IN THE SUPREME COURT OF FLORIDA

RANDALL SCOTT JONES,

Appellant,

v. CASE NO. 72,461

STATE OF FLORIDA,

Appe1lee.

_____/

ON APPEAL FROM THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT
IN AND FOR PUTNAM COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

Point I

The voluntariness of appellant's statement and subsequent confession turned on a question of credibility of the appellant and the two witnesses. The trial court's decision on the motion to suppress and his credibility determination come to this court with a presumption of correctness and this should not substitute its judgment for that of the trial court. Appellant's several signed written waivers are sufficient to meet the stricter test of voluntariness. Even without the confession, the evidence against Jones is sufficient to support the convictions.

Point 11

Whether the sexual battery occurred before or after the death of Kelly Perry is a fact to be determined by the jury based on their own credibility determination of the evidence. Even if this court concludes Kelly Perry was dead at the time of the rape, the act of appellant is sufficient to support a finding of attempted sexual battery and an erroneous conviction for sexual battery is harmless to the sentencing phase because the jury was instructed by the court that it could only consider the specifically enumerated statutory aggravating factors in arriving at its sentencing recommendation.

Point III

Appellant's sentence of death was not unconstitutionally imposed as a result of the failure of appellant's jury to

unanimously determine the applicability of at least one statutory aggravating circumstance to the murders. This court has held that a defendant possesses no constitutional right to be sentenced by a jury and has previously rejected issues similar to this one.

Point IV

Any error in the trial court's instructing the jury on the aggravating circumstance that the murders were especially heinous, atrocious or cruel, is harmless where the judge is the ultimate sentencing authority and he rejected that factor as one that should not go into the weighing process.

Point V

The evidence clearly showed that Jones murdered the victims in order to facilitate his taking of Brock's truck, a thing of monetary value. This supports the applicability of aggravating factor that the murders were committed for pecuniary gain.

If this factor was stricken, that the murders were committed during the commission of a robbery/burglary could be substituted. Although both factors are supported by the evidence, improper doubling keeps the second one from being considered in the weighing process now.

Point **VI**

The murders here were not an unplanned occurrence arising during the course of another felony. The evidence showed that Jones made a deliberate plan to execute the victims and his own admission was that the victims were killed "for no reason at all." That he discussed the killing of the truck's occupants with his friend as the victims they slept, shows appellant had ample time to reflect on the consequences of his actions, and such supports a finding that the murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

Point **VII**

The possibility that the trial court would impose consecutive sentences should the jury return a recommendation of life has nothing to do with the circumstances of the crimes or appellant's character and is outside the scope of penalty phase argument. The court did not err in steering defense counsel back on track.

Appellant's objection to the form of the sentencing verdict sheet was not preserved for appellate review .

Point **VIII**

Appellant's constitutional attacks on his death sentences were not preserved for appellate review and there has been no showing of fundamental error. Thus, the issue should be deemed waived. Furthermore, this claim has previously been rejected by this court as being without merit. It should be concluded that appellant's sentences of death were constitutionally imposed.

Point IX

The established rule against having members of the victim's family identify the victim at trial was not violated where the family members in this case did not identify the bodies of the victims and their testimonies were directed to other relevant matters. The nature of the family member's testimony did nothing to unfairly prejudice the appellant.

Point X

The trial court's refusal to permit defense counsel to withdraw when it was discovered that his office was also representing a state witness on unrelated matters did not constitute reversible error. Dual representation of Jones and the witness did not create an actual conflict of interest and therefore, no prejudice resulted.

Point XI

Both the inquiry of the juror and the peremptory challenges took place at side-bar with both counsels present and just a few feet from the appellant. It is not clear from the record, though, that appellant was not at side-bar during these discussions, but it is evidenced that defense counsel was given full opportunity to discuss the proceedings with appellant before the peremptory challenges were made. Therefore, the fundamental fairness of the proceedings were not thwarted by Jones' not being at the bench.

Point XII

The objection to the admission of the DNA evidence made at trial and on appeal is without merit. The court did not err in

refusing to exclude relevant, scientific evidence on the ground that it was too new. The testimony of the qualified expert in the field was that the DNA "fingerprint" process had been admitted as evidence in other courts and that it utilized time-tested theories and procedures. The trial court did not err in finding the evidence to be reliable.

Point XIII

Any error in the state's witness or the prosecutor commenting on appellant's lack of remorse forhaving committed the crimes was harmless since it was not considered by the judge in aggravation and was accorded no weight in the sentencing process. Evidence which might arguably show lack of remorse should be admissible to refute the existence of mitigating factors since evidence of remorse is admissible to establish a mitigating circumstance. The state presented the evidence for that purpose here, and the court did not err in refusing to grant a mistrial, which is reserved for the most extreme circumstances.

Point XIV

Any error in the trial court's not attaching appellant's fingerprints to the judgments of guilt for first-degree murder is harmless, and vacation of the judgments and sentences is not warranted.

Point XV

Separate convictions and punishments for first-degree murder, shooting into an occupied vehicle, burglary of a conveyance with an assault, and armed robbery do not violate the double jeopardy clause and would be permissible under both

Carawan and Blockburger. Furthermore, Carawan was not the law at the time the crimes were committed here, and it is questionable as to whether Carawan has a sound basis now in view of the recent legislative amendment. All convictions and sentences imposed upon appellant should be affirmed.

POINT I

THE TRIAL COURT DID NOT ERR IN REFUSING TO SUPPRESS STATEMENTS OBTAINED FROM THE DEFENDANT AFTER HE EXPRESSLY WAIVED HIS RIGHTS.

"The preponderance of the evidence standard has been generally applied in Florida cases where the voluntariness of a defendant's confession is at issue. *See, McDole v. State,* **283** So.2d 553 (Fla. **1973).**" Balthazar v. State, 13 F.L.W. **2582** (Fla. 4th DCA November 23, **1988).** Due to the conflicting testimony given by the appellant and officers Hord and Stout, the question of voluntariness came down to a question of credibility to be judged in light of the uncontested evidence. The issue of credibility was resolved against the appellant at the suppression hearing (R 466). The settled rule governing the review of a trial court's decision on a motion to suppress is that the ruling "comes to this court with a presumption of correctness [and] . . . a reviewing court should not substitute its judgment for that of a trial court, but, rather, should defer to the trial court's authority as a fact finder." Wasko v. State, 505 So.2d 1314 (Fla. **1987).**

At the suppression hearing, appellant did not dispute that he was read his rights under Miranda v. Arizona, 384 U.S. 436 **(1966)** at least four times (R 450). On appeal, appellant claims that following his arrest in Mississippi and his receipt of the Miranda warning, he "exercised his right to remain silent and asked for an attorney." He quotes Trooper Haldeman's testimony at trial regarding appellant's response after receiving the Miranda warning in support of his claim and emphasizes the statement, "He

didn't say anything." (R 1330) Appellee would concede that that was an exercise of appellant's right to remain silent at the time, but it certainly did not equate with asking for an attorney. It also cannot be construed as an unequivocal invocation of his right not to talk to the authorities at any time in the future. In fact, appellant subsequently executed a written waiver of rights form (R 1332,1337-1338) before being questioned briefly by Mississippi authorities (R 1331). Since appellant testified that he requested an attorney when arrested in Mississippi, but could not refute the signed waiver, and the arresting officers from Mississippi did not testify at the suppression hearing, Judge Perry reserved jurisdiction on the matter *so* that any statements made by the appellant to the Mississippi police could still be introduced as evidence at trial subject to the state's laying the proper "predicate or foundation for it." (R 465) Statements made by appellant to Lieutenant Edwards in Mississippi were subsequently elicited by **defense counsel** upon cross-examination at trial (R 1339). Interestingly, defense counsel never questioned either of the Mississippi officers at trial as to whether appellant ever invoked his right to counsel.

Appellant was arrested at 10 or 10:30 p.m. on a Sunday night and was first approached by Detective Hord and Lieutenant Stout early in the evening of the next day (R 398). They were not informed of any request by Jones for counsel, and if any question of that arose in their minds, the already executed waiver of rights form would have tended to provide the answer. Appellant voluntarily executed a consent to search the trailer in which he

had been residing in Mississippi (R 1340-1341). It is significant that appellant never testified at the suppression hearing that he was coerced in any way by the Mississippi authorities into signing either of these waivers.

In assessing the validity of a waiver, the courts analyze the totality of the circumstances surrounding the interrogation. The most important factors in the analysis include the suspect's education and age, the presence or absence of an explicit waiver, language barriers, the suspect's familiarity with the American criminal justice system, the suspect's physical condition, and the time between the reading of the Miranda warnings and the actual questioning. The totality of the circumstances here are: Randall Jones was an adult (19 years old) and had spent time in the military (R 1723); there was no evidence that he was a high school dropout and Rhonda Morrell testified at the trial that she went to school with Jones (R 1103,1105); it was discovered through the administration of IQ tests that appellant had an above-average intelligence; Dr. Krop testified that appellant had "high average intellectual abilities, possibly even higher than that" (R 1719); and Jones' testimony at the suppression hearing demonstrated an excellent command of the English language. Appellant signed more than one explicit waiver of his rights (R 1332,1337-1338,1340), United States v. Hack, 782 F.2d 862,866 (10th Cir.), cert denied 106 S.Ct. 2921 (1986)(waiver valid when defendant signed two different Miranda waivers); United States v. Bernard S., 795 F.2d 749,753 n.4 (9th Cir. 1986) (written waiver stronger evidence of voluntariness of waiver than oral waiver); and he claimed enough

knowledge of the criminal justice system to offer a criticism of the way the Mississippi authorities gave the Miranda warning (R 454). There was no indication that appellant was denied food or sleep. See, Aldridge v. Marshall, 765 F.2d 63,65-66 (6th Cir. 1985). All evidence indicates that the actual questioning took place immediately after the reading of the Miranda warnings although there was a possibility that appellant's second statement made to the Putnam County officers was made following an abbreviated Miranda warning. (R 404-405,423,447). However, appellant testified that when asked if he remembered those rights from the day before, he said "Yes." (R 447)

Contrary to all appellant's assertions that he requested counsel and that he was coerced into giving his statements, he testified that he was the one who initiated the conversation (which included his confession) on the way to Palatka, that he voluntarily pointed out the location of the crime at the Rodman Dam area (R 452-453), that he understood his rights the entire time, and that he voluntarily signed the transcription of his second statement back at the jail (R 453-454). Lieutenant Stout did testify that when he returned to the interrogation room, he heard Jones and Detective Hord mention the word attorney, but it was not in the context of asking for one. (R 94, 95, 400-401). Detective Hoard elaborated on this conversation and explained that as he was typing appellant's dictated statement, he heard something that he thought was a request for counsel, so he stopped and looked at Mr. Jones, who related that "no, he was not asking for an attorney that that was not what he said." (R 419)

Detective Hoard also testified that at some point he told Jones that any attorney that Jones would speak with would tell him to stop talking to the police (R **419-420**). That would have likely been the case, and such advice from the officer surely would have resulted in Jones invoking his right to remain silent unless he truly desired to waive it.

Jones testified at the suppression hearing that when Hord and Stout first came to see him at the jail in Mississippi, Hord explained his Miranda rights to him (R **442**). Jones confirmed Hord's testimony as to his advice regarding an attorney would tell him to do, and stated that Hord also told him, "If you want to make a deal with the state attorney, or along those lines, he said, the only way to do that would to be totally honest with me." **(R 443)**. Jones concluded, "After some considerable time, yes, I decided to talk to him.'' (R **443**) That is when Jones gave the statement blaming the killings on his friend Chris.

Detective Hord had testified before Jones did that Jones' mention of an attorney was not in the context of requesting one to represent him (R **415**),

> His concerns at that point were: Was there a possibility of a deal being made on his behalf to testify, to name names with regard to this investigation.
>
> I explained to him that those particular type of arrangements had to be made by attorneys, both the state attorney and any defense counsel that he may have.
>
> But, again, he made no request for an attorney. (R 417)

Jones was brought before Judge C.C. Robertson (R 427, 445) before the Putnam County authorities transported Jones back to Florida. Detective Hord testified that he was told there had been no demand for an extradition hearing in front of a judge and that if Jones signed a form, they could leave with him. Hord stated that they requested a hearing for Jones "with a person who could at least discuss his options with him had he any questions. As a courtesy to us, Judge Robertson was contacted and consented to officiate over the signing of the document." * * * "Just trying to make sure that he [Jones] had every opportunity to have assistance available to him if he desired it." (R 428)

Based on the totality of the circumstances and the credibility of the witnesses, the court determined Jones' waiver of his rights to be voluntary and, therefore, he denied the Motion to Suppress (R 466). Appellant has demonstrated no abuse of the court's discretion in its credibility determination. Consequently, no reversible error has been demonstrated in the admission of appellant's statement of the 17th and his confession of the 20th.

If by some chance, appellant's first statement to Hord is found to be involuntary and suppressible, the admission of such was harmless since Jones did not confess to having committed the murder in that first statement and it was basically cumulative of the second statement, which was properly admitted because it was

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[1] There is no proof that the Mississippi police violated the Mississippi law, requiring an offender to be taken before a proper officer without delay, especially in view of the fact that Jones was arrested after 10 on a Sunday night (R 436, 440)

made after appellant initiated the conversation with the officers. Once an accused individual invokes his Fifth Amendment right to counsel, the police may not interrogate him again until counsel is provided unless the accused initiates further communication, exchanges, or conversations with police. Edwards v. Arizona, 451 U.S. 477,487 (1981). Once a defendant initiates the conversation, he must also waive his previously invoked right to counsel before police may interrogate him. Oreqon v. Bradshaw, 462 U.S. 1039, 603 S.Ct. 2830, 77 L.Ed.2d 405 (1983). In the instant case, after Jones admittedly initiated the conversation with the officers, he was either, re-advised of (R 404-405), or reminded of (R 423), his Miranda rights before being questioned. He said he remembered them, and agreed to talk to the deputies (R 447). He then confessed to having killed the victims and later executed and made corrections to a written form of the confession that included several recitations of his rights (R 594-599, 1497-1500), and which he read aloud before'signing R 429-430, 454). On the last page of the voluntary statement of August 20, 1987, appellant handwrote, "This statement has been prepared by Detective Chris Hord which is my wish." (R 599)

With respect to the guilt phase of the trial, erroneous introduction of both statements would still be harmless because of evidence against Jones that was indisputable. Appellant was seen in the victim's truck early in the morning just hours after the murder (R 1298, 1300-1301), the bullet holes were in the windshield and the gun was on the seat (R 1291-1292). Jones was found in the victim's truck at the time of his arrest in

Mississippi and had Brock's check cashing card in his wallet (R 1365). Jones' former girlfriend, Rhonda Morrell, testified that he acquired a gun (similar to the one that was retrieved from the pawn shop) from her father's house (R 1097, 1102, 1366). Jones pawned a firearm similar to the type that killed the victims under his own name (R 1102, 1366). Ms. Morrell also testified that when she visited Jones in jail, he told her about the murders at Rodman Dam "Said he had shot those two people. He didn't remember doing it, but he had done it." (R 1104) Elliott Louis testified that he had seen appellant around 11:10 p.m. on the night of the murders (R 1084-1085), that Jones showed him a flare gun (R 1086) and asked him if he wanted to go target practicing (R 1089-1090). Louis went to Jones' apartment that he shared with Chris Reesh the following morning (R 1090). There he saw a pair of muddy shoes with what looked like blood on them (R 1091, 1094). The DNA fingerprint expert, Dr. Garner, testified that the semen sample taken from the female victim contained DNA which matched that of Jones and, along with the video testimony of Dr. Pollock (R 304), proved Jones had had sexual intercourse with the female victim near the time of her death. This evidence, which is reviewed in further detail in the following issues, is clearly sufficient to support each of the convictions, including the convictions of first degree murder on a felony murder theory, even if the statements made by appellant to the Putnam County authorities had been suppressed. The convictions should be affirmed.

POINT II

REVERSAL OF THE CONVICTION FOR SEXUAL BATTERY IS NOT MANDATED AND THE CONVICTION DID NOT IMPROPERLY AFFECT THE JURY RECOMMENDATION OF DEATH IN THIS CASE.

In support of his contention here, appellant relied upon the testimony of the medical examiner and the truth of his own statement, which in Point I herein he has argued should have been suppressed and thus disregarded. The medical examiner did testify that the sexual attack on Kelly Perry "probably" occurred after death **(R 1280),** but that she could have lived for seconds after she was shot, that her heart could have still been beating after receiving a shot to the head, and that the victims were dead or dying when they were dragged along the ground (R **1278).**

At the conclusion of the state's case, defense counsel made a motion for judgment of acquittal on all counts listed in the indictment on the basis that no ***prima facie*** case had been established (R **1506).** The trial court properly denied the motion for judgment of acquittal on the sexual battery count and submitted the case to the jury because the state did prove a ***prima facie*** case and the jury is afforded the right to believe or disbelieve as much of the expert's opinion testimony as it chooses. The jury has same right with regard to the statements of the appellant and could have chosen to disbelieve the chronology of events surrounding the crimes as they were set forth in the appellant's statement. The one glaring fact in this case is that the victims were killed for no comprehensible reason. Had it been

certain that appellant had intercourse with Kelly Perry after shooting Paul Brock and before killing Perry, the whole crime would make more sense and there would be no question now that a sexual battery occurred. It is possible that rather than believe the sequence of events as told by appellant, the jury believed that he committed the sexual battery inside the cab of the truck immediately after shooting Kelly Perry and not some minutes later. That someone would kill two people, go tow his vehicle out of the sand, drive away, and then return to the scene of the crime simply to copulate with the corpse does bear more than a degree of incredibility.

Regardless, if indeed sexual battery cannot legally be committed upon a dead person and we believe the chronology of events as recited by appellant to the authorities, sexual battery is still a general intent crime, and if appellant was not actually aware that the shot sustained by Kelly Perry had already proved fatal by the time he copulated with her, then he was at the least guilty of attempted sexual battery and should not be completely exonerated simply because his victim had expired before he violated her. Appellant was charged with committing a sexual battery upon a person twelve years of age or older without her consent and when the victim was helpless to resist (R 6). The state proved each and every element of this crime. Appellant, however, should have requested a special jury instruction on the definition of a "person" in order to preserve this issue for appeal. Instead, appellant specifically approved of the instructions on sexual battery to be given by the trial judge (R

1559). The jury was given the standard jury instructions (R 1625), and based upon those, it correctly found appellant guilty as charged. That Kelly Perry was either unconscious or dead at the time of the sexual battery was sufficient to prove that part of the charge that the victim was "helpless to resist".

The statutory definition of "person" does not specifically exclude a deceased person and it does include in its definition "estates." Section 1.01(3), Florida Statutes (1987). An "estate" is the "total property of whatever kind that is owned by a decedent" prior to the distribution of that property. From that it is apparent that a deceased individual can at least own property. "Property" encompasses "the degree, quantity, nature, and extent of interest which a person has in real and personal property." Black, Black's Law Dictionary (5th edition 1979). Appellee submits that there is no property more personal or in which a person would have a greater interest than in his or her own body. Kelly Perry's body is part of her estate and thus it is a "person" according to our statutory definition until it is disposed of in accordance with the terms of a will or the laws of the state of domicile of the decedent. Kelly Perry's body was sexually battered by the appellant. Where our laws are implemented to protect the living, they should also serve to command respect, if not protection, for the dead. There is no requirement that the victim of a sexual battery be conscious or aware of the battery being perpetrated upon him, and where the evidence proved that the body, or estate, or person of Kelly Lynn Perry was sexually battered by the appellant, his conviction for the crime should be affirmed.

Should this court determine that the sexual battery conviction was illegal, such was harmless to the penalty phase for two reasons. The judge properly instructed the jury that it could consider only three of the aggravating circumstances listed in the statute when considering their recommendation (R 1822-1824), and the jury is presumed to follow the jury instructions. See, Grizzell v. Wainwright, 692 F.2d 722, 726-727 (11th Cir. 1982), cert. denied, 461 U.S. 948, 103 S. Ct. 2129, 77 L.Ed.2d 1307 (1983). The sexual battery had nothing to do with any of the aggravating factors upon which the jury was instructed in this case.

Alternatively, this case could be analogized to McCrae v. State, 395 So.2d 1145 (Fla. 1980) and Correll v. State, 523 So.2d 562 (Fla. 1988). In both cases, an aggravating factor was that the defendant committed the murder during the course of a sexual battery. In McCrae, this court approved such aggravating'factor when the rape had occurred "either shortly before or **immediately following** Mrs. Mears' death.'' McCrae at 1153. This court rejected a subsequent claim of error from McCrae noting that an attempt to commit rape would have sufficed:

> From the fact that the attacker did in fact have sexual union with the body of the victim, either before or after her death, the jury could have inferred that rape was what he intended to do. The overt act of sexual violation, whether the victim was alive or dead, together with the intent inferable from the circumstances, was sufficient to prove the crime of attempted rape, if in fact the jury believed that the victim was dead. Since it was later unclear from the expert testimony whether the

> victim was alive or dead at the time, the jury could have concluded that appellant believed she was alive or at least that he originally set out to have forced sexual contact with her while she lived. The fact that a rape may not have occurred because the intended victim was dead at the time of the actual penetration would not have changed the attacker's intent, which was properly inferable from the evidence. Id. at 871.

The same questionable circumstances surrounded the murder and sexual battery of Susan Correll by her former husband. This court did not address the merits of this issue at all in its Correll decision. The only thing that distinguishes those two cases from the one at bar is that "in the commission of a sexual battery" was given as an aggravating factor in McCrae and Correll, but was afforded no place, let alone a prominent one as an aggravating factor, in the penalty phase of the instant case. Any consideration that might have been given by the jury to the act committed upon Kelly Perry,was not improper, and where the sexual battery was not part of the instructions given to the jury during the penalty phase, no cause for reversal has been demonstrated.

It should finally be noted that the jury recommended sentences of death for the murder of each victim. They had the choice of recommending death for either one, both, or neither. Where the sexual battery did not pertain to victim Brock, but the sentence of death was recommended for his murder as well as that of Kelly Perry, it is demonstrated that the sexual battery was not a significant factor in the jury's deliberation. The sentences of death should be affirmed.

POINT III

IMPOSITION OF THE DEATH PENALTIES IN THIS CASE DID NOT VIOLATE THE FIFTH, SIXTH, OR FOURTEENTH AMENDMENTS WHERE THE JURY DID NOT EXPRESSLY DETERMINE THE EXISTENCE OF STATUTORY AGGRAVATING CIRCUMSTANCES IN SUPPORT OF A SENTENCE OF DEATH FOR FIRST DEGREE MURDER.

As cited in appellant's initial brief, section 775.082(1), Fla. Stat. (1987) provides:

> A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such persons shall be punished by death, and in the later event such person shall be punished by death. (emphasis added)

It is undisputed that in cases such as the one at bar, it is the jury's duty to recommend a punishment to the court, and according to the above Statute, the findings (of aggravating factors) which call for the death penalty are to be made "by the court." Section 775.082(1) Florida Statute (1987).

Appellant claims that "substantive considerations that 'actually define' which first-degree murders are punishable by death are elements of the crime which must be proved beyond a reasonable doubt and found by a jury." Appellee does not dispute that the aggravating factors must be proved beyond a reasonable doubt but just as the jury simply decides whether the defendant is guilty beyond a reasonable doubt or not guilty and is not required to expressly find on the verdict form that each element of the

charged crime has been proven, *so* too should the jury render an advisory sentence of life or death and it is unnecessary to expressly find "elements" of the crime of first degree murder punishable by death. There is no such crime in the state of Florida as "capital first-degree murder," but only first-degree murder of which the basic elements are always the same. In fact, every conviction for first degree murder in Florida involves a **potential** sentence of death. See, State v. Bloom, 492 So.2d 2 (Fla. 1986).

Furthermore, the penalty recommendation by the jury is not required to be unanimous under Florida's capital sentencing scheme, but is derived from a majority determination. James v. State, 453 So.2d 786 (Fla. 1984). Therefore, Jones' motion "to have the jury unanimously determine which aggravating circumstances apply to his case" is a request that is contrary to the law. Section 921.141(2) and (3) certainly do not require the jury to **unanimously** do not determine the existence of aggravating circumstances in support of their majority recommendation.

Appellant's argument here is basically suggesting an alternative method of sentencing in capital cases. The problem with this method is that it invades the province of the court, which is to determine and impose sentence. Appellant alleges, "The failure of the jury to use a special verdict form in the penalty phase violated the Sixth Amendment right to a jury trial." (Appellant's Initial Brief, p.28) Appellee respectfully contends that one has little to do with the other: Appellant was afforded his Sixth Amendment right to a jury trial in this case, but the

Sixth Amendment does not guarantee the right to be **sentenced** by the jury. That is wholly the responsibility of the judge. This court has previously held that a defendant possesses no constitutional right to be sentenced by a jury. Spaziano v. Florida, 468 U.S. 447, 104 S.Ct.3154, 82 L.Ed.2d 340 (1984).

As this court observed in Lightbourne v. State, 438 So.2d 380 (Fla. 1983), the aggravating circumstances ultimately required to support the imposition of a sentence of death need not be alleged in an indictment charging a defendant with a capital felony in order to confer jurisdiction on the trial court to subsequently impose a sentence of death. This result obtains because, in Florida, it is the judge and not the jury who makes the ultimate determination concerning the appropriate sentence to be imposed in a given case. Under Florida's bifurcated system, the trial court is assisted and guided by the jury's recommendation in making its ultimate sentencing determination, but a jury recommendation, be it for death or for life imprisonment, is not binding on the trial court judge with whom the ultimate responsibility for determining the appropriate sentence is reposed by statute. Section 921.141(3), Fla. Stat. (1987); Lusk v. State, 446 So.2d 1038 (Fla. 1984); Thomas v. State, 456 So.2d 454 (Fla. 1984); Thompson v. State, 456 So.2d 444 (Fla. 1984); Engle v. State, 438 So.2d 803 (Fla. 1983).

It should be pointed out that an issue similar to this one has recently been presented for this court's consideration and

subsequently been rejected in the cases of Remeta v. State[2], 522 So.2d 825 (Fla. 1988) and Hildwin v. State, 531 So.2d 124 (Fla. 1988). See also, Wright v. State, 473 So.2d 1277 (Fla. 1985).

For the above mentioned reasons, appellant's argument should be rejected.

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[2] Remeta argued that the jury should be instructed as to the aggravating circumstances during the guilt phase *so* that it could specifically determine which aggravating factors existed. Jones does not appear to be suggesting the use of that procedure in his argument. Appellant's pre-trial motion was that the jury be required to use a special verdict form "during the penalty phase" "to unanimously determine the presence of each statutory aggravating factor." (R 645) Jones' Motion for New Trial does not allege the court's denial of the previous motion as grounds for new trial under the heading "sentencing phase", but lists it as an error under the heading "guilt-innocence phase.'' (R 667)

POINT IV

ANY POSSIBLE ERROR IN THE TRIAL COURT'S INSTRUCTING THE JURY ON THE AGGRAVATING CIRCUMSTANCE OF *AN* ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER IS HARMLESS WHERE THE TRIAL COURT DID NOT USE IT IN THE SENTENCING PROCESS.

Appellee would concede that the jury probably should not have been instructed on the aggravating factor of "especially heinous, atrocious or cruel" since the trial court found that the law did not support its application in this case. However, the prosecutor's argument to the jury was more persuasive for the finding of cold, calculated and premeditated without moral or legal justification than it was for the finding of heinous, atrocious or cruel (HAC). Appellee does take issue, however, with appellant's claim that defense counsel was prevented from arguing the inapplicability of HAC to the jury. A review of the record shows that not to be true (R **1816**). The court specifically told defense counsel that he could present his viewpoint, but just refrain from prefacing that viewpoint with the word "legally." (R **1816**). Use of that word would obviously turn defense's "viewpoint" into an instruction on the law, which was the duty of the court at the appropriate time. Defense counsel could have easily presented examples to the jury to draw a distinction between a murder that should be found to be HAC and one that should not. That the defense did not continue this line of argument was a tactical decision of its own making and cannot be blamed on the court. Therefore, appellant was not denied effective representation of counsel.

Although the jury's recommendation of life or death is to be given deference, the trial court makes the ultimate determination as to sentence and must himself consider which aggravating and mitigating factors apply, what weight should be accorded to each, and how they balance. Appellant's argument here is based on the assertion that the jury was unable to reject the applicability of this factor, thus tainting its recommendation, and relies on, *inter alia*, the fairly recent decision in Maynard v. Cartwright, 486 U.S. __, 108 S.Ct__ , 100 L.Ed.2d 372 (1988), where the United States Supreme Court held that Oklahoma's identical statutory aggravating circumstance did not sufficiently guide the jury's discretion in whether to impose the death penalty. What distinguishes any Florida death penalty case from Maynard is the fact that in Oklahoma, (Maynard's origin), the jury is the ultimate sentencing authority and not the judge, as in Florida.

The court in Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987), noted that Oklahoma had "no provision for curing on appeal a sentencer's consideration of an invalid aggravating circumstance.'' Id. at 1482. Based on the holding of Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the Court of Appeals also concluded that the Oklahoma courts had not adopted a limiting construction that cured the inadequate and over-broad definition of the aggravating circumstance "especially heinous, atrocious or cruel.'' 822 F.2d at 1497.

Nevertheless, after analyzing the Florida Supreme Court's narrowing construction of the statutory aggravating circumstance, the Court in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49

L.Ed.2d (1976) stated, "[We] cannot say that the provision, as *so* construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences." Id. at S.Ct.2968

The facts of the instance case are perfect illustration of how Florida's sentencing procedure overcomes any problem with the language of this aggravating circumstance. The trial court, as actual imposer of sentence, found that the circumstances surrounding the crime in this case did not call for the application of the HAC factor as it has been construed previously by this court. The trial court did not include this factor in its weighing process (R 686,690). Thus, any issue regarding the inapplicability of this aggravating factor to the case at bar is moot and no new penalty phase is necessary.

After analyzing the Florida Supreme Court's narrowing construction of the statutory aggravating circumstance, the Court in Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d (1976), stated, "[We] cannot say tht the provision, as *so* construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences." Id. at S.Ct.2968

Where the trial court properly found two aggravating factors and considered the three statutory mitigating circumstances, but found no persuasive evidence in support of them, the death penalties imposed here should be affirmed. It is clear from the sentencing order that the court also considered "any other aspect of the defendant's character or record, and any other circumstance of the offense," but was unable to find anything that carried great mitigating weight (R 687,691).

Also, contrary to Oklahoma's capital sentencing procedure disapproved in Cartwright, the Florida Supreme Court analyzes the facts of each case to determine if they fall within the court imposed narrowed definition of the aggravating circumstance of "extremely heinous, atrocious or cruel.'' Maynard, **108** S.Ct. **1853;** Proffitt, 96 S.Ct. at 2969-70. This analysis is unnecessary here where the trial court has already eliminated this aggravating factor from the weighing process.

POINT V

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE MURDERS WERE COMMITTED FOR PECUNIARY GAIN.

"In the past, we [this court] have permitted this aggravating factor only where the murder is an integral step in obtaining some sought-after specific gain." Hardwick v. State, 521 So.2d 1071 (Fla. 1988). There is no doubt in the instant case that appellant planned to murder the victims for the primary purpose of taking Brock's truck, valued at approximately $8000. That defendant may not have planned at that time to eventually sell the truck for a sum of money should not be the determinative factor. The truck itself was something of value and an asset which afforded appellant pecuniary gain once it was acquired. As appellant noted, Black's Law Dictionary defines "pecuniary" as "monetary; relating to money; financial; consisting of money or that which can be valued in money." The pickup truck which Brock purchased two months earlier for the sum of eight thousand dollars is unquestionably something which can be valued in money.

Even if the aggravating factor of pecuniary gain cannot be sustained under the facts of this case, the contemporary convictions for armed robbery and burglary would warrant the finding in aggravation that the murders were committed during the commission of those felonies. See, Perry, supra. In fact, such was argued by the state during the penalty phase. It might have been improper doubling of aggravating factors for the trial court to have based its sentencing decision on both pecuniary gain and during the commission of a robbery/burglary. This explains why

the court did not list the latter as an aggravating factor in its sentencing order. However, should the aggravating factor of "for pecuniary gain" be stricken, substituting the unfounded aggravating factor would be proper and would still leave the court with two valid aggravating circumstances and no mitigating ones. See, Echols v. State, 4848 So.2d 568 (Fla. 1985). Where there are no established circumstances mitigating against the death penalty, striking invalid circumstances does not necessarily mean that resentencing is required. Francois v. State, 407 So.2d 888 (Fla. 1981). Since there would be two valid statutory aggravating circumstances remaining once "the commission of a robbery and burglary" is included, and the court eliminated the statutory and nonstatutory mitigating factors, we should be convinced that the result of the weighing process would not have been different if "for pecuniary gain" was not been considered. Brown v. State, supra.

It should briefly be noted here that the court could have properly found that there was a previous conviction of another capital felony, or of a felony involving the use or threat of violence as an additional aggravatiang factor under section 921.141(5)(b), Florida Statutes (1987), for each of the murders based on the contemporaneous conviction for the murder of the other victim. Hardwick v. State, 461 So.2d 79 (Fla. 1984); Correll v. State, supra.

Resentencing in the instant case is not required and the death sentences should be affirmed.

POINT VI

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The facts support the finding that the murders were committed in an especially cold, calculated and premeditated manner. Rogers v. State, 511 So.2d 526,533 (Fla. 1987). From his statement, Jones apparently discussed openly with Chris Reesh his intention to kill the people in the truck (R 1479,1492). The murders were undertaken only after the reflection and calculation which is contemplated by this statutory aggravating circumstance. See, Harvey v. State, 529 So.2d 1083 (Fla. 1988). Appellant's first statement to authorities laid all blame for the killings upon his friend, Chris Reesh. That first statement included, "He did it [shot them] for no reason, no reason at all." (R 1480) Where appellant later admitted that everything in his first statement was true but the roles were reversed (1491), he was in effect admitting that he shot the victims for no reason and that certainly supports the "without any pretense of moral or legal justification" part of the aggravating factor. Appellant had nothing to fear from his victims at the time he killed them; he had no quarrel with them; he did not even know them (R 1485).

Appellant now cites Bates v. State, 465 So.2d 490 (Fla. 1985): "This aggravating factor . . . is reserved primarily for those murders which are characterized as execution or contract murders or witness elimination murders." The sentencing judge made a finding that the victims were shot "execution style.'' (R

686,690). Regardless of whether this aggravating circumstance applies based on the manner of killing or the murderer's state of mind at the time of the killing, the facts of this case support the court's application of this factor.

Although no threats were made by defendant in this case to the victims prior to their murder, as occurred in Hardwick v. State, 521 So.2d 1071 (Fla. 1988), the fact that the defendants in both cases announced their intention to others in advance of the murders reflected proof beyond reasonable doubt that the defendant's decision to kill was based on calculation and prearranged design. Appellant had ample time during the events leading up to the murders to reflect on his actions and their attendant consequences. That fact was sufficient to evidence the heightened level of premeditation necessary under section 921.141(5)(i). Appellant devoted significantly more time to his decision to murder Brock and Perry than the few moments normally required to prove simple premeditated murder.

If all appellant wanted was a truck to get his car out of the sand (as he contends in Point V), he could have had it without killing the people inside. Even though he wanted to steal the truck, there was still no need to murder these two people as they slept. However, appellant's full intention consisted of killing the occupants of the truck as much as it consisted of obtaining the truck. Appellant wanted the truck, but decided to kill its occupants so as not to risk being refused by his merely asking for it. At gunpoint, appellant could have obviously succeeded in robbing the victims of the truck without having to kill them. The

murder here did not simply occur "in the course of" any planned felony. It occurred first and deliberately in order to accomplish the theft of the truck unhindered. The careful wiping of the moisture off the window in order to get a clear shot at the victim is part of the evidence which emphasizes the cold calculation before the murder itself. Compare, Perry v. State, 522 So.2d 817 (Fla. 1988). Appellee is well aware that this factor is often stricken in cases where the defendant decides to murder the victim during the course of committing some other felony and after something unexpected happens, such as in Hamblen v. State, 527 So.2d 800 (Fla. 1988) where the victim pressed an alarm button thus angering the defendant as he was robbing her store and provoking him to shoot her. Jones' actions were much more deliberate than the spontaneous killings committed by Hamblen or the defendant in Rogers, supra. (Utter absence of evidence that defendant had a prearranged design to kill anyone during planned robbery of grocery store.)

The court's finding of this aggravating factor should be affirmed.

POINT VII

THE TRIAL COURT'S RESTRICTION OF DEFENSE COUNSEL'S ARGUMENT TO THE JURY CONCERNING THE CONSEQUENCES AND APPROPRIATNESS OF SENTENCES OF LIFE IMPRISONMENT DID NOT VIOLATE THE SIXTH, EIGHTH OR FOURTEENTH AMENDMENT.

First, it is pure speculation that the court's admonition to both counsels gave the jury the impression that the possible length of incarceration under a life sentence should not be concsidered when determining its sentencing recommendation. Second, before being interrupted by the prosecutor, defense counsel was able to emphasize that should Jones be given a life sentence, he would have to serve a minimum of 25 years before being released and that the judge could impose the two life sentences consecutively (R 1814). However, since it was solely within the discretion of the judge to impose sentence and there could be no guarantee that had the jury recommended life the court would impose the two life sentences consecutively, a jury recommendation of life on that basis would also have been unreliable.

What if the trial court had permitted appellant's counsel to finish his thought and spell out to the jury that two consecutive life sentences could mean a minimum of 50 years in prison before Jones could be released? Then what if, on that basis, the jury recommended life instead of death, but the court then imposed the two life sentences to run **concurrently?** In that instance, the state would certainly have cause to argue that the jury's recommendation was unreliable because the jury was misled into

considering something that was wholly within the court's discretion and unknown at the time the jury was deliberating over its sentencing recommendation. It would stand to reason that any argument such as the one which defense counsel in the instant case was precluded from finishing, would be an improper consideration for the jury. The trial court here did not err in reminding defense counsel of the proper scope of his argument. In Rogers v. State, supra, the court admonished the state to confine its evidence during the penalty phase to those matters provided by statute. The court's ruling on the objection to defense counsel's argument in the instant case did not restrict him from arguing anything pertaining to appellant's character and its appropriateness to a life sentence.

Appellant is permitted under the law to argue that he would not pose a danger if incarcerated, but such should be based on circumstances of the crime and elements of this character, which was what the court was referring to in his admonition to counsel. Compare Harris v. State, 438 So.2d 787 (Fla. 1983), in which the prosecutor's comment during closing argument in the sentencing phase was comparable to the statements that defense counsel in the instant case was deterred from making. In Harris, the prosecutor's comment in the insufficiency of a life sentence or 25 years incarceration was found to have been innappropriate "because it was not a fair comment either in rebuttal or upon any of the aggravating or mitigating factors." Id. at 797. If it is improper for the state to emphasize the relataively small amount of time a defendant could actually serve under a life sentence,

then it should be equally improper for the defendant to lecture on just how long a life sentence might be.

Appellant's objection to the style of the sentencing verdict form has not been preserved for appellate review. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). The trial judge asked both counsels to look at the verdict forms to consider mechanical changes and asked if they were satisfactory to both. Defense counsel replied in the affirmative (R 1781). Had this issue been preserved, there would still be no error since the ocurt reviewed the sentencing form with the jury and told them that in completing the form, it could recommend life for the first-degree murder of either, or both, Matthew Paul Brock or Kelly Lynn Perry (R 1825).

No new penalty phase is required.

POINT VIII

THE FLORIDA DEATH PENALTY STATUTE IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED. FURTHER, APPELLANT FAILED TO PROPERLY PRESERVE THIS ISSUE FOR APPELLATE REVIEW.

None of the alleged constitutional infirmities raised in this issue were ever presented to or ruled upon by the trial court. It has been made clear by this court that absent an allegation and showing a fundamental error, an appellate court will not consider an issue unless it was first presented to and ruled upon by the trial court. Grossman v. State, **13** F.L.W. 127 (Fla. **1988**); Steinhorst v. State, supra; Brown v. State, **381** So.2d **690** (Fla. **1980**). Even alleged constitutional violations can be waived if not timely presented. See, Ray v. State, **403** So.2d **956** (Fla. **1981**). In Grossman, this court noted that the appellant's various constitutional challenges to the capital sentencing statute had been raised in various motions to dismiss. 'In the instant case, there were not such motions and thus no ruling by the trial court on the issue. Appellant's failure to raise these claims results in a procedural fault which bars appellate review since appellant does not allege or demonstrate any fundamental error justifying extraordinary relief from that procedural default. For the first time on appeal, appellant raises a number of challenges to the constitutionality of Florida's death penalty statute. While candidly acknowledging each of these claims has previously been rejected by this court, appellant fails to point out that none were presented to the trial court and at least with respect to appellant's various attacks on the constitutionality of

the statute as applied, same were not properly preserved for appellate review. Eutzy v. State, 458 So.2d 755 , 757 (Fla. 1984); Trushin v. State, 425 So.2d 1126,1129-1130 (Fla. 1982).

To appellant's contention that the aggravating circumstances are impermissibly vague, this court has consistently held that the aggravating and mitigating circumstances enumerated in section 921.141(5) and (6), Florida Statutes, are not vague and provide meaningful restraints and guidelines for the exercise of discretion by the judge and jury. Lqhtbourne, supra; State v. Dixon, 283 So.2d 1 (Fla. 1973). The **per se** constitutionality of section 921.141, as well as the mechanics of its operation, have been consistently upheld despite numerous and multifarious challenges. Proffitt v. Florida, supra; Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 United States 976, 99S.Ct. 1548, 59 L.Ed.2d 796 (1979); Alvord v. State, 322 So.2d 533 (Fla. 1975); Dixon, supra. The failure to provide a capital defendant with notice of the specific aggravating circumstances upon the state will seek to impose the death penalty has likewise been held repeatedly to be constitutional. State v. Bloom, 497 So.2d 2 (Fla. 1986); Gore v. State, 475 So.2d 1205 (Fla. 1985); Hitchcock v. State, 413 So.2d 741 (Fla.), cert. denied, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982).

With respect to appellant's observations concerning this court's reversals of its own prior decision, appellant fails to take into consideration the effect of intervening case law. It is the law in effect at the time an appeal is decided which controls. Dougan v. State, 470 So.2d 697 (Fla. 1985); Wheeler v. State, 344

So.2d 244 (Fla. 1977), cert. denied, 440 United States 924, 99 S.Ct. 1254 (1978). As this court observed in Magill v. State, 420 So.2d 649,651 (Fla. 1983):

> There can be no mechanical, litmus test established for determining whether . . any aggravating factor is applicable. Instead the facts must be considered in light of prior cases addressing the issue and must be compared therewith and weighed in light thereof.

See also, Sullivan v. State, 441 So.2d 609,613-614 (Fla. 1983).

Appellant suggests that this court's body of decisional law regarding the death penalty demonstrates a pattern of inconsistent application of the death penalty statutes rendering those statutes unconstitutional as applied. The appellant also claims that Florida's death penalty can never be constitutionally applied because this court does not review cases that concern persons convicted of first degree murder, but who have received a life sentence. Appellant also draws the same conclusion from this court's practice to review the trial court's findings regarding mitigating circumstances based on an abuse of discretion standard. These arguments are legally and logically defective and this claim should again rejected as it was in Proffitt.

Appellant discusses several aggravating circumstances which he claims have been inconsistently applied: Capital felony being especially heinous, atrocious or cruel; great risk of death to others; capital felony being a homicide committed in a cold, calculated or premeditated manner; prior conviction of violent felony. Since only one of the above aggravating circumstances was

found to exist in appellant's case, appellant has no standing to challenge the constitutionality of those portions of Florida's death penalty statutes which did not affect him. Clark v. State, 443 So.2d 973, note 2 (Fla. 1983). Appellant only specifically challenges one of two aggravating factors found to apply to him, i.e., that the murders were committed in a cold, calculated or premeditated manner. Whether that factor was properly in this case is discussed in Point VI herein. However, appellant has supplied no logical argument here to support that the factor was unconstitutionally applied in his case.

Appellant's apparent belief that this court's consistency in applying its own decisional law is of paramount importance seems to be a misapprehension of the law. Appellee respectfully submits that this court's analysis of its own decisional law is only a vehicle by which this court can review each sentence of death on a case-by-case basis. An individual review of each death sentence is bound to produce some variance in decisional law. The appellee further submits that such a variance is attributable to the uniqueness of each case and does not demonstrate an arbitrary or capricious imposition of Florida's death penalty statutes. Contrary to the appellant's view, this court is not lost in the wilderness of capital constitutional law. With its prior decisions as its compass, this court can chart a clear course to apply Florida's death penalty statutes logically, faithfully, and constitutionally. Although appellant asserts that this court does not have the benefit of the facts and circumstances of other murder cases in which the death penalty is not imposed, such does

not render this court at a disadvantage since it clearly has the benefit of the facts and circumstances of other murder cases in which it has decided to overturn an imposed death penalty and can use those when comparisons are necessary to its review process.

The claim that Florida's death penalty statutes violate the sixth, eighth, and fourteenth amendments has been rejected in Remeta v. State, supra, and to be consistent it should be rejected again. The imposition of appellant's sentence of death should be affirmed as constitutional.

POINT IX

THE TRIAL COURT DID NOT COMMIT REVERSIBLE IN ALLOWING FAMILY MEMBERS TO IDENTIFY THE MURDER VICTIMS WHERE THERE TESTIMONIES WERE DIRECTED TO OTHER RELEVANT MATTERS.

Although appellee recognizes Florida's well established rule against a member of the deceased victim's family testifying for the purpose of identifying the victim, it also notes that "[t]he basis for that rule is to assure the defendant as dispassionate a trial as possible and to prevent interjection of matters not germane to the issue of guilt." Welty v. State, 402 So.2d 1159 (Fla. 1981). Thus, this court has previously held that admission of the identification testimony from a family member is not fundamental error and may be harmless error in certain instances.

As in Welty, it is clear from the record that the brief identification testimony offered by Brock's sister (R 1055) and brother (R 1059) was not of such a nature as to evoke the sympathy of the jury or to prejudice the defendant. In fact, appellant made no objection at trial to the testimony of Perry's sister. This was probably due to the fact that Perry's sister did not identify either of the victims in her testimony (R 1078-1081).

Appellant claims that the testimony of Brock's family members and Perry's sister was wholly unnecessary and irrelevant. This is simply not true, and appellant even admits an exception to this contention regarding the testimony about the incident in Green Cove Springs which was given by Brock's brother, Richard, and Richard's wife, who was unrelated to the victim at the time of

the crime. Terry Warren's (Perry's sister) testimony was for the purpose of placing the victim in the stolen pickup truck around 11 on the night of the murder (R 1079-1080) and describing the earrings that the victim was wearing that night (R 1080-1081), one of which was found underneath the seat of the truck when it was recovered in Mississippi (R 1182).

Appellant is to be reminded that the rule is directed toward identification testimony and does not prohibit a family member from testifying to other matters. In Lewis v. State, 377 So.2d 640 (Fla. 1980), it was not inappropriate for the son and daughter of the victim to establish their relationship to the victim in order to explain the victim's presence in the son's front yard at the time of the murder. In the instant case, William Cook, Brock's brother, only briefly identified his brother in a picture taken before the murder (R 1059), but he was the last person, other than appellant and his buddy, known to have seen the victims alive (R 1060), and his testimony was appropriate to explain why his brother was at Rodman Dam late on the night he was murdered (R 1061-1062).

This brother was also able to describe items that the victim normally kept in the back of his truck (R 1062-1063), which helped to link the truck to a similar one spotted by another witness in a Penescola gas station early in the morning following the murder (R 1303-1304). Mr. Cook gave additional relevant testimony regarding the value of the vehicle stolen by the appellant and that the victim had purchased it two months earlier (R 1064), which would tend to make appellant's claim to Richard Brock that he had just

purchased the truck for $4000 (R 1293) even less credible. Cook's testimony also explained certain evidence taken from the scene of the crime. He testified that his brother smoked Marlboro regulars (R 1064-1065) and the evidence custodian had listed pack of Marlboro cigarettes (R 1154) among things found in the parking lot where the victim's truck had been seen and the blood found.

In Ashmore v. State, 214 So.2d 67 (Fla. 1st DCA 1968), the court held it to be prejudicial error for the deceased husband to testify as to the identification of the body of the deceased. However, such did not occur with any of the relatives who testified in the instant case since none of the family members testified to the identification of the bodies of the victims, but only identified them in pictures taken before their death and that testimony was not of an emotional nature. There was never any testimony as to the closeness of either of the victims' families or concerning how their death had affected the families. Interestingly, all, but one, of the testifying relatives had surnames different from that of the victims. It is purely unsupported speculation that the jury's emotions were inflamed by seeing the brothers and sister of Brock and the sister of Perry.

POINT X

THERE WAS NO REVERSIBLE ERROR IN THE TRIAL COURT'S DENYING DEFENSE COUNSEL'S MOTION TO WITHDRAW MADE WHEN IT WAS REVEALED THAT A STATE WITNESS TESTIFYING AGAINST THE DEFENDANT AT THE PENALTY PHASE WAS BEING REPRESENTED BY DEFENSE COUNSEL'S LAW FIRM ON PENDING CRIMINAL CHARGES.

Before the court permitted the state to call its witness, Edward Tipton, defense counsel renewed its motion to exclude the witness's testimony on the basis of a discovery violation claiming he had received no information regarding the charges pending against the witness in Putnam and Volusia counties and that he had not had an opportunity to prepare for the witness's testimony. Defense counsel stated that he therefore was not prepared to cross-examine him (R 1663). However, during the subsequent arguments of counsel, which amounted to a Richardson [v. State, 246 So.2d 771 (Fla. 1971)] hearing, the prosecutor represented to the court that defense counsel had been orally informed about the witness March 3 or 4 and provided with the witness's statement on March 8 (R 1663). As soon as the prosecutor had received notice of Tipton's statement, he communicated that information to defense counsel and his investigator (R 1663-1664). The trial did not commence until March 21 and the witness was not called until March 28 after an intervening weekend, twenty four days after the state provided the defense with the witness's name. Mr. Pearl, appellant's public defender, stated that he had not received the statement of the witness until March 10 and moved to "withdraw" on that basis, as well as conflict of interest created between

appellant and the witness because the witness was being represented by the public defender of another county. The motions were denied (R **1665).**

Although appellant may be correct in his suggestion that the best way to deal with this situation would have been to have Tipton waive conflict, the continued representation of Jones by the public defender did not violate Jones's constitutional guarantees because no actual prejudice resulted.[3]

Edward Tipton was called by the state as a witness during the penalty phase of the trial. In February or March of **1988** he was housed in a cell at the Putnam County Jail with the appellant Randall Jones (R **1685-1686).** He testified that he had a conversation with Jones about the crimes in this case. During that conversation, Jones told him "that he had asked somebody to pull him out--a guy was pulling a boat out of the water, and he couldn't help them. *So* he said he's not--he wasn't going to be turned down anymore." (R **1686)** Such was the sum and substance of Tipton's testimony on direct which basically reiterated Jones' confession introduced during the guilt phase. On cross-examination, defense counsel asked Tipton if he was in jail because he was charged with seven counts of crimes, and the witness admitted he was (R **1687).** Although the state objected, the trial court permitted defense counsel to list the separate charges pending against Tipton and questioned the witness

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[3] It should be noted that the public defender below never formally sought to implement the procedures of Section **27.53(3),** Florida Statutes **(1987).** See, Babb v. Edwards, 412 So.2d 859 (Fla. **1982).**

regarding the details of three of the charged crimes (R **1687-1689,1691-1692).** This was obviously to impeach the credibility of the witness. Apparently, defense counsel suddenly discovered that the witness was represented by his own office (R **1694)** and moved to withdraw (R **1693).** The motion was denied (R **1694)** and defense counsel went on to cross-examine the witness regarding the rest of the charges against him including the charges pending in Volusia County (R **1995-1997).** The witness either denied committing each of the crimes charged or attempted to give an explanation for his involvement (R **1687-1698).** When the state finally objected that this questioning was completely outside the scope of direct examination and that none of the questions asked of the witness pertained to the impeachment regarding his direct testimony, Mr. Pearl claimed he could not cross-examine the witness due to the conflict of interest.

Not at the time counsel moved to withdraw or, in appellant's brief, is a clue given as to what exactly Jones' counsel would have asked Tipton on cross-examination, but did not because of the claimed conflict of interest. Possible deals Tipton would have received as a result of his testimony are mentioned; however, a review of the record clearly shows that both the state and defense counsel questioned Edward Tipton as to whether he had been offered any deal in exchange for his testimony that day (R **1699,1701).**

The state asserts that defense counsel here, unlike that in Jennings v. State, **413** So.2d **24** (Fla. **1982),** did complete the same cross-examination of the witness that he would have done had there been no possible conflict. Jones received a fair trial through

the complete examination of this less than critical witness. In addition, it is still speculative based on this record whether Tipton was actually represented by the public defender or Huntley Johnson, Jr. of Gainesville. Regardless, it is obvious that Jones and Tipton were not being represented by the same attorney since Mr. Pearl was totally unaware that Tipton might be represented by the public defender's office. It was not the dual representation of Jones and Tipton that curtailed the cross-examination, but the lack of any further information about Tipton that could be used to impeach him. When defense counsel was attempting exclude this witness, he admitted a lack of knowledge about the witness and that he was not prepared to cross-examine him (R 1663). Unlike the circumstances in Correll v. State, supra, where Correll's public defender had discovered a great deal of impeachment material in his office's file on the state's witness, who was being represented by another assistant public defender on unrelated pending charges, and was compelled to use that information in the interests of Correll, Jones' counsel had gleaned no information about Tipton by virture of his also being represented by the public defender. This is obvious since Mr. Pearl did not even know that Tipton had such representation.

See also Webb v. State, 433 So.2d 496 (Fla. 1983). In Webb, appellant and his wife were both being represented by the public defender in their respective cases. They were not co-defendants, nor were their interests adverse or hostile to each other. It was found that neither "had an interest in the outcome of the other's proceeding such as would render the public defender

incapable of advising and representing either client adequately." Id. at 498. This court held, "Because of the divergent nature of the proceedings and the absence of common interests between appellant and his wife, we find no conflict in the facts before us." Id.

The same finding, with the same result, should be made in the instant case where there was even less of a connection between Jones and Tipton than there was between Webb and his wife, whose contempt charge arose from her not appearing to testify at her husband's trial. There was no actual conflict of interest between Jones and Tipton and the public defender's performances should not have been affected by the dual representation.

The continued representation of Jones by the public defender did not violate Jones' constitutional guarantees because no actual prejudice resulted. No new penalty phase is necessary and the sentences of death should be affirmed. The continued representation of Jones by the public defender did not violate Jones' constitutional guarantees because no actual prejudice resulted.

POINT XI

THE TRIAL COURT DID NOT ERR IN CONDUCTING AN INQUIRY OF A JUROR OUTSIDE THE PRESENCE OF THE DEFENDANT OR IN HAVING THE PEREMPTORY CHALLENGES EXERCISED OUTSIDE THE PRESENCE OF THE DEFENDANT.

Appellant now claims that he was involuntarily absent from a crucial stage of his trial: The exercising of the peremptory challenges of the prospective jurors. In Turner v. State, 530 So.2d 45 (Fla. 1988), wherein a similar issue was raised, this court relinquished jurisdiction for the trial court to conduct an evidentiary hearing in order to determine whether Turner waived his absence through counsel or acquiesced in counsel's waiver of his presence.

During trial of that case, the judge and counsel had removed themselves to chambers for the exercise of juror challenges, leaving Turner in the courtroom. Although this court subsequently held that Turner had not waived his right to be present during the exercise of challenges nor had he constructively ratified or affirmed his counsel's actions, this court did determine Turner's absence to be harmless. Such was based on the testimony during the relinquishment which demonstrated that defense counsel had discussed with Turner, in simple terms, the jury selection process, and had solicited his input as to which jurors he liked, did not like, or had any particular feeling about. This court, noting that Turner had an opportunity to participate in choosing which jurors would be stricken from the panel, found:

> He could have offered no further assistance during counsel's actual

> exercise of the peremptories. Nor could he assist counsel in the presentation of the legal arguments supporting the requested challenges for cause. Turner's involuntary absence did not thwart the fundamental fairness of the proceedings, and, therefore, was harmless.

Id. at **49-50.**

In the case at bar, it can be determined from the record that at the conclusion of the voir dire, the court specifically gave defense counsel and Jones an opportunity to confer (about the jury selection, it must be assumed). Defense counsel thanked the court for that opportunity and the court instructed counsel, "When you're ready, come up side-bar, please." (R **873)** The record does not show whether defendant came up with his counsel or not, but for the sake of this argument, it will be assumed that he remained in his chair at the defense table a few feet from the bench. The procedure exhibited here was almost identical to that utilized and deemed acceptable in Willis v. State, **523** So.2d **1283** (Fla. 4th DCA **1988)** (Willis' request to be present at the bench was denied). Once the conference at side-bar commenced, the state challenged juror **#4** and defense counsel challenged **#8** (R **873).** The ten jurors remaining were thereby selected and reseated in the first two rows of the courtroom. (R **874-875).**

Twelve more names were called (R **875-876)** and voir dire examination of those twelve took place in full view of Jones. Again, at the conclusion of voir dire, the court specifically permitted defense counsel time to discuss the jurors with appellant and no limitation was placed on appellant's ability to consult with counsel before any decisions or challenges were made.

Cf., Smith v. State, 476 So.2d 748 (Fla. 3d DCA 1985). Apparently, the counsel and Jones concluded their conference because the court said, "If you're ready, come up side-bar." (R 969) The record states that the "following side-bar conference was had out of the hearing of the prospective jury." (R 970) It is still not certain that Jones was not at the bench or could not hear the conversation there.

In an effort to select two jurors and two alternates out of the twelve, the state challenged juror #1 for cause, which was denied (R 970). The state then exercised a peremptory. Defense counsel accepted the next two jurors and although given the chance to back-strike, stated that he was "perfectly satisfied." (R 972) The next morning, upon losing two of the previously approved jurors (R 984), six new prospective jurors were called for voir dire examination and when the defense was finished, the court stated, "I'll be glad to give you some time to confer." Defense counsel replied, "Thank you. A moment will be sufficient." (R 1021) The challenges took place side-bar and the record is unclear as to Jones' position in the courtroom showing only that the conference was outside the hearing of the prospective jury (R 1021). Defense counsel moved to strike juror #109 for cause which was denied (R 1022-1023). It was pointed out by the defense that another of the six jurors had hearing problems (R 1024). Apparently juror #96 indicated an inability to impose the death penalty if warranted (R 1023). There was finally an informal stipulated acceptance of jurors Lielasus and Taylor as alternates (R 1024). All of the above took place in the presence of Jones,

if not within his hearing. Such serves to distinguish this case from Francis v. State, 413 So.2d 1175 (Fla. 1982)(peremptories were exercised in the jury room and Francis' counsel told him he could not be present. Just prior to counsel's retiring to jury room Francis had been out of the courtroom to use the restroom).

The same reasoning applied by this court in Turner should be applied to the facts in this case for the same result. See also, United States v. Bascaro, 742 F.2d 1335,1349-1350 (11th Cir. 1984). It is clear from the record that Jones had an opportunity to participate in which jurors would be stricken from the panel since he was present during the voir dire and consulted with his counsel afterward and before the peremptory challenges were exercised. He could have offered no further assistance during his counsel's actual exercise of the peremptories nor could he assist his counsel in the presentation of the legal arguments supporting the requested challenges for cause.

If this court finds that Jones was involuntarily absent, it should also be found that such did not thwart the fundamental fairness of the proceedings, and therefore, Jones' not being at the bench during the exercise of the peremptory challenges was harmless. The manner in which the trial court conducted the jury selection was within his discretion and appellant has not demonstrated an abuse of that discretion.

After Mrs. McKinney was moved from her position as an alternate to replace one of the discharged jurors (R 1022), the court informed both counsels that Mrs. McKinney had told the bailiff that "she may know Dave Stout", a police witness, and "she

also may know some of the relatives or have heard of some of the relatives." (R 1022) Defense counsel requested that "she be asked about that privately" and then accepted the jury "subject to Mrs. McKinney being privately asked one or two little things." (R 1022) The record shows Mrs. McKinney and counsels were called up to the bench and the jury retired to the jury room (R 1024). There is nothing in the record to show that appellant was not present at side-bar when the private interview of Mrs. McKinney took place. The record does not demonstrate that the juror actually knew Lieutenant Stout or any of the victims' family, and therefore, appellant is unable to prove prejudice.

In view of case law, appellee would be willing to admit that the better practice would have been to have appellant present at the bench during the inquiry, if indeed he was not present; however, it was determined in United States v. Adams, 799 F.2d 665, rehearing denied 812 F.2d 1415 (11th Cir. 1986), cert. denied Morrell v. United States, 107 S.Ct. 2464, 95 L.Ed.2d 873 (1987), that the defendants' constitutional right to be present at every stage of a criminal proceeding was not violated by the trial court's ex parte interview of a juror who disclosed an improper jury contact during trial. In that case, not even the defendants' counsels were privy to the communication between the juror and the court, which was not a circumstance of the instant case.

In United States v. Gagnon, 105 S.Ct. 1482 (1985), the Court held that "[t]he district court need not get an express 'on the record' waiver from the defendant for every trial conference which a defendant may have a right to attend." "A defendant knowing of

such a discussion must assert whatever right he may have under Rule **43** [Federal Rules of Criminal Procedure] to be present.'' Id. at **1485**. Although the conversation taking place at side-bar among the court, Mrs. McKinney, and counsels should have been apparent to Jones, he never asserted his right to be present under Florida's Rule 3.180 which is comparable to Rule **43**.

Since the record demonstrates no objection to Mrs. McKinney's serving as a juror in this case, it should be assumed either that Mrs. McKinney did not actually know Lieutenant Stout or the victims' families, or that her knowledge of them was so vague as to not interfere with her impartiality, in which case appellant was not prejudiced. It should be noted that appellant alleges no specific prejudice in his argument, or even that the juror was actually acquainted with the witness or victims' families from which prejudice might be presumed.

POINT XII

THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO INTRODUCE EVIDENCE CONCERNING DNA IDENTIFICATION.

The state presented Dr. Garner, Director of the laboratory from Cellmark Diagnostics (R 1386), as an expert in DNA "fingerprinting" to prove that the semen found in the vagina of one of the murder victims had originally come from the defendant, Randall Jones. Contrary to appellant's assertion, the predicate for the admissibility of the DNA evidence was not inadequate. Although there are other companies that specialize in the area of DNA print comparison and analysis in the United States other than Cellmark, it should be noted that the defense presented no experts to attempt to refute Dr. Garner's testimony regarding the results of the tests done on the samples in this particular case, nor anyone to attempt to refute the reliability of the use of DNA print comparison for identification purposes.

Appellant's assertion that three years is not a sufficient time to allow those who would refute the results to do so was not established by the evidence. The defense did not even present anyone who was thinking about refuting the reliability of DNA print comparisons. Dr. Garner testified that Dr. Jeffreys' work in genetics and DNA was "subjected to intense pere pressure review by the scientific community." (R 1407-1408) Although appellant further contends that the evaluation by six thousand scientists of the DNA "fingerprinting" is less than reliable because the "probes" used in the tests are all supplied by Cellmark, it should be noted that Lifecodes Corp., the company that performed the DNA

analysis introduced into evidence in Andrews v. State, 13 F.L.W. (Fla. 5th DCA October 20, 1988) uses different probes of its own. Dr. Garner testified that there are literally hundreds of DNA probes and most of them are used in the medical diagnostic area (R 1420). Appellant raises questions concerning the consequences of blood transfusions, organ transplants and exposure to radiation or chemicals, and the undersigned is not sufficiently knowledgable to say that exposure to these things could not result in the DNA from the cells of certain fluids or tissues of an individual **not** matching with the DNA from other fluids or tissue taken from the **same** individual prior to exposure however, in this case the DNA extracted from the semen in the victim's vagina **matched** that extracted from Randall Jones' blood (R 1426,1434-1436). Appellant's hypothetical query is irrelevant in this case. Dr. Garner testified that the band pattern found in the DNA from Randall Jones would occur in only one out of over nine billion people (R 1436). No other DNA was present in the vaginal swabbings (R 1438). Incidently, the defense presented no evidence that Jones had ever had a blood transfusion or organ transplant which might have skewed the results of the tests done in this case.

Although the use of DNA "fingerprinting" may be relatively new in criminal prosecutions, this is not a case of first impression in Florida Courts. The tests done by Cellmark in this case were basically the same as that done by Lifecodes in Andrews and described in the court's decision in that case. There, the trial court's admission of the DNA evidence was affirmed by the

appellate court which addressed the admissibility of DNA evidence in general and the testing methods used by Lifecodes. This court should likewise affirm the admissibility of DNA evidence.

Appellant contends that the trial court erred by allowing testimony and admitting evidence obtained through DNA print identification. Although appellant admits that the admissibility of scientific tests or experiments is within the discretion of the trial court, he argues that evidence of scientific tests and experiments should be admitted only if the reliability of the results have been widely recognized by and accepted among scientists and cites Stevens v. State, 419 So.2d 1058 (Fla. 1982) and Frye v. United States, 293 F. 1013 (D.C.Cir.1923). Appellee submits that there has never been an express adoption of the Frye standard in Florida, and certain district courts in this state have concluded that the Frye test is not in fact the law, noting its incompatibility with the Florida Evidence Code. See, Kruse v. State, 483 So.2d 1383 (Fla. 4th DCA 1986); Brown v. State, 426 So.2d 76 (Fla. 1st DCA 1983). These courts have noted that it would seem impossible to reconcile the rigid requirement of Frye, regarding acceptance in the scientific community as a prerequisite for admission of evidence derived from a scientific test, with the more generous provisions of Sections 90.401, 90.402, 90.403 and 90.702, Fla. Stat. (1983) and (1987), which essentially state that all relevant evidence is admissible and an opinion by an expert is admissible, as long as it will aid the finder of fact in determining an issue.

In Brown, the first district conducted a lengthy analysis of Florida decisions, including Coppolino v. State, 223 So.2d 68 (Fla. 2nd DCA 1968), Kaminski v. State, 63 So.2d 339 (Fla. 1952), and Stevens, supra, and concluded that the Frye test had never been adopted in Florida dispute some arguably ambiguous language in certain decisions. The First District determined that while both the Kaminski and Coppolino courts cited Frye, neither one adopted nor applied it. Brown, at 87. The Kaminski court did not adopt it because the case involved the more narrow question of whether testimony concerning the **taking** of a lie detector test, rather than its results, should be admitted. Had the Coppolino court applied Frye, the test results in that case clearly would have been inadmissible. The First District respectfully disagreed that the Coppolino court's passing reference to Frye is the correct approach to utilize. Brown, at 87.

The First District further found support for its view in this court's more recent decision in Jent, supra, which involved testimony regarding hair analysis. This court in Jent cited Coppolino in utilizing a somewhat inverse Frye standard. Instead of stating that the test must be sufficiently established to have gained scientific acceptance, the Jent court stated that " . . . the problem presented to the trial courts is whether scientific tests are so **unreliable** and scientifically **unacceptable** that admission of those tests constitutes error." Jent, at 1029 (emphasis added). The Jent court went on to state that a trial court has wide discretion in the admissibility of evidence, and its ruling will not be disturbed absent an abuse of discretion.

Id. Great significance was attached to the fact that neither Frye nor Kaminski were alluded to in Jent, and so it was determined that this was clearly not an adoption of the Frye holding. Brown, at 87.

The court in Brown then analyzed the Stevens decision, and stated that while on the surface it seemed to embrace the Frye test, since the court cited Coppolino as support for its view, this undercut the interpretation that it embraced Frye. The First District further noted that the Stevens court had stated in the same paragraph that the admissibility of tests or experiments is within the discretion of the trial court, which is contrary to Frye, since Frye severely curtails trial court discretion. The conclusion was that the later statement was much more consistent with the Jent opinion. Brown, at 87.

The court in Brown then noted that the view expressed by certain scholars was that Coppolino not only does not accept Frye, but in fact utilizes the "preferred approach," known as the "relevancy approach." Id. at 88. See, Gianelli, The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later, 80 Colum.L.Rev. 1197 (1980), McCormick on Evidence, Section 203 (2nd Ed. 1972). In light of recent developments in the law, including the growing number of jurisdictions which have rejected or modified Frye, McCormick more recently argued:

> A drumbeat of criticism of the Frye test provides the background music to the movement away from the general acceptance test. Proponents of the test argue that it assures uniformity in

evidentiary rulings, that it shields juries from any tendency to treat novel scientific evidence as infallible, that it avoids complex, expensive, and time-consuming court room dramas, and that it insulates the adversary system from novel evidence until a pool of experts is available to evaluate it in court. Most commentators agree, however, that these objectives can be attained satisfactorily with less drastic constraints on the admissibility of scientific evidence. In particular, it has been suggested that a substantial acceptance test be substituted for the general acceptance standard, that a panel of scientists rather than the usual courts screen new developments for acceptance, and that the traditional standards of relevancy and the need for expertise -- and nothing more -- should govern.

The last mentioned method for evaluating the admissibility of scientific evidence is the most appealing. It avoids the difficult problems of defining how "general" the general acceptance must be, of discerning exactly what it is that must be accepted, and of determining the "particular field" to which the scientific evidence belongs and in which it must be accepted. Generally scientific acceptance is a proper condition for taking judicial notice of scientific facts, but it is not a suitable criterion for the admissibility of scientific evidence. Any relevant conclusions supported by a qualified expert witness should be received unless there are distinct reasons for exclusion. These reasons are the familiar ones of prejudicing or misleading the jury or consuming undue amounts of time. McCormick Sections 203 at 607-8 (3rd Ed. 1984)(footnotes omitted).

See also, McCormick, Scientific Evidence: Defining a New Approach to Admissibility, 67 Iowa L. Rev. 879 (1982).

The court in Brown, supra further recognized that the relevancy approach also accords fully with the Florida Evidence Code, and also questioned whether Frye has survived the enactment of evidence codes in those jurisdictions that had adopted Frye. Id. at 89 n.19. It recognized that the Florida Evidence Code is patterned after the Federal Rules of Evidence, and it is well settled that if a state statute is patterned after its federal counterpart, the statute will take the same construction in Florida courts as its prototype has been given, insofar as such construction comports with the spirit and policy of the Florida law relating to the same subject. Id. The Brown court determined that unfortunately the answers from the federal sector were not uniform, with some courts assuming that Frye had survived, while at least one had determined it had not, but that no federal court had directly faced or analyzed the issue. Id. However, since Brown, at least one federal circuit has squarely addressed the issue and rejected Frye. See, United States v. Downing, 753 F.2d 1224 (3d Cir. 1985).

An exhaustive analysis of the issue was conducted by the court in Downing, which began with Frye, incorporated the work of numerous scholars, and examined the Federal Rules of Evidence with their accompanying advisory notes, as well as a number of both state and federal decisions. Id. at 1233-1241. The court determined that Frye should be rejected as an independent controlling standard of admissibility, though it was one factor that the trial court should consider in deciding whether to admit evidence based upon a novel technique. Id. at 1237. The court

concluded that the language of Rule 702, the spirit of the Federal Rules of Evidence, and the experience with Frye suggested the appropriateness of a more flexible approach to the admissibility of novel scientific evidence. Id. This new approach, essentially the "relevancy approach", requires the trial courts to conduct a preliminary inquiry focusing on:

> . . . (1) the soundness and reliability of the process or technique used in generating the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury, and (3) the proferred connection between the scientific research or test result to be presented, and particular disputed factual issues in the case.

Id. at 1237. District court decisions to admit or exclude scientific evidence are then reviewed by an abuse of discretion standard. Id. at 1240. Appellee submits, as scholars have reasoned, that this is essentially the approach utilized by the Coppolino court back in 1968, although it was prior to the promulgation of the Evidence Code, and clearly the approach endorsed by the Brown court which incorporates the Evidence Code. (The Brown court did not have to determine which approach to utilize; however, since it determined that t e method by which testimony is hypnotically induced was not one which fell within the ambit of Frye.)

The court in Downing recognized that a growing number of courts have focused on reliability as a critical element of admissibility, and concurred with that reasoning. Id. at 1238 (Citations omitted). It envisioned a flexible reliability inquiry that could turn on a number of considerations, in contrast to the

"nose-counting" process espoused in Frye. The reliability assessment permits explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance in that community, but does not require it, and the court may look to other factors which bear on the reliability of evidence, particularly when the form of scientific expertise has no "track record" in litigation. Id. at 1238. [For an application of the Downing analysis to testimony regarding footprint measurement evidence, see, United States v. Ferri, 778 F.2d 985 (3rd Cir. 1985).

Other states have held that state rules of evidence, patterned after the Federal Rule, displace Frye and provide that all evidence, including expert scientific evidence, is admissible if it is relevant and its probative value outweighs any prejudice. State v. Williams, 388 A.2d 500 (Me. 1978); State v. Dorsey, 88 N.M. 184, 539 P.2d 204 (1975); State v. Brown, 297 Or. 404, 687 P.2d 751 (1984); Jones v. State, 716 S.W.2d 142 (Tex. App. Austin 1986). The Oregon Brown court adopted an approach virtually identical to that in Downing, supra, whereby Frye is but one of seven factors to be utilized by the trial court in determining the admissibility of scientific evidence. Other state supreme courts have rejected the restrictive approach of Frye, preferring to opt instead for a general relevancy test for the admission of evidence. Compare, Watson v. State, 64 Wis.2d 264, 219 N.W.2d 398 (1974); Whalen v. State, 434 A.2d 1346 (Del. 1980); Harper v. State, 249 Ga. 519, 292 S.E.2d 389 (1982); State v. Hall, 497 N.W. 2d 80 (Iowa 1980); State v. Catanese, 368 So.2d 975 (La. 1979).

In addition, a number of other Florida district court criminal decisions have consistently recognized that Florida courts have long enjoyed considerable discretion in the admittance of novel or experimental evidence (if they feel certain standards of scientific reliability have been attained) both prior to and subsequent to the Evidence Code. Worley v. State, 263 So.12d 613 (Fla. 4th DCA 1972) (voiceprints-citing Coppolino); Hawthorne v. State, 470 So.2d 770 (Fla. 1st DCA 1985) (battered woman's syndrome (BWS)-the trial court has the discretion to determine the qualifications of the expert and whether the subject can support the expert's opinion); Terry v. State, 467 So.2d 761,764 (Fla. 4th DCA 1985)(BWS-relying on Hawthorne, supra, and the "liberal policy on admission of evidence in the evidence code endorsed by the legislature and the Florida Supreme Court in sections 90.702 and 90.703, Florida Statutes (1981)"); Lopez v. State, 478 So.2d 1110 (Fla. 3d DCA 1985) (alcohol absorption rate - Jent, supra, for proposition that the trial court has wide discretion concerning the admissibility of evidence, and further stating that the determination of the sufficiency of facts necessary to form an opinion lies within the province of the expert, and deficiencies in expert testimony relate to weight, not admissibility); Brown v. State, 477 So.2d 609 (Fla. 1st DCA 1985) (effect of alcohol on body - in Florida, the determination of an issue concerning a subject matter's general acceptance by the relevant scientific community is generally a discretionary call by the trial court and is subject to an absue of discretion standard, citing Coppolino); Bradford v. State, 460 So.2d 926 (Fla. 2d DCA 1984) (bitemarks-The

trial court has wide discretion in admission of evidence, subject to an abuse of discretion standard); Rodriquez v. State, 327 So.2d 903 (Fla. 3d DCA 1976) (hypnosis - It is a well-settled rule in Florida that the trial judge enjoys wide discretion in areas concerning the admission of evidence and his ruling will not be disturbed unless an abuse of discretion has been shown). This rule applies to the trial court's exclusion of evidence as well as its admission of evidence. See Hawthorne, supra.

While this court in Bundy v. State, 471 So.2d 9 (Fla. 1985), did again discuss the Frye test for admissibility, it did not indicate whether or not such test was the law in Florida, and at least one district court has noted that the holding in Bundy that evidence obtained through hypnosis is not admissible, need not be grounded on an outright acceptance of Frye. Hawthorne, supra. In addition, this honorable court again recently recognized its holding in Jent: the trial court has wide discretion concerning the admissibility of evidence and subjects about which an expert can testify. Correll v. State, 523 So.2d 562 (Fla. 1988). Florida district courts apply the same rule in a civil context. Robinson v. Hunter, 506 So.2d 1106 (Fla 4th DCA 1987); Crawford v. Shivashankar, 474 So.2d 873 (Fla. 1st DCA 1985); Fay v. Mincey, 454 So.2d 587 (Fla.2d DCA 1984).

Appellee contends that the DNA print identification in this case was properly admitted when measured against sections 90.402, 90.403 and 90.702 of the Florida Evidence Code. Section 90.402 provides that "[a]ll relevant evidence is admissible, except as provided by law." There are two types of relevance: logical and

legal. Logical relevance is controlled by section **90.401** which states that "[r]elevant evidence is evidence tending to prove or disprove a material fact." The DNA evidence and testimony pertaining to it was crucial to identifying appellant as the individual who committed sexual intercourse with the female victim near the time of her murder, so it was clearly materially and logically relevant.

Section **90.403** encompasses the test for legal relevance by requiring that "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence . . . " It is in this area that the undertones of Frye become applicable. As already stated, in Jent, supra, it was noted that as a general rule, the problem presented to the trial court is whether scientific tests are so unreliable and scientifically unacceptable that admission of those tests constitutes error. That was coupled with the well known observation that a trial court has wide discretion concerning the admissibility of evidence and, in the absence of an abuse of discretion, a ruling regarding its admissibility will not be disturbed on appeal. Id. at **1029**.

Appellee ventures to say that it was no accident that these two statements of law are found in the same paragraph of the Jent decision, and that both were utilized in resolving the claim of error regarding the admission of certain evidence pertaining to hair analysis. Obviously, if a scientific test is unreliable, any evidence derived from it would be irrelevant, in that it would be

misleading to the jury or unlikely to lead them to the truth. However, a showing of reliability need not be made, as Frye demands, by "counting heads" within the scientific community. Requiring a showing of this sort, prior to the admission of any scientific evidence, would have the effect of needlessly excluding otherwise relevant evidence. See, Harper v. State, supra.

As noted by the Downing, supra, court, there are a number of factors that bear on the reliability of evidence. One is the Frye test, which the instant DNA test does indeed satisfy. Another factor to consider is the novelty of the technique, or its relationship to more established techniques. Id. at **1239**. The procedures employed in the instant test have been utilized since the early **1950's** (R **1391-92**), and the court in Andrews, supra. noted that DNA print identification is predicated on several well accepted scientific principles. The expert testimony in Andrews was that the "DNA sequencing and comparison testing has been done for about ten years, is considered reliable, is performed by a number of laboratories around the world and is generally accepted in the scientific community. He stated also that the test and information received therefrom are routinely used in such areas as the diagnosis, treatment and study of genetically inherited diseases." Id. At **2366**. Dr. Garner, the expert in the instant case, and his company merely give the test a forensic application. The forensic application is recognized in England as well as in the United States (See Appendix). While only one appellate court in this country has passed on the admissibility of DNA print identification in a criminal case, such evidence has been admitted

in civil actions. See, In the Matter of the Adoption of Baby Girl S, ___ N.Y. 2d (N.Y. Surr. Ct. 1988). At least one other court has recognized in dicta the validity and advantages of this test. See, State v. Apanovitch, 33 Ohio St. 3d 19, 514 N.E.2d 394 (1987) (Brown, J. concurring in part and dissenting in part). In that case, the defendant was sentenced to death based on circumstantial evidence of murder involving rape and robbery. Justice Brown strongly disagreed with the imposition of the death sentence because the evidence was not overwhelming. Part of the state's case was that the defendant had the same type of blood as the assailant, and this was based on the medical technologists' testimony that tests conducted on vaginal and oral swabs revealed the presence of blood group A, which was the defendant's blood type. Justice Brown was troubled because the victim also had blood group A, and found that it was unfortunate that the state had not done a DNA test, because utilization of this procedure would have made the issue of guilt or innocence far less murky.[4]

A third factor bearing on the reliability of evidence is the existence of specialized literature dealing with the technique. Again, the record reveals there is a wealth of publications on this procedure (R 1407-1410)).

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[4] Justice Brown cited to Giusti, Bair, Pasquale, Balazs, and Glassberg, "Application of Deoxyribonucleic Acid (DNA) Polymorphisms to the Analysis DNA Recovered from Sperm" (1986), 31 J. of Forensic Sciences 409; Kanter, Baird, Shaler and Balazs, "Analysis of Restriction Length Polymorphisms in Deoxyribonucleic Acid (DNA) Recovered from Dried Blook Stains''(1986), 31 J. of Forensic Sciences 403-408; Butzel, Genetics in Courts (1987) 611. Balazs was the expert who testified in the Andrews case.

The next factor is the qualifications and professional stature of expert witnesses and the non-judicial uses to which the scientific technique is put. Appellee submits there can be no dispute that the expert witness is eminently qualified and his professional stature is unquestionable (R **1387-1390).**

A recent California case involving the admission of electrophoretic testing on dried blood stains contains a good discussion on the assessment of expert testimony. People v. Reilly, **242** CalRptr. **496** (Cal.App. 1 Dist. **1987).** The court there recognized that where the sole (or crucial) witness has a significant or professional interest in promoting the new technique, or lacks theoretical training, that witness's ability to speak for all concerned has been questioned. Id., at **503.** However, it also recognized that a certain degree of interest must be tolerated if scientists familiar with the theory in practice of a new technique are to testify at all. Id. at **504.**

Another factor is 'frequencywith which a technique leads to erroneous results, as well as the type of error generated by the technique. Dr. Garner unequivocally testified that this technique will not lead to erroneous results, but rather, if error is committed or a specimen is contaminated, it will lead to no results (R **1398,1425).** In addition, controls are utilized in every step in the process so that if error did occur, it would be readily ascertainable (R **1395-96,1403)** and those quality controls were applied during the testing of the samples in the instant case **(R 1400-1402).**

One factor that McCormick has set forth for considering reliability of a scientific technique is analogizing it to other scientific techniques whose results are admissible. 67 Iowa L.Rev. at 911-912. Since the DNA matching test incorporates the "electrophoresis" procedure, appellee would analogize this portion of the test to the aforementioned electrophoretic testing of dried blood stains, which the court in Reilly, supra, described as follows:

> Electrophoresis is a method for separating charged molecules, and its use for genetic markers in blood is mechanically uncomplicated.

Id. at 502 (emphasis added) This test has been admitted by courts utilizing the Frye standard, as in Reilly, supra; those utilizing the relevancy approach, as in Plunkett v. State, 719 P.2d 834 (Okla.), cert. denied 107 S.Ct. 675 (1986) and most recently by this court in Correll, supra.

Appellee would further submit that an analogy is not even necessary in the instant case due to the procedure's general acceptance in the scientific community for more than ten years. In contrast to evidence derived from hypnosis, truth serum or polygraph, evidence derived from DNA print identification is based upon proven scientific principles, and any alleged "weakness" in the technique utilized or potential unreliability of the result derived is a matter of weight and credibility, rather than admissibility, to be brought out through cross-examination or the presentation of independent evidence of impeachment. The relevancy of evidence can be determined, as it was here, by the

testimony of experts in the field, and the propriety of admission of such evidence, whether derived from a scientific test or not, is properly left to the sound discretion of the trial court, which must resolve all other questions of evidentiary admissibility.

In the instant case, the trial court heard testimony at trial from Dr. Garner and watched him walk the jury through each stage of the procedure, utilizing diagrams and exhibits (R 1416-1424,1427,1431-1435). The trial court was able to witness the jury's reaction, and had it detected mass confusion, would surely have put a halt to it. Further, testimony of the state's expert was unrebutted as to the acceptance and reliability of DNA print identification. As in Jent, given the fact that it cannot be said that this test is so unreliable and scientifically unacceptable that admission of any results derived from it would be error; and it was not abuse of discretion for the trial court to admit the evidence. Reversible error has not been demonstrated. The instant convictions should be affirmed.

POINT XIII

THE STATE'S BRIEF PRESENTATION TO THE JURY OF EVIDENCE TENDING TO SHOW JONES' LACK OF REMORSE FOR COMMITTING THE CRIMES WAS NOT REVERSIBLE ERROR.

During closing argument at the guilt phase, the prosecutor asked the rhetorical question, "Did you see any remorse?" (R **1608)** This comment was made in an effort to rebut the defense's proposition that Jones' cooperation with authorities was evidence of lack of premeditation. Although objection to the comment was overrule, the prosecutor did not mention remorse again in that argument. during the penalty phase, a state witness, Captain Miller, was testifying regarding Jones' actions at the scene of the crime and mentioned that as they were driving away, appellant "Showed no remorse." From this witness's testimony during the guilt phase, it can be assumed that he was about to add that Jones told a joke as they drove away, but he was interrupted by an objection from defense counsel (R **1675).**

The prosecutor then assured the court side-bar that "lack of remorse" had not been and was not going to be made a feature in the penalty phase and that the state was not arguing it as an aggravating factor, but only that appellant's attitude after the crimes might have some bearing on whether the crimes were committed in a cold, calculated and premeditated manner with no moral or legal justification (R **1675-1676).** The court then pointedly asked the prosecutor whether he or his witness was going to use the word "remorse" again. The prosecutor responded in the negative and the court denied the previously made motion for mistrial (R **1677).**

When the prosecutor resumed examination of its witness, he alleviated some of the lack-of-remorse impression that Captain Miller's prior testimony may have given. Captain Miller was asked what he had meant by appellant's "matter-of-fact" approach." Instead of it meaning that Jones showed no remorse, Captain Miller explained that it meant Jones was "very calm, and thoroughly explained what had happened at the scene." (R **1678)** Appellant now objects to that testimony of Captain Miller that abruptly concluded with, " As we were driving from the scene he had a joke which he told.'' (R **1680)** Appellant contends that such statement equated with a comment on appellant's lack of remorse **(R 1681).** Appellee respectfully submits that this is an unsupported and unlikely since we were never told what the joke was and, that the jury would equate the two is unlikely and certainly speculative.

In response to defense counsel's objection and motion for mistrial, the prosecutor explained that the testimony he was attempting to elicit from Captain Miller was for the further purpose of refuting the possible mitigating circumstance that appellant was under the influence of extreme mental or emotional disturbance at the time of the crime **(R 1682).** Upon being assured by defense counsel that his psychiatric witness would not render an opinion that Jones was under extreme emotional disturbance, the state ended its direct examination of Captain Miller (R **1682-1683).**

Appellee recognizes that the trial court had indicated that it would give a precautionary instruction later, but that it failed to do *so.* However, appellant had some responsibility in

reminding the court of this before the jury was allowed to retire to the juryroom for deliberations. It should be concluded that appellant did not object to the jury's being retired without receiving this instruction because he did not wish to reemphasize the subject of appellant's lack of remorse. If the testimony of Captain Miller and the comments of the prosecutor were error, then such was harmless where "lack of remorse'' was not considered in aggravation by the judge in his sentencing order and was accorded no weight in the sentencing process. See, Quince v. State, 414 So.2d 185 (Fla. 1982); Valle v. state, 474 So.2d 796 (Fla. 1985). Although this court has held that a defendant's lack of remorse cannot be used as an aggravating factor, Pope v. State, 441 So.2d 1073 (Fla. 1983), admission of evidence which may, or may not, be interpreted as lack of remorse is not always reversible error. See, Echols, supra. There is no indication in the record that the trial judge considered appellant's lack of remorse in his finding of aggravating factors. As for appellant's claim that the jury improperly considered this evidence, the jury is presumed to follow the judge's instructions as to the evidence it may consider. Grizzell, supra.

The appellee also recognizes this court's holding in Pope that any consideration of a defendant's remorse was extraneous to the question of whether the murder was especially heinous, atrocious or cruel and concedes that the prosecutor here erred in that regard. However, where the aggravating factor of especially heinous, atrocious or cruel was not fund by the court to exist and not considered at all in the weighing process, the issue of

whether "lack of remorse" was considered in relation to that factor is moot.

From this court's decisions in Pope and Robinson v. State, 520 So.2d 1 (Fla. 1988), it is clear that a murder's lack of remorse for his crime has no place in the consideration of aggravating factors, but that the existence of remorse may be considered with regard to **finding** mitigating factors. Since a pendulum must swing both ways, a "lack of remorse" must also be permitted to **refute** certain mitigating factors, as it was in this case. The state argued that the objected-to testimony was for the additional purpose of refuting the mitigating circumstance of extreme mental or emotional disturbance. Although appellant was unable to get an instruction on that mitigating factor, he did argue such under the guise of "any other aspect of defendant's character.

POINT XIV

THE TRIAL COURT'S FAILURE TO COMPLY WITH SECTION 921.241, FLA. STAT. (1987) WAS HARMLESS ERROR.

Section 921.241, Florida Statute (1987) provides in part:

> Every judgment of guilty or not guilty of a felony shall be in writing, signed by the judge, and recorded by the Clerk of the Court. The judge shall cause to be affixed to every written judgment of a felony, in open court and in the presence of such judge, the fingerprints of the defendant against whom such judgment is rendered. Such fingerprints shall be affixed beneath the judge's signature to such judgment.

The purpose of this legislation was to make admissible in evidence the judgments of convictions bearing the convicted felon's fingerprints as prima facie evidence. "This procedure serves the purpose of identification in successive offender cases. It also is an aid in determining identity of alleged probation and parole violators." Hearns v. State, 223 So.2d 738 (Fla. 1969). The statute referred to in Hearns was substantially identical section 921.241 and was "designed to promote law enforcement, including deterrents to recidivism." State ex rel. Gerstein v. Schwartz, 357 So.2d 167 (Fla. 1978).

If appellant's convictions and sentences for first degree murder are affirmed by this court, then this oversight of the trial judge in not having appellant's fingerprints attached to those judgments is a harmless error that does not require the judgments and sentences to be vacated. The purpose of the statute would not be defeated where the convicted felon is imprisoned under two sentences of death and would have small chance to become a successive offender.

Should this court, for some reason, remand for resentencing of appellant on any one of the convictions attacked in this appeal, then he could be fingerprinted at the time of resentencing and certified fingerprints could be attached to the judgments of guilty of first degree murder.

At the most, appellee would not object to this cause being remanded for the trial court to attach a copy of appellant's fingerprints to the judgments previously entered for first degree murder.

POINT XV

CONVICTIONS FOR MURDER, SHOOTING OR THROWING A DEADLY MISSILE INTO AN OCCUPIED VEHICLE, BURGLARY OF A CONVEYANCE WITH AN ASSAULT, AND ARMED ROBBERY ARE NOT DUPLICITOUS AND DO NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AND ARTICLE I, SECTION 9 FLORIDA CONSTITUTION.

Convicting and sentencing appellant for the four distinct evils of burglary with an assault and armed robbery and first-degree murder and shooting into an occupied vehicle do not raise a problem of double jeopardy such as that found in Carawan v. State, 515 So.2d 161 (Fla. 1987). Although appellee admits that appellant is correct in his statement that the evil done to the victims is addressed by separate convictions for first-degree premeditated murder and the evil done to the property is addressed by the separate robbery conviction, appellee must assert that such does not preclude the finding that there were additional evils done to each or punishment for those additional evils. It must also be noted that appellant's crimes were committed prior to this court's decision in Carawan, and because the legislature has amended section 775.021(4)[5], making clear its intent to permit multiple convictions for crimes arising out of a "single evil," Carawan is not the law now. Clark v. State, 530 So.2d 519 (Fla. 5th DCA 1988)(Clark shot a single shot and was convicted and sentenced for attempted murder one, shooting into an occupied building, and being a person engaged in a criminal offense with a

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See Ch. 88.131, § 7 (F.L.W. Session Law-Rptr. July 4, 1988).

weapon. The District Court found Carawan inapplicable.) See also, Vause v. State, 476 So.2d 141 (Fla. 1985)(convictions and sentences for third-degree murder, shooting at or into an occupied vehicle, and use of a firearm during the commission of a felony affirmed.)

"With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S.359,103 S.Ct. 673,74 L.Ed.2d 535 (1983). Hunter makes it clear that the rule of Blockburger v. United States, 284 U.S.299,52 S.Ct. 180,76 L.Ed.306 (1932), is a rule of statutory construction designed to assist courts in determining legislative intent. That the ***Blockburger*** rule was statutorily adopted has always been a clear statement that the Florida Legislature intends to punish separately offenses which meet the ***Blockburger*** rule. A correct analysis of the statutory elements of first-degree premeditated murder[6] and shooting into an occupied conveyance[7] reveals that the offenses contain virtually no common elements.

Appellant claims that the shots fired into the pick-up truck were those that effected the deaths of the two victims. That is true for two of the three shots fired, but since, according to the medical examiner's testimony, the first shot would have killed Paul Brock (R 1277), the second shot fired at Brock was unnecessary to effect his murder and is sufficient to

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[6] Section 782.04(1)(a) 1 and 2, Fla. Stat. (1987)

[7] Section 790.19, Fla. Stat. (1987)

support the conviction and separate sentence for shooting into an occupied vehicle. Even if the recent legislative amendment to section 775.021(4) had not disturbed the reasoning in Carawan, the very footnote from that decision cited by appellant refutes his contention. This court emphasized that its holding applies only to separate punishments "arising from one act, not one transaction." Id. at 170 n.8. Here, each shot fired into the vehicle was a separate act, while together they constituted one transaction that also included the burglary and the armed robbery. Regardless of which test is applied, separate convictions and sentences for the two murders and the shooting into the occupied conveyance should be affirmed.

Appellant argued, pre-trial that the burglary was committed by shooting into the truck and, therefore, was duplicitous of the shooting into the occupied conveyance. However, the burglary as charged in the indictment (R 5) was committed by Jones' entering the truck with the intent to commit murder and/or robbery, and such is not duplicitous of the armed robbery. See, Lamb v. State, **532** So.2d 1051 (Fla. **1988)** (convictions for first-degree murder, burglary with assault and grand theft affirmed). Since separate convictions for burglary of a dwelling and grand theft are commonly affirmed when something of value is actually taken from the home by the burglar, the convictions here for burglary of a conveyance while armed or with an assault and armed robbery should likewise be affirmed. This is especially true where the evidence shows that appellant not only robbed the victims of the conveyance itself, but robbed them of the tools in the back (R 1079,1303),

Perry's purse (R 1485) and Brock's check cashing card (R 1365). In Echols v. State, supra., separate convictions and sentences for first-degree murder, robbery with a firearm and armed burglary with an assault were affirmed. In a related case, Dragovich v. State, 492 So.2d 350 (Fla. 1986), convictions and sentences for armed robbery and armed burglary were affirmed where appellant hired another person to murder the victim and the hired gun entered the victim's home, killed him, and then took jewelry and cash from the house. See also, Harris v. State, supra., (separate convictions and sentences for burglary (of a dwelling) with an assault and robbery (took money from victim's purse in the house) affirmed.); Ferri v. State, 441 So.2d 606 (Fla. 1983)(separate judgments of guilty of burglary and robbery affirmed.)

The above cases demonstrate that it is not unusual for a defendant to be punished twice for entering the property of another with a felonious intent and for completing that felonious intent. Here, appellant twice entered the pickup truck of Paul Brock--first to remove the occupants, one of whom he then raped, and then a second time to take the vehicle. Where a conveyance, such as a truck, could be stolen without entering it by towing it away, and where such a conveyance can be burglarized without the conveyance itself being taken by force, neither one is the lesser included of the other and each contains at least one element that the other does not. Therefore, it is apparent that the legislature intended dual punishments for the two crimes of burglary enhanced by an assault and armed robbery, and such does not violate the Double Jeopardy Clause.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully requests this honorable court affirm the judgments and sentences of the trial court in all respects.

Respectfully submitted,

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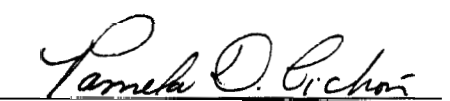

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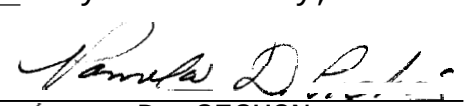
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief of Appellee has been sent by delivery to: Larry B. Henderson, Assistant Public Defender, 112-A Orange Ave., Daytona Beach, Florida, 32014, this 17th day of January, 1989.



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