florida, has already rejected the Wheeler-Payne Doctrine. Neil v. State, (slip opinion filed June 21, 1983, and is appended hereto).

V.

THE STATE'S CLOSING ARGUMENT WAS NOT FUNDAMENTALLY INFLAMMATORY TO PERMIT THE ISSUE TO BE RAISED FOR THE FIRST TIME ON APPEAL.

Defendant asserts that the State's closing argument was so prejudiced that it deprived the Defendant of a fair trial and therefore can be the basis for reversal without a contemporaneous objection. In support thereof, the Defendant has randomly picked out fourteen of the prosecutor's statements. The State submits that said comments were taken out of content and when viewed in their proper perspective were not improper. Therefore, it was incumbent of Defendant to raise the issue at trial in order to preserve it for appeal. See, Perry v. State, 146 Fla. 187, 200 So. 525 (1941).

Wide latitude is permitted in arguing to a jury. Spencer v. State, 133 So.2d 729 (Fla. 1961) cert. denied, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962), cert. denied 372 U.S. 904, 83 S.Ct. 749, 9 L.Ed 2d 730 (1963). Logical inferences may be drawn, and counsel is allowed to advance all legitimate argument. Spencer v. State, supra. Inferences are not objectionable merely because they over-characterize, or that soundness of their logic, or relevancy may be lacking. Schnoider v. State, 152

So.2d 731 (Fla. 1963); Brown v. State, 80 Fla. 741, 80 So. 574 (1920). The normal parameter of closing argument is significantly broadened under the doctrine of invited response. Pitts v. State, 307 So.2d 473 Fla. 1st DCA 1975); cert. dismissed 423 U.S. 918 (1975). Personal belief of guilt are not permitted, however statements that the facts show guilt are permissible. Coleman v. State, 215 So.2d 96 (Fla. 4th DCA 1968). Each case must be considered on its own merits and within the circumstances surrounding the complained of remarks. Breedlove v. State, 413 So.2d 1 (Fla. 1982). Finally, it is the reviewing court's duty to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violation. United States v. Hastings, 33 Crim.Law Rptr. 3091 (1983). See also Hall v. State, 403 So.2d 1321 (Fla. 1981).

The only possible comment that could arguably be improper is:

> 1. No one is trying to hide anything from you, but I do not think the man should walk out the door because of a slight conflict like that. I do not think this man should walk out the door because the Diazes did not know whether it was 10:00 or what time in the morning it was. (T. 1114-1115).
>
> 2. The defense attorney is going to argue that this is a bad identification. I do not believe it is. (T. 1113).

> 3. I believe all the elements have been met in this case beyond a reasonable doubt. There is no doubt about it. (T. 1100-1101).
>
> 4. I have done my job. I believe that I have proven the defendant guilty beyond a reasonable doubt. (T. 1118).
>
> 5. Sure there were some conflicts. If thee weren't I would be surprised as to who got together here on this case and planned this testimony. (T. 1114).
>
> Defendants Brief page 50-51.

The defendant contends that this is a comment stating personal belief. However, even this comment does not reach the level of impermissible argument inasmuch as it was a permissible deduction of the sufficiency of the evidence to establish the defendant's guilt.

In Coleman v. State, supra, the challenged language used by the prosecutor was "and if you believe as I do", was held not to be a unfair comment. The Court held.

> The language used by the prosecutor 'and if you believe as I do' when considered in full context as used was not an expression of personal opinion irrespective of the evidence but was a permissibe conclusion or deduction by him of the suf ficiency of the evidence to establish the defendant's guilt. It was fair comment made in the discharge of the function of his office. . . (citations omitted)
>
> 215 So.2d at 98.

Therefore, when all of the challenged comments are viewed in their proper content, it is evident that none of them were fundamentally inflammatory. As such, contemporaneous objections were necessary in order to preserve the issue for appeal. Inasmuch as this was not done, this issue should not be addressed or in the alternative summarily denied.

VI.

THE TRIAL COURT DID NOT ERR IN REFUSING THE JURY INSTRUCTIONS AS TO THE PENALTIES OF THE LESSER INCLUDED OFFENSES.

Rule 3.390(a) Florida Rules of Criminal Procedure states:

> (a) The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel and upon request of either the State or Defendant, the judge shall include in said charge the maximum and minimum sentences which may be imposed (including probation) for the offense for which the accused is then on trial.

The Defendant states that the above underlined language, has been interpreted to mean different things by the District Court of Appeal, and further asserts that it has not been specifically ruled upon by this Court to mean only those crimes charged in the charging document.

The State submits, that upon a close scrutiny of the case law, this Court has indeed ruled that said language means only those crimes charged in the charging document.

In Welty v. State, 402 So.2d 1159 (Fla. 1981), this Court restated its holding in Tascano v. State, 393 So.2d 540 (Fla. 1980) as follows:

> In Tascano, we held that the language of Florida Rule of Criminal Procedure, 3.390(a), providing that the trial judge must include in her charge to the jury "the maximum and minimum sentences which may be imposed (including probation) for the offense for which the accused is on trial," is mandatory and that upon request of either the State or Defendant the trial judge must instruct on the maximum and minimum sentences for the crime charged.
>
> 402 So.2d at 1162.

Likewise in State v. Fitzpatrick, 430 So.2d 444 (Fla. 1983) this Court, although it was not necessary to decide this point stated:

> ...reversal would be required for the trial court's failure to instruct the jury on the maximum and minimum penalties for the offense charged in light of Tascano v. State, 393 So.2d 540 (Fla. 1980). We agree with the Fourth District that reversal is mandated by Tascano.
>
> 430 So.2d at 445.

Accord: Renaud v. State, 408 So.2d 1059 (Fla. 4th DCA 1981); James v. State, 393 So.2d 1138 (Fla. 3d DCA 1981); see also Settle v. State, 288 So.2d 511 (Fla. 2d DCA 1974); Mitchell v. State, 304 So.2d 466 (Fla. 3d DCA 1974); Lewis v. State, 399 So.2d 473 (Fla. 4th DCA 1981).

The Defendant tries to avoid the clear language of the aforelisted cases by relying on Malloy v. State, 382 So.2d 1190 (Fla. 1979) and Dorminey v. State, 314 So.2d 135 (Fla. 1975) for the proposition that the tiral court if requested is required to give instructions on the penalties for lesser included offense. However, said cases pre-date Tascano and therefore are inapplicable.

Defendant also relies on Gibbs v. State, 394 So.2d 231 (Fla. 1st DCA 1981) for a post Tascano decision approving instruction as to penalties of lesser included offenses. However, the Defendant misreads said case. This Court in affirming in State v. Gibbs, 406 So.2d 1113 (Fla. 1981), relied on Murray v. State, 403 So.2d 417 (Fla. 1981). Murray dealt only with the crime charged and therefore is not supportive of Defendant's position. Likewise Defendant's reliance on Williams v. State, 399 So.2d 999 is also misplaced.

Therefore, the trial court did not err by failing to give instructions as to penalties of the lesser included offenses inasmuch as the trial court followed this Court's ruling in Welty.

VII.

THE TRIAL COURT DID NOT ERR IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT WHERE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATING FACTORS.

In Tedder v. State, 322 So.2d 908 (Fla. 1975) this Court held that a jury's recommendation of life should be given great weight and that in order to sustain a sentence of death, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Thereafter in Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978), wherein this Court sustained the trial court's override of a jury recommendation, it was stated that the ulimate decision as to whether the death penalty should be imposed rests with the judge. Further, death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances. State v. Dixon, 283 So.2d 1 (Fla. 1973).

In the case sub judice, the trial court found the following factors were appropriate aggravation and mitigation:

Pursuant to Florida Statute 921.141(3), this Court is required to, and does consider each of the mitigating and aggravating circumstances involved herein and makes the following findings:

AGGRAVATION

(a) Whether the defendant was under sentence of imprisonment when the defendant committed the murder for which he has been convicted.

FINDING: The defendant JONES was not under sentence of imprisonment when he committed the murder for which he has been convicted.

I specifically find that this aggravating factor does not apply.

(b) Whether the defendant has been convicted of another capital felony or a felony involving the use or threat of violence to some person.

FINDING: On April 5, 1982, the defendant JONES was convicted of two offenses which involved the use or threat of violence to another person. Although the defendant was convicted of these two offense, to wit: robbery with a firearm and kidnapping with a firearm, at the same time he was convicted of the murder for which he is

presently to be sentenced, the facts show that these two crimes occurred prior to the murder. The defendant was in full control of the truck and its driver, Tomas DeVillegas, before he, the defendant, drove the truck to another location where the actual murder took place.[1]

I specifically find that this aggravating factor does apply.

(c) Whether, in committing the murder for which the defendant has been convicted, the defendant knowingly created a great risk of death to many persons.

FINDING: There is no evidence that in committing the murder for which the defendant has been convicted that he knowingly created a great risk of death to many persons.

I specifically find that this aggravating factor does not apply.

[1]This Court is aware of the decisions of King v. State, 390 So.2d 315 (Fla. 1980) and Lucas v. State, 376 So.2d 1149 (Fla. 1979), in which it was held proper for the trial court to consider as a previous conviction for a violent felony those convictions returned contemporaneously with the First Degree Murder conviction and which became a fact prior to the time the trial judge imposed the sentence.

(d) Whether the murder for which the defendant has been convicted was committed while he was engaged in, or an accomplice in, the commission of the crimes of robbery or kidnapping.[2]

FINDING: The murder was committed while the defendant JONES was engaged in the commission of a robbery and kidnapping.

I specifically find that this aggravating factor does apply.

(e) Whether the murder for which the defendant has been convicted was committed for the purpose of avoiding or preventing a lawful arrest effecting an escape from custody.

FINDING: The murder was committed by the defendant JONES for the sole purpose of avoiding or preventing a lawful arrest. Once the truck and its contents were under the control of the defendant, the victim of the

[2]The entire section of Florida Statute 921.141(5)(d) provides as follows: "The [murder] was committed while the defendant was engaged, or was an accomplice, in the commission of or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb."

murder posed no threat to the defendant. However, the defendant drove the victim to a less populated area, many blocks from where the truck was originally hijacked. There, the victim was dragged out of the truck and ordered into the trunk of another vehicle. When the victim refused, the defendant placed the gun next to the victim's head and fired one shot into his skull. There was absolutely no need for the defendant to kill the driver of the truck, other than to eliminate the sole witness who could identify the perpetrators.

I specifically find that this aggravating factor does apply.

(f) Whether the murder for which the defendant has been convicted was committed for financial gain.

FINDING: The murder was committed during the commission of a robbery of the victim, and therefore it was committed for financial gain. The defendant JONES deprived the victim of his truck full of meat worth approximately $25,000-$30,000 by means of force and violence which culminated in the victim's death. Subsequent to the murder, the defendant drove the truck to a warehouse and tried to

sell the meat.[3]

I specifically find that this aggravating factor does apply.

(g) Whether the murder for which the defendant has been convicted was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

FINDING: There is no evidence that the murder was committed to disrupt or hinder the lawful exercise of any governmental function or enforcement laws.

I specifically find that this aggravating factor does not apply.

(h) Whether the murder for which the defendant has been convicted was especially wicked, evil atrocious or cruel.

FINDING: Although this was a senseless killing, there has been no evidence presented that causes this case to reach the level established by the Florida Supreme Court

[3]Generally, this aggravating factor would be duplicitous to subsection (d). However, this murder was committed not only while the defendant was engaged in the commission of a robbery, but also while he was engaged in the commission of a kidnapping. The crime of kidnapping, as alleged and proved in this case, is not a crime involving pecuniary gain. Therefore, this Court considers subsection (d) and subsection (f) as separate aggravating factors.

necessary to classify this murder as "especially wicked, evil, atrocious or cruel.

I specifically find that this aggravating factor does not apply.

(i) Whether the murder for which the defendant has been convicted was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

FINDING: There was absolutely no necessity for the taking of human life in the case. The unarmed victim had been rendered helpless from the moment his truck was hijacked by the defendant and his accomplice. Helpless, and in no position to defend himself, the victim cried and begged for his life throughout this terrifying ordeal. The defendant coldly, with calculation and premeditation, placed the gun to the side of the victim's head and fired one shot at point blank range. There is absolutely no legal or moral justification for the death of Tomas DeVillegas.

I specifically find that this aggravating factor does apply.

MITIGATION

(a) Whether the defendant has no significant history of prior criminal activity.

FINDING: There is no evidence that the defendant has any criminal record.

I specifically find that this mitigating factor does apply.

(b) Whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

FINDING: There is no evidence that JONES was under the influence of extreme mental or emotional disturbance during the commission of the murder.

I specifically find that this mitigating factor does not apply.

(c) Whether the victim was a participant in the defendant's conduct or consented to the acts.

FINDING: The victim, a totally uninvolved and innocent individual, at no time and in no way consented to nor participated in the conduct of the defendant's acts.

I specifically find that this mitigating factor does not apply.

(d) Whether the defendant was an accomplice in the murder committed by another person, and the defendant's participation was relatively minor.

FINDING: The defendant was not a mere accomplice, but rather the individual most responsible for the victim's

death. The evidence satisfies this Court beyond a reasonable doubt that the defendant was the primary performer during the robbery and kidnapping. The defendant JONES was the only offender to carry, and eventually use, a handgun in committing this murder. The defendant's participation was most definitely major, and not minor.

I specifically find that this mitigating factor does not apply.

(e) Whether the defendant acted under extreme duress or under the substantial domination of another person.

FINDING: There is no evidence that the defendant's actions were a result of his being under any form of duress or substantial domination of another.

I specifically find that this mitigating factor does not apply.

(f) Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

FINDING: There is no evidence that JONE'S capacity to appreciate the criminality of the murder he committed was diminished or impaired in any way. In fact, the evidence is to the contrary. The defendant proceeded

methodically upon a course of conduct which he planned. The defendant acted solely out of greed and for his own selfish interests in committing the robbery and kidnapping. Furthermore, the defendant knew exactly what he was doing when he ordered the victim into the trunk of the Cadillac and expressed his intent to kill the victim if the victim did not comply with his requests.

I specifically find that this mitigating factor does not apply.

(g) The age of the defendant at the time of the crime.

FINDING: FREDDIE JONES was 25 years old at the time of the crime. He was far enough into his majority where age can no longer be an excuse for such conduct.

I specifically find that this mitigating factor does not apply.

(h) Whether there any other aspects of the defendant's character or record, and any other circumstances of the offense.

FINDING: This Court heard and considered the testimony of the psychologist and the defendant's father ("defendant has no propensity to commit acts of violence"), his employer ("the defendant was a good worker"), and his preacher ("the defendant was a member of the Church, did

work for the Church, and showed no signs of violence") and I have given these matters their just weight.

This Court has used as a basis for consideration in imposing sentence no information whatsoever not known to the defendant and/or his counsel of record. Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

Upon the preceding specific findings of fact, the Court bases its sentence. It is the opinion of this Court that there are sufficient aggravating circumstances existing to justify the sentence of death. This Court, having found one statutory mitigating circumstance, and after weighing and considering the aggravating and mitigating circumstances, is of the opinion that the aggravating circumstances far outweigh the mitigating circumstances, either statutory, or by any testimony, facts or circumstances presented at the trial and at the advisory proceeding. This Court, therefore, after due consideration, refuses to concur with the advisory sentence and recommendation rendered by the trial jury.

It is therefore the sentence of this Court that as to Count I of the Indictment, FREDDIE C. JONES be adjudicated guilty of Murder in the First Degree and that he be sentenced to death for the murder of TOMAS DeVILLEGAS.

(R.1837-1844).

The State submits that there was no reasonable basis for the jury to have concluded that some mitigating circumstances existed sufficient to outweigh the aggravating circumstances and therefore the trial court did not err in overriding the jury recommendation. This is evidenced not by the number of aggravating factors found, but the characteristics supporting said factors. Although the jury recommendation could have been influenced by those factors listed on pages 58-59 of his brief, the trial court found that they did not outweigh the aggravating factors.

Inasmuch as this murder was a cold-blooded "execution", committed after the commission of a kidnapping and armed robbery, by one who previously been convicted of other violent felonies, and committed solely to avoid a lawful arrest, death is an appropriate sentence. Under the totality of the circumstances, it was unreasonable for the jury to find the mitigating factors outweighed the aggravating factors. See, Spaziano v. State, 8 F.L.W. 178 (Fla. 1983); Buford v. State, 403 So.2d 943 (Fla. 1981); White v. State, 403 So.2d 331 (Fla. 1981); Zeigler v. State, 402 So.2d 365 (Fla. 1981); Johnson v. State, 393 So.2d 1069 (Fla. 1981); Hoy v. State, 353 So.2d 820 (Fla. 1978); Dobbert v. State, 375 So.2d 1068 (Fla. 1979).

VIII.

THE TRIAL COURT PROPERLY APPLIED FLORIDA STATUTE §921.141 IN FINDING AGGRAVATING CIRCUMSTANCES.

A. The Trial Court Properly found a previous conviction.

On April 5, 1982, the jury returned a verdict finding the Defendant guilty of first degree murder, robbery and kidnapping. (R.1781-1783). Thereafter findings of guilt were entered as to all counts (T.1425) and he was adjudicated (T.1576).

At the sentencing phase of the trial, the trial court, found §921.141(5)(b) to be an applicable aggravating circumstance. (R.1838). In so doing the trial court found:

> On April 5, 1982, the Defendant Jones was convicted of two offenses which involved the use or threat of violence to another person. Although the defendant was convicted of these two offense, to wit: robbery with a firearm and kidnapping with a firearm, at the same time he was convicted of the murder for which he is presently to be sentenced, the facts show that these two crimes occurred prior to the murder. The Defendant was in full control of the truck and its driver, Tomas DeVillegas, before he, the defendant, drove the truck to another

location where the actual
murder took place.

(R.1838).

In support thereof, the Court cited King v. State, 390 So.2d 315 (Fla. 1980) and Lucas v. State, 376 So.2d 1149.

King, and Lucas both stand for the preposition that where a defendant is convicted of first degree murder and another violent felony and where the other violent felony conviction was a fact at the time the jury considered its recommendation and at the time the trial court imposed the sentence, the other violent felony conviction is properly considered an aggravating circumstance of a previous conviction for a violent felony.

The Defendant asserts, albeit erroneously, that the case sub judice is governed by Meeks v. State, 339 So.2d 186 (Fla. 1976). In Meeks, this Court held that contemporaneous convictions arising from the same sequence of events is not to be considered as an aggravating circumstance of prior conviction of a violent felony. Therefore, Defendant herein being convicted contemporaneously of murder and other violent felonies, it was error to consider the contemporaneous conviction as an aggravating factor.

In advancing this position, Defendant has overlooked two important facets of King and Lucas. First, in King, after this court found the contemporaneous convictions were the proper basis for the aggravating factor in question, the court held:

> In reaching this reason, we have not overlooked our decision in Meeks v. State, 339 So.2d 186 (Fla. 1976). The conviction in Meeks are factually distinguishable from those in the instant case; however, to the extent there is conflict with Meeks, we hereby recede.
>
> 390 So.2d at 321.

Second, in Lucas, the facts evidence a continuous sequence of events. However, the court found that the contemporaneous convictions could be considered as the aggravating circumstance of a prior conviction of a violent felony.

Therefore, the trial court in the case sub judice did not improperly apply this aggravating circumstance inasmuch as contemporaneous convictions can be considered as a prior conviction of a violent felony, regardless of whether said convictions arise out of a continuous sequence of events.

B. The Trial Court Did Not Double Sections 921.131(5)(d) and (f).

The Defendant contends that the trial court erred in doubling the impact of the fact that the murder herein was found to have been committed in the course of a robbery and therefore committed for pecuniary gain. The cases cited in support thereof, do stand for the basic proposition. However, there is a major factual distinction between those cases and the case at bar.

In support of his position, Defendant relies on Provence v. State, 337 So.2d 783 (Fla. 1979) and its progeny. However, the State submits that the case sub judice is governed by the law enunciated in Cannaday v. State, 427 So.2d 723 (Fla. 1983).

In Cannady, the Defendant was charged and convicted of robbery, kidnapping and first degree murder. At the sentencing phase, the trial court found that the murder was committed during the commission of a felony and that it was committed for pecuniary gain. This court found no improper doubling of aggravating circumstances and held:

> The trial judge premised this first aggravating circumstance on the finding that the crime was committed during the commission of a kidnapping. Because this finding was based

> upon kidnapping and not robbery, there was no improper duplication of aggravating circumstances. (Citation omitted)
>
> 427 So.2d at 730.

Accord Smith v. State, 424 So.2d 726 (Fla. 1982); Quince v. State, 414 So.2d 185 (Fla. 1982); Brown v. State, 381 So.2d 690 (Fla. 1980) cert. denied, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981).

In the case sub judice, Defendant was convicted of robbery, kidnapping and murder. (R.1835). The trial court found that the murder was committed during the kidnapping thereby leaving the robbery to support the finding that the murder was done for pecuniary gain. (R.1839-1840). Therefore there was not an improper duplication of aggravating circumstances.

C. The Trial Court Finding That The Murder Was Committed In A Cold, Calculated and Premeditated Manner Was Supported By the Evidence.

The aggravating circumstance that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, ordinarily applies in those murders which are characterized as executions or contract murders. McCray v. State, 416 So.2d 804 (Fla. 1982).

The State submits, and the evidence supports, that Defendant "executed" the victim and therefore said finding of a premeditation was proper. The facts supporting are:

> 1. Just prior to death, the deceased was on the ground, crying, begging for his life. (T.1466-1469).
>
> 2. Defendant responded by kicking the victim. (T.1469).
>
> 3. The victim continued to beg for his life. (T.1469).
>
> 4. There was stippling on the victims face. (T.1162).
>
> 5. There was soot on the victims temple. (T.1164).
>
> 6. The victim was shot from a distance of between four inches and two feet. (T.1165).
>
> 7. There was soot on the victims left hand. (T.1168-1169).
>
> 8. That the victim was in a defensive position with his hands in front of his fact, trying to ward off the effect of the bullet, at the time he was shot. (T.1170).

As the aforelisted facts show, the victim was begging for his life just prior to his death. The Defendant then, without any hesitation shot and killed the victim. The Defendant had enough time to think about his actions, and chose to kill the victim. Therefore, the State submits,

that the facts evidenced an "execution" and the finding of premeditation was proper.

IX

THE TRIAL COURT DID NOT ERR WHERE IT CONSIDERED ALL OF THE MITIGATING FACTS, BUT CHOOSE NOT TO GIVE ANY WEIGHT TO ONE OF THE NON-STATUTORY MITIGATING FACTS.

In the penalty phase of the trial, defendant presented to the jury the following non-statutory mitigating facts:

1. Accident reconstruction testimony stating that crushing of the victims head by the vehicle was accidental. (T. 1486).

2. Testimony of Dr. Elenewski, a clinical psychologist, who after seeing the defendant once for two hours (T. 1496), testified that in his opinion the defendant would be a model prisoner. (T. 1500-1505) Dr. Elenewski's testimony was contro dictory in nature, when he stated that defendant was easily influenced and then stated that he was an ambitious, self sufficient person. (T. 1501).

3. Defendant's employer testified that he was a good worker, without violent tendencies. (T. 1523).

4. Defendant's Pastor testified that he was a churchmember (T. 1527) and he showed no violent tendencies. (T. 1528).

The jury, after hearing all of defendant's mitigating facts, retired to deliberate. (T. 1570). Thereafter, an advisory verdict was returned recommending life in prisonment. (T. 1573).

After the jury was discharged, the trial court made its findings concerning the statutory aggravating and mitigating factors. (T. 1581-1586). Prior to imposition of the sentence, non-statutory mitigating factors were considered and sentence imposed as follows:

> "As to any other aspects of the defendant's character or record, and any other circumstances of the offense, I will find there is sufficient evidence to show the defendant had no propensity as far as his father was concerned to commit acts of violence. I am taking that into consideration. I will take into consideration the recommendation from his employer that he was good worker. I will take into consideration the preacher that he was in fact a member of the church and did work for the church and evinced no signs of violence. I will take these matters into consideration.
>
> I must follow the law. The law says if there are more aggravating factors than mitigating factors weighing the balance, not in numbers, the imposition of the death penalty is appropriate.
>
> I so specifically find and I specifically sentence you to die under the requirements of the Florida law. You are sentenced to death for the crime of murder in the first degree.
>
> (T. 1586).

Defendant contends that the trial court erred by failing to consider or give any weight to the testimony of Dr. Elenewski. The State submits, that no error occurred

inasmuch as the Court did consider said testimony, but in accord with the law, it was within the trial court's province to assess the weight of said testimony. It is evident from the record that said testimony was considered by the trial court, but no weight was given thereto. (R. 1843)

In Smith v. State, 407 So.2d 894 (Fla. 1981), the defendant alleged that the trial court erred in sentencing by refusing to find as mitigating circumstances that defendant was under the influence of extreme mental/or emotional disturbance and/or that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. This court found this point meritless and stated:

> "Although consideration of all mitigating circumstances is required by the United States Constitution, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury. Lucas v. State, 376 So.2d 1149 (Fla. 1979).
>
> 407 So.2d at 901.

In Mikenas v. State, 407 So.2d 892 (Fla. 1981), this Court was present with the exact same issue and held as follows:

> ". . .The testimony heard consisted of two psychologist concerning the possibility of defendant's rehabilitation and a minister concerning his alleged progress in religion. Their testimony was not considered as a mitigating circumstance by the court. The testimony was apparently permitted by the trial court in an abundance of fairness to defendant, but the court was not required to give it weight as a mitigating circumstance.
>
> 407 So.2d at 893.

Finally, the trial court's failure to state, on the record, that he was not going to give the testimony any weight is not indicative evidence that he did not consider said testimony. Palmes v. State, 397 So.2d 648 (Fla. 1981). However, the trial court's sentencing order stated that said testimony was considered. (R. 1843).

See also, Lucas v. State, 376 So.2d 1149 (Fla. 1979) (it is within province of trier of fact to weigh evidence). Riley v. State, 413 So.2d 1173 (Fla. 1982))(same); Quince v. State, 414 So.2d 185 (Fla. 1982)(same). Porter v. State, 429 So.2d 293 (Fla. 1983).

In the case sub judice, the jury and the trial court was not deprived of the testimony in question. The trial court in imposing the sentence gave no weight to the considered testimony and therefore no error occurred.

X

DEATH IS A DISPROPORTIONATE SENTENCE IS NOT A PROPER ISSUE ON APPEAL IN THE CASE SUB JUDICE.

It is defendant's position, that before the death penalty is imposed, the court must insure that it is in alignment with the sentences in all similar cases. This is a total misreading of the applicable law. The issue of disportionate sentences becomes viable only when two or more defendant's are charged and convicted of the same crime but received different penalties. Barclay v. State, 343 So.2d 1266 (Fla. 1977); Messer v. State, 330 So.2d 137 (Fla. 1976); Slater v. State, 316 So.2d 539 (Fla. 1975). Only then does the issue of disproportionate sentences become reviewable and what is reviewed is not the facts of the case, but the differences in the aggravating and mitigating circumstances. Barclay v. State, supra; Meeks v. State, 339 So.2d 186 (Fla. 1976).

The defendant relies on McCaskill v. State, 344 So.2d 1276 (Fla. 1977) to support his position to review similar cases. However, McCaskill also dealt with two defendant's, and the review undertaken was how the courts treated other cases where two or more defendant's were convicted of the same crime. Said case does not stand for the proposition that each death penalty case must be compared with all

factually similar cases. See Dobbert v. State, 375 So.2d 1069 (Fla. 1979) for proposition that this court's failure to review capital cases where sentence of life has been imposed does not violate Eighth and Fourteenth Amendments.

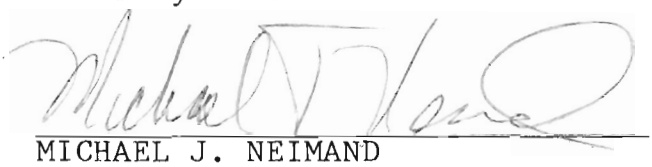
Therefore, the State urges that this Court not even consider this issue.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State respectfully submits that the judgment and sentence of the lower court should clearly be affirmed.

Respectfully submitted,

JIM SMITH
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to KATHLEEN PHILLIPS and JOEL V. LUMER, Special Assistant Public Defender, Attorneys for Appellant, 711 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130, on this 28th day of June, 1983.

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