IN THE SUPREME COURT OF FLORIDA

RANDALL SCOTT JONES,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

CASE NO. 72,461

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PUTNAM COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The state charged Randall Scott Jones (hereafter Jones) with two first-degree murders, one armed robbery, a burglary of a conveyance while armed and/or with an assault, shooting or throwing a deadly missile into an occupied vehicle, second-degree grand theft, and sexual battery (R5-6). 1/ The matter proceeded to a jury trial in the Circuit Court in and for Putnam County, the Honorable Robert R. Perry presiding. The defense presented no evidence. The jury deliberated for 45 minutes before finding Jones guilty of all counts as charged (R1650-1651,642-643).

The penalty phase was conducted four days later. Jones moved for the use of a special verdict form for the jury to unanimously determine the presence of statutory

1/ (R) refers to the record on appeal of the instant case.

aggravating circumstances; that motion was denied (R645-646,669). Defense counsel unsuccessfully sought to withdraw based on conflict of interest between Jones and a state's witness (Edward Tipton) (R1665). That motion to withdraw was renewed during cross-examination of Tipton by defense counsel when it was revealed that the Office of the Public Defender of the Seventh Judicial Circuit was at that time representing Tipton on charges in Volusia and Putnam Counties (R1693-1694). Defense counsel concluded "cross-examination" of Tipton by stating, "Your Honor, I cannot impeach him for the reasons which I have explained to you. I cannot cross-examine this witness with respect to the statement made in the jail for the reasons which I have explained to you, and decline to do *so.*" (R1698)

Jones presented the testimony of a forensic psychologist and rested (R1707-1777). The jury was instructed on the following aggravating circumstances; 1) The murder was committed during the commission of a burglary or robbery; 2) the murder was especially wicked, evil, atrocious or cruel; 3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (R1822). The jury was instructed on the following mitigating factors; 1) Jones has no signigicant history of prior criminal activity; 2) age at the time of the crime, and: 3) any other aspect of Jones' character or record and any of the circumstances of the offense (R1823). Following approximately a half-hour of deliberations, the jury recommended by a vote of 11 to 1 that sentences of death be imposed for both murders (R1830,654).

Jones was adjudicated guilty of armed robbery, burglary of a conveyance with an assault, shooting a deadly missile into an occupied vehicle, and sexual battery **(R693-694)** and sentenced in conformity with the recommended guideline sanction to a nine year term of imprisonment on the armed robbery conviction, to a seven year term of imprisonment on the burglary of a conveyance while armed conviction, to a three and one-half year term of imprisonment on the shooting a deadly missile into an occupied vehicle conviction, and to a seventeen year term of imprisonment on the sexual battery conviction, all sentences to be served concurrently with credit for **261** days time served **(R693-699).** In a separate written judgment and sentence, Jones was adjudicated guilty of two counts of first-degree murder and sentenced to death based on findings of a capital felony committed for pecuniary gain and commission of a homicide in a cold, calculated and premeditated manner without any pretense of moral or legal justification **(R685-692).** No mitigating circumstances were found.

A timely notice of appeal was filed May **19, 1988 (R703-704),** and the Office of the Public Defender was appointed to represent Jones for the purpose of his appeal **(R702).** This brief follows.

STATEMENT OF THE FACTS

Randall Jones was born May 7, 1968 (R1733). He was abandoned by his mother (R1719). He thereafter lived with his father and step-mother (R1720). His behavior was indicative of having been an abused child (R1721). He exhibited classical symptoms of emotional disorders, starting fires, stealing, and lying at an early age (R1722). When 11, he was taken to a psychiatrist and hospitalized for three weeks; following a short release he was rehospitalized for nine weeks and diagnosed to be a border-line schizophrenic (R1722). He was adjudicated a dependant child, and then a delinquent child (R1722-23). In two separate IQ tests, Jones achieved scores of 108 and 118, which is the high-average range (R1719).

The diagnosis of borderline schizophrenia is now termed "border-line personality disorder". These people have an ongoing difficulty adjusting to society and, during high levels of stress, can become psychotic, lose touch with reality and lose control of impulses (R1726). Jones was honorably discharged on May 1, 1987 from the United States Army after one year of service (R585,1723). His father died early in 1987 (R1724). Jones was to have married his 18 year-old girl friend in December of 1987 (R1095), but she and Jones broke up following the death of one of her parents (R1724).

Around 11 o'clock p.m. on July 26, 1987, Jones asked a friend if he wanted to go target practicing. The friend said no and was taken home by Jones (R1084,1090). Around midnight, a fisherman leaving the Rodman Dam area was approached by two young

men and asked if he could help them with their stuck vehicle (R1119-1122). The fisherman had no tow rope or cable and so informed the boys; he also informed them that there was a four wheel drive truck in the parking lot and that perhaps they could receive help there (R1124). Around 12:30, a twelve year-old boy camping at the Rodman Dam Campground was awakened by three rapidly fired gunshots (R1108-1112). He heard tires squealing approximately a half-hour later before going to sleep (R1111).

Blood and broken glass were found in the parking area the next morning and reported to a concession worker (R1127-1129). Later that morning the same concession worker was going to a swimming area and noticed blood on the trail; she investigated and found the body of a man lying in the woods (R1133). The police were summoned and arrived at approximately 1:13 p.m. (R1139). They found the semi-nude body of a female approximately 20 feet from the male (R1162,1179-1181). Evidence was photographed hastily due to an approaching thunderstorm (R1153-1155). A torrential downpoor hit the area approximately an hour after the police arrived, and some evidence was completely washed away (R1155). A videotape of the scene was made after the rain (R1158-1159).

The male victim (Paul Block, hereafter "Brock") had been shot twice in the head (R1252-1253); either wound was instantly fatal (R1277). One bullet entered the chin, broke the floor of the mouth, broke the chin, extracted teeth in the lower jaw, went through the base of the skull and came out the left side of the head with massive destruction of the skull, whereas

the other wound appeared to have been inflicted at a tangential angle (R1259). Powder burns around the entrance wound to the chin were consi tent with the gun being fired at near-contact with the muzzle (R1255-1256), whereas the other wound was consistent with having been inflicted from a distance of greater than three to four feet unless a barrier was interposed between the firearm and the victim when the shot was fired (R1257-1258).

The female victim (Kelly Perry, hereafter "Perry") had been shot in the forehead at a distance of three to four feet (R1260). That rifle shot was also instantly fatal (R1277). A vaginal examination revealed the presence of sperm (R1263-68). A pathologist determined it most probable that the sexual activity occurred after the death of Perry (R1280). The bodies bore evidence of having been dragged along the ground at or near the time of death (R1254,1278).

On July 27, 1987 at approximately 6:50 a.m. Brock's brother saw Jones driving Brock's Chevrolet pick-up truck at a Jiffy-Mart in Green Cove Springs (R1288-93,1301). A 30-30 rifle equipped with a scope was seen by the brother inside the truck; bullet holes were in the windshield (R1290-93). Jones was questioned by Brock's brother, and Jones stated that he had just purchased the truck for four thousand dollars (R1292-93). On July 28th or 29th, 1987 Jones, still driving the truck, arrived at the Lighthouse Childrens' Home in Kosciusko, Mississippi, which is located in the center of the state approximately two hundred and fifty miles north of 1-10 (R1319-22). On August 16, 1987 Jones was arrested by a Mississippi Highway Patrol Officer

for being in possession of the stolen truck (R1326-27). Authorities in Putnam County were notified, and two Sheriff's Deputies responded to Mississippi to take custody of Jones. Two statements were obtained from Jones, one written in Mississippi when Jones was interrogated (R587-592) and the second given orally during the trip from Mississippi to Palatka; that statement was later reduced to writing and signed by Jones (R594-602).

In the initial statement, Jones stated that Chris Reesh had accompanied him target practicing at the Rodman Dam area, and that when their vehicle became stuck they tried unsuccessfully to get assistance from a fisherman. They thereafter came across two people sleeping in a Chevrolet truck at the Rodman Dam area. Jones stated he and Reesh discussed shooting the two people in the truck to obtain the vehicle, and that he (Jones) stated he wanted no part of it and commenced walking up the road; he went approximately a quarter of a mile when he heard the shots. He came running back to see what was going on and saw that Reesh had shot both people. Reesh then dragged the two victims into the woods and the truck was cleaned and used to pull out Jones' stuck vehicle. Jones thereafter took the truck and the rifle and went to Mississippi and, on the way, encountered a person in Green Cove Springs who inquired about the truck (R587-592).

In the second statement, Jones stated in the initial statement that he had reversed the roles of the people. Jones stated that he and Reesh discussed for approximately a half-hour waking the occupants of the truck and that Reesh did not like the idea of waking them up. Jones and Reesh then saw the fisherman

and went to him in an effort to get help for their stuck vehicle. When the fisherman was unable to help them, they returned to the dam. Five or ten minutes passed. "Chris was spazzed out about waking them up. I said I was going to shoot them *so* we could use their truck. He said that I was crazy. This was by the boat ramp. Chris was about 20 feet away waiting when I shot through the window three times. I shot him first and his head popped up. I must have hit his chest or something and it ricocheted into the windshield. I shot again and hit him in the head. She had started moving and I shot her in the head." (R595). The bodies were removed from the truck and dragged into the woods. The truck was used to get the car out of the sand, and then Reesh drove the car back toward Palatka as Jones drove the truck. When the got to within a mile of State Road 19 Jones went back to the dam and tried to put the man's body into the back of the truck; it was too heavy *so* Jones dragged it further into the bushes. Jones then dragged Perry's body further into the woods and had sexual intercourse with it. (R596)

While in jail, Jones told his ex-fiance' that he had shot those two people, but did not remember doing it (R1103-04). When returned to Palatka Jones cooperated fully; he accompanied detectives to the Rodman Dam area and gave a detailed explanation of what had occurred (R1675-76,1684).

SUMMARY OF ARGUMENTS

POINT I: When Jones was first arrested in Mississippi he asked the auth ritie for an attorney. Notwithstanding Jones' request, he was not provided counsel. When two Putnam County Sheriff's Deputies went to Mississippi they interrogated Jones in violation of his right to counsel and obtained statements. The statements were obtained in violation of Jones' Sixth Amendment right to counsel, and they should have been suppressed following Jones' timely motion. The convictions must be reversed and the matter remanded for retrial.

POINT 11: Under Florida law a sexual battery cannot be committed upon a corpse. Jones timely moved to dismiss the sexual battery charge on those grounds, and the court erred in failing to grant the motion to dismiss where it is uncontested that any sexual activity by Jones occurred well after the death of Perry. The sexual battery conviction requires reversal. This requires recomputation of guideline sentences for the remaining felony convictions. Further, because their finding that Jones was guilty of sexual battery likely influenced the death recommendation, the death sentences must be vacated and the matter remanded for a new penalty proceeding.

POINT 111: Jones moved to have a special verdict form used during the penalty phase whereby the jury would find the applicability of statutory aggravating circumstances. That request was denied. The ruling denied Jones his Sixth Amendment

right to a jury trial because the death penalty is contingent in Florida upon the presence of at least one statutory aggravating circumstance. These aggravating circumstances are substantive elements of the crime which actually define which crimes are punishable by the death penalty. The death sentences must be reversed and the matter remanded for a new penalty phase.

POINT IV: Over objection, the court instructed the jury that, in recommending the appropriate sanction, they could consider whether these murders were especially heinous, atrocious or cruel. As a matter of law, that circumstance is inapplicable. The jury reasonably based their recommendation of death entirely on this faulty consideration, and certainly it influenced their recommendation. This is especially *so* where the judge restricted defense counsel's closing argument that pertained to the meaning of that aggravating circumstance. The state cannot show that the erroneous giving of this particular unsupported instruction was harmless error, especially where only two other statutory aggravating circumstances were defined by the Court. Accordingly, the death sentences must be reversed and the matter remanded for a new penalty phase.

POINT V: The finding that the murders were committed for pecuniary gain is unsupported by the evidence. It appears that the victims were killed as an impulsive reaction to having been rejected by the fisherman when he was asked for help. Further, it was error to allow a policeman over objection to state that he determined that the murder was committed for pecuniary gain.

Because this aggravating circumstance does not apply it should be struck and the matter remanded for resentencing before a new jury.

POINT VI: The finding that the murder was committed in a cold, calculated and premeditated manner is speculative because the shots to the head are explainable as being the only place where the sleeping victims were exposed. The killings appear more to have been impulsive rather than carefully planned or well thought out in advance. The aggravating circumstance must be struck and the matter remanded for resentencing.

POINT VII: Jones was prevented by the Judge from arguing the consequences and appropriateness of sentences of life imprisonment. This occurred as defense counsel was addressing the manner in which the sentences could be imposed making Jones ineligible for parole for fifty years, even without consideration of the guideline sentences for the other felony convictions. Because the restriction of this relevant and proper line of argument violated the Fifth, Sixth, Eighth and Fourteenth Amendments, a new penalty phase is required.

POINT VIII: The death penalty in Florida is being arbitrarily and capriciously applied as a result of vague and inspecific statutory language. Decisions of this Court have not provided consistent results under the same or substantially similar facts. Moreover, this Court has applied the wrong standard of review

concerning the presence of mitigating circumstances. Instead of consistently providing plenary review in all cases, this Court considers itself bound to an abuse of discretion standard when the jury recommends death. The death penalty statutes in Florida facially and as applied violate the Sixth, Eighth , and Fourteenth Amendments. The death sentences must be reversed and sentences of life imprisonment imposed.

POINT IX: Over objection, the state unnecessarily presented the testimony of four relatives of the victims. Three of those witnesses established absolutely nothing relevant. They were put before the jury over objection solely to demonstrate that the victims had a large family. The intentional injection of this improper consideration (large family of victim) by the prosecutor, over objection calls for sanctions and for a new penalty phase.

POINT X: Defense counsel sought to withdraw based on a conflict revealed just prior to the penalty phase based on joint representation of the defendant and a state witness; that motion was summarily denied. Defense counsel renewed the motion to withdraw when, on cross-examination, he learned that the state witness was also being represented by the Office of the Public Defender on charges in Putnam County. That motion also was summarily denied. The failure of the trial judge to conduct any inquiry when alerted to the conflict was error. By forcing defense counsel to defend one client by cross-examining another,

the judge placed defense counsel in diametrically opposed positions and denied the defendant effective representation of counsel guaranteed by the Sixth Amendment. Because the record shows that the defendant was prejudiced by the denial of his counsel's motion to withdraw, the death sentences must be reversed and the matter remanded for a new penalty phase.

POINT XI: Jones was absent during two critical stages of his trial. He was not present at the bench when defense counsel exercised the peremptory challenges; he was not present at the bench when the court conducted an unrecorded inquiry of a juror. The burden is on the state to demonstrate a knowing, voluntary and intentional waiver by Jones of his right to be present at those times. The state cannot do *so.* Accordingly, the convictions must be reversed and the matter remanded for retrial.

POINT XII: The state used scientific evidence concerning DNA comparison to establish that the DNA of Jones was present in the vaginal swabbings of Perry. The scientific evidence was not in this case shown to be sufficiently reliable to permit its use. Because Jones timely objected to the use of this prejudicial evidence and because the state cannot demonstrate that the improper use was harmless error, the convictions must be reversed and the matter remanded for retrial.

POINT XIII: In what was an intentional ploy, the prosecutor repeatedly placed evidence before the jury that Jones showed no

remorse. When told that he could not use the word "remorse", the state recharacterized the testimony but to the same end. Timely objections and motions for mistrial were to no avail. A request for a cautionary instruction went unheeded. The use of this evidence rendered the death recommendation unreliable under the Eighth Amendment, a new penalty phase is required.

POINT **XIV**: Jones has not been adjudicated in compliance with the pertinent Florida statutes, in that his fingerprints were not affixed to the judgment. That technical error requires correction.

POINT **XV**: In Carawan v. State, infra, this Court held that multiple punishments are improper for discreet events arrising from a single criminal intent. Jones' intent to effect the death of Perry and Brock are punished separately by convictions for first-degree murder; another punishment for shooting into the vehicle to accomplish that single criminal intent is duplicitous and in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution. Similarly, Jones' criminal intent to take and use the truck is punished separately by a conviction and sentence for armed robbery; a separate conviction and sentence for burglary for that same criminal intent is duplicitous and in violation of the double jeopardy clause of the Fifth Amendment and Article I, Section 9 of the Florida Constitution. Accordingly, the convictions for burglary of a conveyance with an assault and shooting into an occupied vehicle must be vacated.

POINT I

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS STATEMENTS OBTAINED FROM THE DEFENDANT FOLLOWING A REQUEST FOR COUNSEL THAT WAS NOT GRANTED.

Jones was arrested in Mississippi on August 16, 1987 and charged with receiving stolen property (R1326,1339). Jones exercised his right to remain silent and asked [2/] for an attorney when first arrested (R454); the request was renewed when the

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2/ Jones stated at the suppression hearing that he requested an attorney when arrested (R454). At trial, without objection, the arresting officer stated;

> Q. (Prosecutor) Trooper Haldeman, would you please indicate for the record and for our jury the rights that you read to the defendant?
> A. (Trooper Haldeman). I told Mr. Jones: 'You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer, have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements.' I then turned the card over, which there are two questions on the back. I then read off the card: 'Do you understand each of these rights --'
> Q. And did he indicate --
> A. -- I have explained to you, and he said, 'Yes, I do.'
> Q. Okay.
> A. I said: 'Having these rights in mind, do you wish to talk to us now?' He didn't say anything. I handcuffed him and I placed him in the police vehicle, which he was being transported to the Attala County Jail.
> Q. Did you subsequently have any contact with the Defendant after that?
> A. Not immediately. Later that evening, after I contacted the investigator with the Mississippi Highway Safety Patrol, Jim Edwards came down and I witnessed another form where he read Mr. Jones his rights again.
> Q. Okay. And was he questioned at that time?
> A. Not in depth.
> Q. Okay.
> A. After his rights were read to him, I witnessed the rights by my signing my signature and he was questioned briefly. (R1329-31) (emphasis added).

Putnam County Deputies questioned him in Mississippi **(R400-402, 415-417,442-445).** Prior to trial Jones moved to suppress the statements, alleging that the statements had been obtained in violation of his Sixth Amendment right to counsel, in that the initial request for an attorney was not honored and Jones was dissuaded from talking to an attorney by deputies in Mississippi.

When the motion to suppress was heard, Deputy Hord testified that he did not recall Jones asking for an attorney prior to giving the statement **(R417).** Lieutenant Stout remembered that, when he returned to the interrogation of Jones by Deputy Hord after having gone to get something to eat, Jones and Deputy Hord were talking about an attorney for Jones **(R400-402).** Jones testified at the suppression hearing that he said he wanted an attorney in light of the seriousness of the matter, and that Deputy Hord had told him that an attorney would only tell him to shut up and mess things up; that if Jones wanted Hord to help him get a deal with the State Attorney, Jones was going to have to be totally honest **(R442-43).**

Judge Perry ruled:

> Now, I don't know what evidence the State intends to introduce, but with regard to any statements this Defendant made to the Mississippi authorities prior to the invocation -- or prior to the entrance on the scene of the Florida authorities, I will reserve jurisdiction on that matter because this Defendant has indicated that he requested an attorney, and we all agree that once an attorney is requested, must be afforded and all questioning should cease. So, I do not -- there'll have to be a proper predicate and foundation laid for introduction of any Mississippi statement, because we don't have that

> predicate or foundation here at this time, and I don't know whether they intend to use it, but I'm just telling you, you got to lay the predicate or foundation for it.
>
> With regard to the statements made to the Florida officers, both in Mississippi and after returning to Florida, oral and written, the motion to suppress is denied.

(R465-466).

When a clear and unequivocal request for counsel is made, an accused "'is not subject to further interrogation by the authorities until counsel has been made available to him,' unless he waives his earlier request for assistance of counsel." Smith v. Illinois, 469 U.S. 91, 94-95 (1984) quoting Edwards v. Arizona, 451 U.S. 477, 484-485 (1981).

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

Miranda v. Arizona, 384 U.S. 436, 473-74 (1966)(emphasis added).

In Edwards v. Arizona, 451 U.S. 477 (1985), the United States Supreme Court held:

> [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

When the Mississippi Police first arrested Jones, Jones exercised his right to remain silent and unequivocally requested that counsel be appointed **(R454).** The failure of the Mississippi police to timely comply with rules which mandate an initial court appearance by Jones immediately after his arrest compound the error. **(R456-457).** See Mallory v. United States, **354** U.S. **449, 77** S.Ct. **1396, 1** L.Ed.2d **1479 (1957).** The Putnam County Deputies disregarded Jones' invocation and exercise of his constitutional rights and twice re-initiated interrogation of Jones. This clearly violated the dictates of Edwards, supra. The statements were obtained in violation of the Fifth, Sixth and Fourteenth Amendments and, accordingly, they required suppressing upon the timely motions. The convictions must be reversed and the matter remanded for retrial.

POINT II

THE CONVICTION FOR SEXUAL BATTERY MUST BE REVERSED BECAUSE THE ACTS ALLEGEDLY CONSTITUTING THE SEXUAL BATTERY OCCURRED WELL AFTER THE DEATH OF THE VICTIM.

In Count VII of the Indictment, the state charged "that RANDALL SCOTT JONES, on or about the 27th day of July, 1987, within Putnam County, Florida, did then and there unlawfully commit a sexual battery upon KELLY LYNN PERRY, a person twelve (12) years of age or older, to-wit: twenty-two (22) years of age, by oral, and, or vaginal penetration by the sex organ of the said RANDALL SCOTT JONES without the consent of KELLY LYNN PERRY, and when the victim was helpless to resist." (R6). Prior to trial, Jones filed a Sworn Motion to Dismiss the sexual battery count, alleging in pertinent part that Kelly Lynn Perry and Matthew Paul Brock were both shot and killed instantly while asleep in the cab of a pick-up truck; the bodies were removed from the truck and concealed in the underbrush, and: the defendant returned to the body of Kelly Lynn Perry and copulated with it. Jones' motion stated, "The sexual act upon the body of Kelly Lynn Perry occurred after her death. As a matter of law, the crime of sexual battery can not be committed against a corpse." (R149-150).

The state filed a sworn Traverse, agreeing with the material facts contained in Jones' Motion to Dismiss but alleging that those acts constituted a violation of Section 794.011(e), Florida Statutes (R162-163). The Motion to Dismiss

was denied (R246) following a hearing (R503-516). At trial, defense counsel renewed the motion to dismiss and, with the state's approval, was granted a continuing objection to such testimony (R1263-65). At trial the medical examiner who examined the body of Perry testified that the sexual activity "most probably" occurred after death (R1280). He agreed that the death of both victims was instantaneous (R1277). Assuming that the statements given to Deputy Hord are admissible (See Point I, supra), they indicate that the sexual activity took place after the death of Perry and the concealment of the body (R1494).

"The term 'sexual battery' means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object[.]" Section 794.011(1)(h), Fla.Stat. (1987). The statute otherwise requires that "a person commit a sexual battery on a person." See §794.011(2)-(5), Fla. Stat. (1987) (emphasis added). In McCall v. State, 503 So.2d 1306 (Fla. 5th DCA 1987), revs'd on other ground 524 So.2d 663 (Fla. 1988), the Fifth District Court of Appeal stated, "Here, the evidence indicates the victim was rendered unconcious, if not killed, by the first blow to the head; certainly there was no clear and convincing evidence that he was alive or conscious thereafter. Contrary to the finding by the trial court, neither sexual battery nor robbery can be committed against a corpse." McCall at 1307. This Court reversed McCall, but in doing so agreed that a sexual battery could not be committed on a corpse:

> We reject the state's argument that the facts considered by the trial court in the second departure reason, that respondent committed sexual battery on the victim by penetrating the victim's anus with a metal pipe, can be considered as evidence to support departure based upon excessively brutal conduct on the part of respondent in committing the murder. If the victim were still alive during this incident, a sexual battery was committed for which no conviction was obtained. It is improper to depart from the sentencing guidelines based upon a crime for which a conviction has not been obtained. See Fla.R.Crim.P. 3.701(d)(11). If the act was committed after the victim was dead, we agree with the district court below that mutilation of a body subsequent to death does not indicate the killing itself was excessively brutal and therefore cannot be a valid basis for departure. Cf. Jackson v. State, 451 So.2d 458 (Fla. 1984)(actions after death of the victim are irrelevant in determining whether aggravating circumstance of heinousness applies).

State v. McCall, 524 So.2d 663, 665 (Fla. 1988) (footnote 1) (emphasis added). In Love v. State, 450 So.2d 1191 (Fla. 4th DCA 1984), the court held that aggravated battery could not be committed on an unborn fetus because an unborn fetus is not a "person" as that term is defined by §1.01(3), Fla. Stat. (1983). Similarly, in Commonwealth v. Sudler, 496 Pa. 295, 436 A.2d 1376 (1981), the Supreme Court of Pennsylvania held that under the Pennsylvania statutes a sexual battery could not be committed against a corpse because their statutory definitions of "person" do not include a corpse.

There is no doubt here whatsoever that any sexual activity undertaken by Jones occurred after the death of Perry.

According to Jones' statement, Perry was shot in the head with a 30-30 rifle while asleep in the pick-up truck. The bodies were dragged into the woods and concealed. The truck was cleaned and taken to pull Jones' stuck automobile from the sand. Only after Jones returned to the corpse did the alleged sexual battery occur. The medical examiner agreed that it was "most probable" that conduct occurred after the death of Perry (R1280).

This issue was presented to the trial court prior to trial in the form of a sworn motion to dismiss. The traverse filed by the state did not disagree with the material facts stated in the motion to dismiss but rather contended that a sexual battery could be committed upon a corpse. Thus, if a sexual battery cannot be committed against a corpse as a matter of law the trial court erred in denying the motion to dismiss and the ruling should be reversed on appeal.

Sexual gratification is not an element of sexual battery. Aiken v. State, 390 So.2d 1186 (Fla. 1980). "As pointed out by the Fifth District in [State v. Smith, 401 So.2d 1126 (Fla. 5th DCA 1981)] the sexual battery statute, §794.011, Fla.Stat. (1981), proscribes a crime of violence, not a crime of sex." State v. Rider, 449 So.2d 903, 905 (Fla. 3d DCA 1984). The Florida sexual battery statute is violated when a person "commits a sexual battery upon a person" §794.011(2)-(5), Fla. Stat. (1987). As noted by the Fourth District in Love, supra, a "person" is expressly defined by statute as an individual or child. The definition does not include an unborn fetus *so*, logically, it does not include a corpse.

The violence done to the person of Kelly Perry was in this case homicide, for which Jones was convicted of first-degree murder. As this Court stated in Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975), "It is our opinion that when [the victim] died, the crime of murder was completed and that the mutilation of the body many hours later was not primarily the kind of misconduct contemplated by the Legislature in providing for the consideration of aggravating circumstances." When the murder of Perry was completed, the violence that could be committed against her person was also completed. The sexual activity occurred not with the "person" of Perry, but with a corpse. Accordingly, the sexual battery conviction must be reversed. Further, because the contemporaneous, improper conviction of sexual battery reasonably influenced the jury to recommend the death sentences, the death sentences are unreliable under the Eighth Amendment. As such the death sentences should be reversed and the matter remanded for a new penalty phase before a new jury. In any event, the felony sentences must be vacated and the matter remanded for recomputation of the correct recommended guideline sanction.

POINT III

DEATH PENALTIES WERE IMPOSED IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS BECAUSE THE JURY DID NOT DETERMINE THE EXISTENCE OF STATUTORY AGGRAVATING CIRCUMSTANCES THAT DEFINE WHICH FIRST-DEGREE MURDERS ARE PUNISHABLE BY DEATH.

At the penalty-phase jury charge conference Jones moved pursuant to the Fifth, Sixth and Fourteenth Amendments to have the jury unanimously find the existence of the statutory aggravating circumstances applicable to his case (R645-646,1799). The motion was denied (R1799,669). The jury instead issued a generic recommendation of death (R654). The trial judge found two statutory aggravating circumstances to apply under the facts of this case, viz: §921.141(5)(f)(murder committed for pecuniary gain) and §921.141(5)(g) (murder committed in a cold, calculated or premeditated manner without any pretense of moral or legal justification)(R685-692).

> The aggravating circumstances of Section 921.141(6) Florida statutes actually define those crimes, when read in conjunction with Florida Statutes 782.04(2). . ., to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)(emphasis added). "By delineating the circumstances in which the death penalty may be imposed, the legislature has not invaded this Court's prerogative of adopting rules of practice and procedure. We find that the

provisions of section 921.141 are matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty. Vaught v. State, 410 So.2d 147, 149 (Fla. 1982).

"[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." Patterson v. New York 432 U.S. 197, 210, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). "Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which - were they to be tried in a federal court - would come within the Sixth Amendment's guarantee." Duncan v. Louisiana, 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)(footnote omitted). But see Richmond v. Arizona, 434 U.S. 1323, 98 S.Ct. 8, 54 L.Ed.2d 34 (1977).

This Court has unequivocally held that the aggravating circumstances set forth in §921.141(6), Fla.Stat. are substantive law that "actually define those crimes, when read in conjunction with Fla.Stat. §§782.04(1) and 794.01(1)[3] F.S.A. to which the

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3/ Capital punishment is now viewed as Constitutionally disproportionate punishment for the crime of sexual battery.

death penalty is applicable in the absence of mitigating circumstances." Morgan v. State, 415 So.2d 6, 11 (Fla. 1982); Vaught v. State, 410 So.2d 147, 149 (Fla. 1982); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). 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. It is not the stigma of being a convicted first-degree murderer that most affects those convicted of this crime, but rather the death penalty itself.

Florida's first-degree murder statute lumps all first-degree murders together, be they committed from an act of premeditation or the unlawful killing of a human being during the commission of an enumerated felony. S782.04 Fla. Stat. (1987). Insofar as the punishment that attends first-degree murder, the statute provides that the unlawful killing of a human being committed in a certain way is first-degree murder, a capital felony, punishable as provided in S775.082, and goes on to state, "In all cases under this section, the procedure set forth in S921.141 shall be followed in order to determine sentence of death or life imprisonment." $782.04 (1), Fla. Stat. (1987).

> 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 $921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

Section 775.082 (1), Fla.Stat. (1987).

Jones moved in writing prior to the penalty phase to have the jury unanimously determine which aggravating circumstances apply to his case, contending that he was guaranteed that right by the Fifth, Sixth and Fourteenth Amendments (R645-646). The motion was denied (R669). Thereafter, the judge found that the murders were committed for pecuniary gain and that the murders were committed in a cold, calculated or premeditated manner without any pretense of moral or legal justification (R685-692).

Section 921.141(2) in part provides:

> ADVISORY **SENTENCE** BY **THE** JURY. - After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(emphasis added). Expressed in the above-emphasized portion of the statute is the requirement that the jury actually find aggravating circumstances before moving on to find and consider mitigating circumstances; this statutory requirement heretofore has been disregarded. It is respectfully submitted, especially in light of the timely, specific request by Jones, that the jury is required by §921.141(2) and the Sixth Amendment to unanimously determine the existence of aggravating circumstances when and if the jury recommends a sentence of death, and that the trial judge

may thereafter reject but not supplement those findings of statutory aggravating circumstances when and if the death sentence is imposed. The findings issued by the trial court pursuant to §921.141(3), Fla. Stat. could then incorporate the express findings of the jury, but the trial court no longer would be free to incorporate his own perception of what the testimony and evidence established to justify imposition of the death penalty.

The failure of the jury to use a special verdict form in the penalty phase violated the Sixth Amendment right to a jury trial. The particular statutory aggravating circumstances found by Judge Perry to have been established by the testimony are entirely subjective and dependent on what factually transpired at the time of the murders. The death sentences must be reversed and a new penalty phase conducted because of the denial of the rights to Due Process and a jury determination of the facts on which the penalty to be imposed is based.

POINT IV

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE AGGRAVATING CIRCUMSTANCE OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER AND IN PREVENTING DEFENSE COUNSEL FROM ARGUING TO THE JURY THE INAPPLICABILITY OF THAT CIRCUMSTANCE AS A MATTER OF LAW.

The defendant's statements (if they are to be considered; See Point I, supra) indicate that both victims were shot in the head with a high-powered rifle and killed instantly as they lay asleep in a pick-up truck (R1492-1493). The medical examiner testified that both victims were killed instantly from being shot in the head with a high-powered rifle (R1277). There was NO testimony that the bodies displayed defensive wounds: there was NO testimony that the victims were aware of their impending death. One witness who heard what were apparently the fatal gunshots testified that three gunshots were fired in a period of about five seconds (R1112).

At the penalty phase jury charge conference the prosecutor requested that the jury receive instructions concerning an especially heinous, atrocious or cruel murder (R1784-1786). Jones objected on the basis that the instruction was wholly unsupported by the evidence (R1786-1791); the objection was overruled (R1791). The prosecutor thereafter argued to the jury that the statutory aggravating circumstance applied: "Was it during the commission of one of those crimes? You know it was. [Was] it especially heinous, atrocious or cruel? You know it was. Two people sleeping in a truck, not doing

anything to anybody, out there at Rodman Dam, spent the night together, and a guy walks up for the purpose of taking their truck and ends their life. Stranger to stranger, no reason but that." (R1811).

Defense counsel attempted to argue that, though murder is often heinous, atrocious, and cruel, in the legal sense that aggravating circumstance is reserved exclusively for something different (R1815). The prosecutor objected and, though the objection was overruled, Judge Perry stated, "I will give the instructions on the law, gentlemen, let's try to confine ourselves to the aggravating and mitigatings" and told defense counsel, "I would prefer that you not preface the words with legally." (R1815). Thus, unable to argue that the circumstance was not legally supported by the evidence, defense counsel was forced to withdraw from that line of argument (R1816).

"A homicide is especially heinous, atrocious or cruel when 'the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Boenoano v. State, 13 FLW 401, 403 (Fla. June 23, 1988), quoting State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). "Acts committed independently from the capital felony for which the offender is being sentenced are not relevant to question of whether the capital felony itself was especially heinous, atrocious, or cruel." Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985); See Halliwell v. State, 323 So.2d 557 (Fla. 1975).

A judge may properly instruct on all of the statutory aggravating circumstances, notwithstanding evidentiary support. Straight v. Wainwright, 422 So.2d 827, 830 (Fla. 1982); see also Jacobs v. Wainwright, 450 So.2d 200, 202 (Fla. 1984)(reading verbatim all statutory aggravating and mitigating). It is not improper for a judge to refuse to instruct the jury on mitigating circumstances that are not supported by the record. Roman v. State, 475 So.2d 1228, 1234 (Fla. 1985)("The standard jury instructions instruct the judge to give instruction on only those aggravating and mitigating circumstances for which evidence has been presented."); Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985)("We find no error. The judge followed the standard instructions and specifically addressed all circumstances and gave instructions for those aggravating and mitigating circumstances for which evidence had been presented.") The note to the judge contained in the Standard Jury Instructions in Criminal Cases, 2d Ed. expressly states, "Give only those aggravating circumstances for which evidence has been presented." p.80 (emphasis added).

The trial court erred in instructing the jury on the aggravating circumstance of an especially heinous, atrocious or cruel murder where a timely objection was made and where there was NO evidentiary support whatsoever for the instruction. It is expressly submitted that giving the unsupported instruction over objection violated the Eighth Amendment, in that the presence of that legally improper instruction was confusing and misleading to the jury concerning their recommendation of the appropriate

sanction. Further, the limitation of defense counsel's closing argument denied Due Process, the right to be heard, and effective representation of counsel guaranteed by the Fifth, Sixth and Fourteenth Amendments.

The presence of the instruction was prejudicial and confusing. This was not a situation where the jury was read verbatim all of the statutory aggravating circumstances which, if unobjected to, is apparently not reversible error. See Straight v. Wainwright, supra. The jury in this case received instructions on only three aggravating circumstances. This particular aggravating circumstance, due to the subjectivity involved, violates the Eighth Amendment because it fails to adequately channel the discretion of the jury.

> To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge of balance the facts of the case against the standard of activity which can only be developed by involvement with the trials of numerous defendants. Thus, the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

State v. Dixon, 283 So.2d 1, 8 (Fla. 1975)(emphasis added). See Maynard v. Cartwright, 486 U.S. __, 108 S.Ct. __, 100 L.Ed.2d 372 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980).

The jury in this case ought not to have had before them the consideration that these murders were especially heinous, atrocious or cruel, because clearly as a matter of law they are not. Defense should also have been allowed to argue to the jury

that as a matter of law the murders were not especially heinous, atrocious or cruel, if for no other reason than because the argument was eminently correct. Such arguments are not uncommon, as where affirmative defenses such as entrapment or intoxication are involved. Judge Perry's interference with the argument of defense counsel by implying, in the presence of the jury, that defense counsel's view was not the legal one, was tantamount to an instruction that the murders were especially heinous, atrocious or cruel, resulting in a denial of Due Process.

In anticipation of an argument by the state that the error is harmless, it is submitted that the erroneous presence of this particular instruction led the jurors to conclude, and reasonably so, that they were entitled to consider whether in their opinion these murders were especially heinous, or cruel and to base the death recommendation on this erroneous consideration. The jury would reasonably view the sexual battery conviction previously returned by them as making those murders especially heinous. The jury would not appreciate, in the absence of a separate instruction in that regard, that acts on a corpse after the murder could not support the circumstance. See Halliwell, supra. A lay person would inevitably conclude that these murders were especially heinous, atrocious or cruel. The state cannot meet its burden of showing beyond a reasonable doubt that the erroneous presence of this particular instruction in the face of a timely objection did not affect the recommendations of death by the jury. See State v. Lee, 13 FLW 532 (Fla. Sept. 1, 1988); Ciccarelli v. State, 13 FLW 536 (Fla. Sept. 8, 1988).

The death sentences must be reversed and the matter remanded for a new penalty phase with a new jury due to violations of the Fifth, Sixth, Eighth, and Fourteenth Amendments. These violations were caused by the presence of an improper instruction that was wholly unsupported by the evidence. Timely and specific objections by defense counsel were overruled. The presence of that particular instruction under the facts of this case was so susceptible to confusion and misapplication by the jury that distortion of the reasoned sentencing procedure required by the Eighth Amendment has occurred; the recommendation of the jury is unreliable and flawed

POINT V

THE TRIAL COURT ERRED IN FINDING THAT THE MURDERS WERE COMMITTED FOR PECUNIARY GAIN.

The trial judge found the existence of Section 921.141(5)(f) as follows:

> THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN. Testimony and the statements made by the Defendant which were admitted in evidence at trial show that the murders were committed so as to steal Mathew Paul Brock's pick-up truck. The truck had a value in excess of Four Thousand (4,000) Dollars. The Defendant stole the truck after murdering its occupants and was attempting to sell it when apprehended by law enforcement in Mississippi.

(R689).

Section 921.141(5)(f), Fla. Stat. (1985) provides: "The capital felony was committed for pecuniary gain." Blacks defines pecuniary as "monetary; relating to money: financial; consisting of money or that which can be valued in money." Blacks Law Dictionary, Fifth Edition, p.1018.

> We also find no proof beyond a reasonable doubt that the killing was for pecuniary gain. Although there was evidence that Hardwick killed Pullum for stealing Quaaludes, this fact alone does not establish that the killing itself was to obtain financial gain. In the past, we have permitted this aggravating factor only where the murder is an integral step in obtaining some sought-after specific gain. Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). See Simmons v. State, 419 So.2d 316 (Fla. 1982). Since any financial advantage

> Hardwick could have expected in this case at most was indirect and uncertain, we cannot conclude that this aggravating factor existed beyond a reasonable doubt.

Hardwick v. State, 521 So.2d 1070, 1076 (Fla. 1988). In McCray v. State, 416 So.2d 804 (Fla. 1982) the defendant broke into a van and took guns, placing them in the woods next to the van. When the defendant returned to retrieve the guns he encountered the owner of the van; the owner was murdered. This Court disapproved the finding of the aggravating circumstance of pecuniary gain under these circumstances. Logically, that same reasoning applies here.

It appears that the trial judge found the existence of this aggravating circumstance because Jones was attempting to sell Brock's truck when he was apprehended in Mississippi. However, the evidence shows that Brock and Perry were murdered as an impulsive reaction to having been rejected when they asked the fisherman for help. No financial gain was achieved by Jones in this situation, and the taking and sale of the truck was apprently an after thought. To be sure, Jones wanted to use Brock's truck to extricate his own vehicle. This is not to say, however, that the killing falls within the range of killings for pecuniary gain as defined by the Florida Legislature. That aggravating circumstance appears to be geared toward murders accomplished through hire or for direct reception of money. Mere use of the truck would not have improved Jones' financial worth, and as such the finding of that aggravating factor is improper pursuant to Scull v. State, 13 FLW 545,547 (Fla. Sept. 8, 1988).

Further, in this case Detective Ford, over objection, was permitted to state that in his opinion the murders were committed for pecuniary gain based upon the fact that Jones took the truck after the murders (R1702-1706). That testimony from a trained police officer was improper, in that it interfered with the jury's independent determination of whether the murder was in fact committed for pecuniary gain, assuming that such a finding would be proper under these facts. Because the evidence in this case fails to show beyond a reasonable doubt that Jones committed the murders to improve his own financial gain, the pecuniary gain aggravating circumstance must be struck, the death sentences vacated, and the matter remanded for resentencing with a new penalty proceeding.

POINT VI

THE TRIAL COURT ERRED IN FINDING THAT THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION WHERE THE FINDING IS UNSUPPORTED BY THE EVIDENCE.

The trial court found that this murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification based upon the following:

> To borrow from Latin maxims of common law . . . res ipsa loquitor. RANDALL SCOTT JONES got his car stuck in sand pits while target practicing with a high powered rifle. He came upon Mathew Paul Brock and Kelly Lynn Perry, who were sleeping in a truck and Rodman Reservoir, near the sandpits. JONES had asked another individual to pull his car out prior to encountering the victims, this person could not help him. JONES then made up his mind that he would not be turned down again. He approached the victims in that truck, calmly wiped away the moisture on the window, aimed and, at close range, shot Mathew Paul Brock in the face twice, execution style, and Kelly Lynn Perry in between the eyes. Both victims had been sleeping. They were assasinated so that JONES could pull his car out of some sand pits. There is not even a hint of reason, justified or unjustified, for these extremely violent murders. Many have been asked why RANDALL SCOTT JONES did such malicious and heartless acts; bewilderment pervades the case. JONES had already answered the question though, he wanted their truck and murder was his vehicle to accomplish this goal. Simply put, RANDALL SCOTT JONES places no value on human life. He assasinated two defenseless human beings because his car was stuck and he did not want to bother with asking them to pull him out.

(R685-686).

The aggravating circumstance of murder committed in a cold and calculated manner without any pretense of moral or legal justification applies only to crimes which exhibit heightened premeditation greater than is required to establish premeditated murder, and it must be proven beyond a reasonable doubt. Gorham v. State, 454 So.2d 556 (Fla. 1984), cert denied 105 S.Ct. 941. "This aggravating factor 'is not to be utilized in every premeditated murder prosecution,' and is reserved primarily for "those murders which are characterized as execution or contract murders or witness elimination murders.' (citation omitted)." Bates v. State, 465 So.2d 490, 493 (Fla. 1985).

There appear to be in Florida three distinct levels of premeditation; the "slight" premeditation that has been observed to be a nonstatutory mitigating circumstance, See Wilson v. State, 493 So.2d 1019 (Fla. 1986); Ross v. State, 474 So.2d 1170 (Fla. 1985); White v. State, 403 So.2d 331, 336 (Fla. 1981); the routine premeditation which exists in all premeditated murders but which does not rise to the level of cold, calculated and premeditated without any pretense of moral or legal justification, see Amoros v. State, 13 FLW 560 (Fla. Sept. 15, 1988), and; the extensive period of premeditation and planning that gives rise to the finding of this aggravating circumstance. See Boenoano v. State, 13 FLW 401 (Fla. July 1, 1988). There has also been vacillation as to whether this aggravating circumstance applies based on the manner of killing, See Caruthers v. State, 465 So.2d 496, 498 (Fla. 1985), or the murderers' state of mind at the time of the killing. See Johnson v. State, 465 So.2d 499,

507 (Fla. 1985). As contended in Point VIII, infra this aggravating circumstance is too vaguely worded and defined and it provides too much maneuverability to the juries, trial and appellate courts to impose/affirm the death penalty in the face of emotionally compelling facts. The evidence fails to support this aggravating circumstance under any of the prior approaches.

Specifically, Jones' possession of the murder weapon clearly does not imply that Jones planned to use that weapon to murder or harm someone where Jones was out target practicing in a secluded area when his vehicle became stuck in the sand. Therefore, the cases that suggest that possession of a murder weapon supports this aggravating circumstance are inapposite. If the aggravating circumstance is viewed as dealing with the manner in which the murder was committed, the fact here that the victims were shot in the head at close range is reasonably explained by the fact that the murder weapon, a 30-30 rifle with scope sights, could not effectively be shot at close range by use of the sights, especially where the victims were lying on the seat of a high pick-up truck. (State's Exhibit 3, R549). Jones' statement shows that he believed that the first shot had hit Brock in the chest which required a second shot to the head. Jones' statement reflects, "I shot him first and his head popped up. I must have hit his chest or something and it richocheted into the windshield. I shot again and hit him in the head. She started moving and I shot her in the head." (R595). This is inconsistent with Jones having carefully aimed the rifle. Jones intended to kill both victims, as determined by the verdict of

guilt for premeditated murder. More is required to prove that the aggravating circumstance exists beyond a reasonable doubt, where there is no evidence that Jones knew the victims.

> We . . . conclude that, although there was sufficient evidence of premeditation, there was an insufficient showing in this record of the necessary heightened premeditation, calculation, or planning required to establish this aggravating circumstance. See Rogers v. State, 511 So.2d 526 (Fla. 1987); Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). In McCray v. State, 416 So.2d 804 (Fla. 1982), we explained that this circumstance applies to those murders which are characterized as executions or contract murders, although that description is not intended to be all inclusive. In Rogers v. State, we found this aggravating circumstance requires calculation which includes a careful plan or prearranged design and receded from a broader use of the circumstance in Herring v. State, 446 So.2d 1049 (Fla.), cert. denied, 469 U.S. 989 (1984), particularly where there was no evidence of any prearrangement.

Amoros v. State, 13 FLW at 562. (Emphasis added).

There is simply insufficient proof that the murders fall under the definition of this statutory aggravating factor. To the extent that the murders were "planned" to allow Jones to use the truck, that aspect of the crime is already contained in the pecuniary gain finding. It appears more likely, however, that the murders were simply done from impulse. Accordingly, this aggravating circumstance should be struck, the death sentences vacated and the matter remanded for resentencing.

POINT VII

THE TRIAL COURT VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY RESTRICTING DEFENSE COUNSEL'S ARGUMENT TO THE JURY CONCERNING THE CONSEQUENCES AND APPROPRIATENESS OF SENTENCES OF LIFE IMPRISONMENT.

The jury was instructed during the guilt phase of trial that, "the maximum penalty for the crime of first-degree murder is death. If you find the Defendant guilty of first-degree murder, I must impose a sentence of death, or a sentence of life in the state prison, with a minimum mandatory of twenty-five years." (R1565,1638). At the conclusion of the penalty phase the following occurred during the argument of defense counsel:

> MR. PEARL: (Defense counsel) . . . . Now, I don't think that in your minds you should minimize the importance, however, of your recommendation. Because it has been said that you heard in the charges that the Judge makes the final decision, he is the one who actually imposes the sentence which he feels is appropriate. But don't minimize your part in it. Your recommendations carry great weight. And it is the law that the Judge must give them consideration, very strong consideration, before making up his mind.
>
> Now, suppose that Randy was by your verdict or through your verdict to receive life. Don't forget, first of all, he must serve a minimum 25 years before he can be released. It's also true that there are two murders, and the Judge in his discretion may impose those two sentences consecutively, which would mean that Randy Scott Jones --
>
> MR. MCLEOD: I'm sorry to interrupt. This is outside the scope of this argument, Your Honor.

> MR. PEARL: I don't think so.
>
> THE COURT: I will give the instructions on the law, gentlemen, let's try to confine ourselves to the aggravatings and mitigatings.

(R1814-1815). The ruling prevented defense counsel from arguing the propriety of a life sentence based upon the length of time that Jones would be confined if not executed. Further, the admonition gave the jury the impression that such a consideration by them was improper, thereby rendering the jury recommendation unreliable under the Eighth Amendment.

"[A]ny sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." Jurek v. Texas, 428 U.S. 262, 275, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

> The Court has . . . held that evidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an "aggravating factor" for purposes of capital sentencing. (citation omitted) Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. 1/ Under [Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)], such evidence may not be excluded from the sentencer's consideration.

Skipper v. South Carolina, 476 U.S. 1, 5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)(footnote 1, in pertinent part, states, "[I]t is also the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' Gardner v. Florida, 430 U.S.

349, 362, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).").

The jury was instructed as to the possible penalties that could be received by Jones following a first-degree murder conviction. In closing argument, defense counsel sought to address the appropriateness of imposition of a life sanction on Jones where those life sentences could be made to run consecutively to each other as well as the guideline sanctions imposed for the other felony convictions, meaning Jones would not be eligible for parole for fifty years, and even then he would have to serve the sentences for the felony convictions. Clearly that line of argument was relevant; clearly the restriction of that line of argument was reversible error under the Sixth, Eighth and Fourteenth Amendments.

Specifically, the right to Due Process and effective representation of counsel demands that a defendant, through his counsel, be afforded an adequate opportunity to address the appropriateness of the death sanction. Restriction by the trial court in this case of defense counsel's argument in the presence of the jury interfered with defense counsel's ability to adequately represent his client and further rendered the advisory sentence unreliable under the Eighth Amendment. A jury recommendation is an integral part of a death sentence and it is afforded great weight by the sentencer. By restricting defense counsel's ability to argue the appropriateness of a life sentence due to the fact that Jones would have been removed from society for a period of ~~at~~ least fifty years, the judge prevented Jones from addressing an extremely relevant consideration to assist the

jury to intelligently weigh the appropriateness of a recommendation for two life sentences.

A problem also arises with the verdict form, in that separate recommendations were not obtained from the jury. The jury may have concluded from the verdict form that they were required to issue the same recommendations for both murders, that is, that they were unable to recommend life for one murder and death for the other. That reasonable possibility violates the Eighth Amendment. In any event, the restriction of defense counsel's argument that was correct and otherwise relevant denied Jones his rights to Due Process, to address the evidence and the law, and to effective representation of counsel. The death sentences are based on a faulty recommendation by the jury. Accordingly, a new penalty phase is required.

POINT VIII

THE FLORIDA DEATH PENALTY VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE AGGRAVATING AND MITIGATING CIRCUMSTANCES DO NOT GENUINELY LIMIT THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY; THE FACTORS ARE PRONE TO ARBITRARY AND CAPRICIOUS APPLICATION.

The bete noire of capital punishment is a procedure enabling arbitrary and capricious imposition of the death penalty. This occurs when too much discretion is afforded imposition of the death penalty. It was in response to the condemnation of arbitrary and capricious imposition of the death penalty in Furman v. Georgia, 408 U.S. 238 (1972) that the Florida Legislature enacted death penalty legislation embodying statutorily defined aggravating circumstances that must exist and outweigh mitigating factors before the death penalty is authorized. The aggravating/mitigating circumstance comparison survived an Eighth Amendment challenge in Proffitt v. Florida, 428 U.S. 242 (1976). That court subsequently explained why the required consideration of specific aggravating/mitigating circumstances prior to authorization of imposition of the death penalty affords sufficient protection against arbitrariness and capriciousness:

> This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself. For a system "could have standards *so* vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and

> capricious sentencing like that found unconstitutional in Furman could occur." 428 U.S. at 196, n.46, 49 L.Ed.2d 859, 96 S.Ct. 2909. To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant v. Stephens, 462 U.S. 862, 877 (1983)(footnote omitted). Thus aggravating circumstances must be sufficiently definite to provide consistent application, and aggravating circumstances that are too subjective and non-specific to be applied even-handedly are unconstitutional. See Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. ___, 100 L.Ed.2d 372 (1988)(aggravating circumstance of "especially heinous, atrocious or cruel" too indefinite); Godfrey v. Georgia, 446 U.S. 420 (1980)(aggravating circumstance of "outrageously or wantonly vile, horrible and inhumane" too subjective).

Florida's death penalty system utilizes ten statutory aggravating circumstances. It is respectfully submitted that when the ten circumstances are considered in pari materia the class of first-degree murderers who are eligible for the death penalty is not sufficiently restricted to preclude capriciousness and arbitrariness in the imposition of the death penalty. Too much unbridled discretion is afforded the jury, trial and appellate courts when the sentence is recommended, imposed and reviewed.

The aggravating circumstances used in Florida are replete with highly subjective language:

(5) AGGRAVATING CIRCUMSTANCES - Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

§921.141(5), Fla.Stat. (1987). The statutes provide no definition of the subjective terms found in either the aggravating or mitigating circumstances, so the courts and the juries are left to fend for themselves to determine when the factors exist.

The facial constitutionality of Florida's death penalty statute against an Eighth Amendment challenge was determined in

1976 by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 253 (1976). The Court ruled that the statutes and procedures complied with the Eighth Amendment at that time. Proffitt, 428 U.S. at 927. Of the 21 death penalty cases reviewed at the time of Proffitt, this Court had reversed 7. It is respectfully submitted that more meaningful statistics now exist and that the definitions of the statutory aggravating and mitigating circumstances have since proved too broad to comport with constitutional requirements of specificity and consistency in application, and that the vagaries of unbridled discretion denounced in Furman v. Georgia, 408 U.S. 238 (1972) have returned in full force. It is further submitted that the procedure is otherwise unconstitutional under the Sixth Amendment (see, Point 111, supra).

In State v. Dixon, 283 So.2d 1 (Fla. 1973), which is perhaps the one most important Florida case relied on by the United States Supreme Court in Proffitt, this Court rejected the contention that the statutory aggravating and mitigating circumstances were impermissibly vague, stating, "review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under circumstances in another case." Dixon at 10. Indeed, this language is specifically cited by the United States Supreme Court in approving the death penalty system in Florida. Proffitt at 251.

It is respectfully submitted that this Court has failed to consistently apply the statutory aggravating and mitigating circumstances. This Court has rendered decisions that are

diametrically opposed to others containing virtually the same material facts. These decisions cannot be reconciled. Time and again this Court is belatedly acknowledging that previously approved aggravating circumstances were in fact improperly applied. It is critical that the statutory aggravating circumstances be sufficiently specific so as to afford consistent application by this Court, which in turn provides guidance to the trial courts, which in turn provides guidance to the juries. This simply has not happened. The vacillation by this Court not only fails to provide sufficient guidance to the trial courts and ultimately the juries, it also demonstrates that the aggravating circumstances are too susceptible to interpretation to afford unerring application in the face of compelling facts with the procedure now being utilized. See Point 111, supra. It is not only the application of a single vague factor that is the problem. Rather, the recurrent corrections in the application of most of the aggravating circumstances signals that the procedure now used is too prone to error.

ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

The bare wording of this aggravating circumstance is unconstitutionally vague. Maynard v. Cartwright, 486 U.S. __, 108 S.Ct. __, 100 L.Ed.2d 372 (1988). In Raulerson v. State, 358 So.2d 826 (Fla. 1978) this Court approved the trial court's finding of a murder committed in an especially heinous, atrocious or cruel manner. After resentencing was ordered by the federal court for the middle district of Florida, Raulerson v. Wainwright, 408 F.Supp.381 (M.D. Fla. 1980), this Court struck

the finding, after reviewing ~~the same~~ facts, stating, "We have held that killings similar to this one were not heinous, atrocious, and cruel. (citations omitted)." Raulerson v. State, 420 So.2d 567,571 (Fla. 1982).

GREAT RISK OF DEATH TO OTHERS

This Court has receded from a prior holding made in King v. State, 390 So.2d 315 (Fla. 1980), where this Court affirmed the trial court's finding of the defendant having created a great risk of death or serious harm to others when he set fire to his house. King was granted a resentencing by the Eleventh Circuit Court of Appeal due to ineffectiveness of trial counsel during the sentencing proceeding. King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), cert denied, 471 U.S. 1016 (1985). On direct appeal to this court following resentencing, this Court, again reviewing the same facts, struck the aggravating circumstance previously approved in 1980, stating:

> On his original appeal, this Court affirmed the trial court's finding this aggravating factor and stated that "when the Appellant intentionally set fire to the house, he should have reasonably foreseen that the blaze would pose a great risk to the neighbors, as well as the firefighters and the police who responded to the call." 390 So.2d at 320. Upon reconsideration we find that this aggravating factor should be invalidated. In Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979), we stated:"'great risk' means not a mere possibility, but a likelihood or great probability." Furthermore, we have also said that "a person may not be condemned for what might have occurred." White v. State, 403 So.2d 331, 337 (Fla. 1981) cert. denied, 463 U.S. 1229 (1983). Only the victim was in the house when

> King set it on fire. That two fire-fighters suffered smoke inhalation and that the fire caused considerable damage to the house does not justify finding that this aggravating factor has been established. This case is a far cry from one where this factor can properly be found. E.g., Welty v. State, 402 So.2d 1159 (Fla. 1981)(setting fire to condominium when six elderly people were asleep in other units qualified as great risk of death to many persons).

King v. State, 514 So.2d 354,360 (Fla. 1987). If the King case "is a far cry from one where the factor could be properly be found", how did that factor get approved in the first case? How many trial courts have relied on the King decision rendered in 1980 that established the wrong standard for this aggravating circumstance? Further, how is it that this Court overlooked the Kampff decision upon which it now relies when that case was decided a year prior to King?

COLD, CALCULATED OR PREMEDITATED

This Court's vacillation in its dealings with the statutory aggravating circumstances cannot help but breed confusion to those seeking to consistently apply the aggravating circumstances. For instance, in Caruthers v. State, 465 So.2d 496 (Fla. 1985) this Court disallowed a finding of a cold, calculated and premeditated murder where a robber shot a store clerk three times. This Court stated "the cold, calculated and premeditated factor applies to a manner of killing characterized by heightened premeditation beyond that required to establish premeditated murder." Caruthers at 498 (emphasis added). Eight pages later, in the next reported decision, this Court approved

the same factor, stating "this factor focuses more on the perpetrator's state of mind than on the method of killing. Johnson v. State, 465 So.2d 499, 507 (Fla. 1985)(emphasis added). Then in Provenzano v. State, 497 So.2d 1177 (Fla. 1986), this Court reverted to the prior standard, stating ". . . as the statute indicates, if the murder was committed in a manner that was cold and calculated, the aggravating circumstance of heightened premeditation is applicable." Provenzano at 1183. How are the trial courts to know which standard applies? Is it the defendant's state of mind or is it the manner in which the crime was committed?

Further, there patently exists selective application of the second prong of the cold calculated or premeditated, without any pretense of moral or legal justification. In Banda v. State, 13 FLW, 451, 452 (Fla. July 14, 1988) this Court stated, "We conclude that, under the capital sentencing law of Florida, a 'pretense of justification is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." (emphasis added). In Cannady v. State, 427 So.2d 723 (Fla. 1983), this Court disapproved the finding of a cold, calculated or premeditated murder because, according to the defendant, the victim rushed at him before he was shot five times. "During his confession appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that appellant had at least a pretense of a moral or legal justification, protecting his own life." Cannady at 730.

Yet in Provenzano v. State, 497 So.2d 1177 (Fla. 1986) this Court approved that aggravating factor and rejected as a pretense of moral justification the uncontroverted fact that the victim (a courtroom bailiff) was repeatedly firing a pistol at the defendant when the bailiff was shot. See also Turner v. State, 13 FLW 426, 428 (Fla. July 7, 1988)(no pretense of moral justification where defendant believed victims [his wife and another woman] had a lesbian relationship resulting in defendant losing family).

PRIOR CONVICTION OF VIOLENT FELONY

In Hardwick v. State, 461 So.2d 79 (Fla. 1984) this Court approved utilization of a violent felony committed by a defendant upon a murder victim contemporaneous with the crime of murder to establish a prior conviction for a violent felony. "Where the evidence supports a finding of premeditated murder or where the violent felony is not a necessarily included element of felony murder, we cannot say that the separate acts of violence on one victim are less revealing of the violent propensities of the perpetrator than contemporaneous acts of violence on separate victims. We find no error here." Hardwick at 81. However, this Court has now receded from Hardwick. Patterson v. State, 513 So.2d 1257 (Fla. 1983). See also Wasko v. State, 505 So.2d 1314 (Fla. 1987). If these aggravating circumstances are so clear, how are they being *so* consistently misapplied?

Yet another aberration concerns the trial court's use and this Court's review of lack of remorse by a defendant. In Pope v. State, 441 So.2d 1073 (Fla. 1983) this Court held:

> [H]enceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing

> evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor.

Pope at 1078 (emphasis added). Thus, the only way for a sentencer to even refer to remorse would seem to be an acknowledgement that it exists as a non-statutory mitigating factor, in that it would be virtually impossible for a trial judge to address every possible non-statutory mitigating circumstance and affirmatively state that it does not exist. Yet, when a sentencing order refers to an absence of remorse as a non-existent mitigating circumstance in a particular case, this Court will sometimes acknowledge the impropriety, as in Patterson, supra, and at other times determine that an acknowledgement of lack of a mitigating factor is not the same thing as using that same factor in aggravation. See Echols v. State, 484 So.2d 568, 575 (Fla. 1985) (not improper to use no remorse to negate mitigation). The reasoning is but a semantical distinction without a meaning.

As previously noted, this Court rejected the contention that the aggravating circumstances are impermissibly vague, stating "review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under circumstances in another case." Dixon at 10. The foregoing examples cannot rationally be reconciled with that guarantee and they demonstrate that this Court needs to reconsider whether the current procedure employed to find and review statutory aggravating circumstances is sufficiently consistent so as to comport with constitutional requirements. These patent inconsistencies

in application of the aggravating circumstances show that the tail is now wagging the dog.

Furthermore, Appellant feels constrained to point out that the guarantee of consistency between the same penalty for the same facts in different cases is suspect on at least four bases over and above vagueness, those being the trial judge rather than the jury finding the facts of the crime, limited exposure by this Court to other murder cases, the use of an improper standard to review the presence of mitigating circumstances, and a presumption of propriety of the death penalty in the presence of one aggravating circumstance and no mitigating circumstance. More specifically, in reference to the first observation, it is axiomatic that the jury determines what factually happaned concerning the offense when the verdict concerning guilt is returned. A finding of guilt does not, however, include any of the statutory aggravating circumstances that must exist to authorize imposition of the death penalty. Under Section 921.141(2), the procedure which would render more consistent findings would be if, after a jury verdict of guilty of first-degree murder, a penalty phase occurs where the jury unanimously finds in writing which aggravating factors apply to the facts they found when deciding guilt. The jury would still contemporaneously render a majority recommendation of either life or death. Review by the trial judge is then required if the death sentence is imposed, and he is further required to support that sentence in writing based upon the findings of the jury. The sentence and findings are then subject to appellate review by

this Court. To do otherwise fosters inconsistency in the face of compelling facts or politics and otherwise violates the Sixth and Fourteenth Amendments. See Point 111, supra.

Secondly, when this Court performs a proportionality review, this Court does not have the benefit of the facts and circumstances of other murder cases in which the death penalty was not imposed other than by review of such cases on a discretionary basis pursuant to certified questions or decisions in express and direct conflict with other decisions. In that respect the spectrum through which this Court views the facts determining the proportionality of imposition of the death penalty is geared solely to first-degree murder cases in which the death penalty was actually imposed, rather than the wider range of facts of other murder cases wherein the life imprisonment sanction is imposed by the trial court. Because the perception of this Court is as a matter of procedure unduly restricted an adequate proportionality analysis of first-degree murder cases cannot be performed.

Further, the guarantee of consistency is suspect because this Court at times considers itself bound to an abuse of discretion standard insofar as determining the presence vel non of mitigating circumstances, but at other times embarks upon a plenary review the record to discern the existence of either statutory or non-statutory mitigating circumstances. The election of this Court not to provide plenary review in all cases effectively defeats the guarantee of consistent application of the death penalty. A trial court's finding of the non-existence

of a mitigating circumstance is not entitled to the weight that this Court is affording it, and by not in every death case providing plenary review to determine the presence of mitigating circumstances this Court is failing to provide a truly accurate proportional analysis in violation of the Eighth Amendment.

It is respectfully submitted that a trial court's error in failing to recognize and consider relevant mitigating evidence contained in the record, instead of being condoned by this Court as an act of discretion, should be corrected by this Court when the uncontroverted presence of such mitigating evidence is pointed out on appeal. The failure of a trial judge to acknowledge as valid reasons for mitigation uncontroverted facts which were recognized in other cases (of which he may be and probably is unaware) as valid reasons for mitigation clearly results in discriminatory, arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments. Facts that constitute a reason to mitigate a sentence in one case must also constitute a reason to mitigate a sentence in another case if the death penalty is to receive the promised consistent application. This Court has specifically recognized this premise in the death penalty context:

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same.

Slater v. State, 316 So.2d 539, 542 (Fla. 1975). See also State v. Dixon, 283 So.2d 1, (1973). At diverse times this Court

acknowledges that mitigating evidence is present in the record yet at other times defers to a trial court's discretion to find such factors. If an appellate court myopically accepts the trial court's finding of no mitigating circumstances when there is a recommendation of death from the jury, why take the blinders off when there is a jury recommendation for life imprisonment? See Amazon v. State, 487 So.2d 8 (Fla. 1986); Pope v. State, 441 So.2d 1073,1076 (Fla. 1983).

Specifically, this Court has held that the trial judge is in as good a position as is the jury to apply the aggravating and mitigating circumstances, in that "the trial judge does not consider the facts anew. In sentencing a defendant, a judge lists reasons to support a finding in regard to mitigating or aggravating factors.'' Provenzano at 1185. If all that is being accomplished is listing reasons, this Court is in an even better position than is the trial judge because this Court can better recognize what constitutes valid non-statutory mitigating circumstances that should have been considered by the trial court but were not, simply because this Court reviews all the cases, whereas the trial judge only presides over a limited few. If appellate courts will provide plenary review to determine for themselves the voluntariness of a statement, which at least involves a quasi-factual determination, certainly that same degree of scrutiny and participation must apply to a matter as grave as imposition of the death sentence. See Miller v. Fenton, 474 U.S 104, 88 L.Ed.2d 405, 106 S.Ct. 445 (1985)(rejection of "presumption of correctness" as an issue of fact as to whether

confession was voluntarily given). Again, it is stressed that for the death penalty to be constitutionally applied the "discretion" to impose that penalty must be kept at a minimum. Similarly, the discretion of an appellate court in affirming death penalties must be minimized. By allowing the trial judge such unbridled discretion in determining mitigating circumstances and in failing to perform an adequate independent analysis of the existence of mitigating circumstances, this Court is renegging on its promise of consistent application of the death penalty under the same facts.

For these reasons it is respectfully submitted that, as now applied, the statutes governing imposition of the death penalty in Florida are impermissibly vague and are otherwise subject to unfair and discriminatory application. This Court has held that an Eighth Amendment challenge must be raised on direct appeal, even when not raised previously. See Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987). Thus, this error is properly addressed now. These errors violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9, 16 and 22 of the Florida Constitution. Accordingly, the death sentences must be vacated and sentences of life imprisonment imposed.

POINT IX

THE TRIAL COURT ERRED IN ALLOWING, OVER OBJECTION, FAMILY MEMBERS TO IDENTIFY THE MURDER VICTIMS.

Several of Paul Brock's relatives testified at trial. Their testimony was unnecessary and irrelevant. The state presented the testimony of Matha Carbo (R1048-1057). Her testimony established: Matha Carbo is thirty years old and employed by Armtec; she was Brock's sister; he worked through the union at Georgia Pacific and lived with an older brother on Highway 17 (R1049). Perry and Brock were good friends, having grown up together; Matha Carbo had seen Perry before, as well as her brother's four wheel drive Silverado Chevrolet (R1050). Over objection, Carbo identified a truck depicted in state's exhibit 3 as belonging to her brother (549-550,R1050-51). Mrs. Carbo last saw her brother two days before July 26, 1987 when she was at her mother's house having a family get together (R1051-1052). Her brother had been to Rodman's Dam before, that being a place where all of her brothers got together and went fishing (R1052).

The following unsuccessful objection to this testimony was made: "Objection at this point, Your Honor. These questions are leading and suggestive. I object to them on that basis and I still, the testimony of this witness is not probative of any facts in this case and I object to it and move to strike it on that basis." (R1052). Mrs. Carbo then testified that her brother was familiar with the Rodman Dam area (R1052). Mrs. Carbo identified a picture of Kelly Thomas (Perry) as being her brother's friend (R1053).

When defense counsel sought to have the witness identify state's exhibit 2 as depicting her brother, the following transpired

> MR. PEARL: If it please the court, Your Honor, counsel has just shown me a photograph of the decedent before death and he proposes to have that photograph identified by a close member of his family. This is prejudicial, inflamatory, and I object to it and if then in I would move for a mistrial.
>
> THE COURT: The objection is overruled. Mistrial is denied.
>
> MR. PEARL: Thank you.

(R1054). Mrs. Carbo then identified the photograph of her brother (R549,1055). The following transpired:

> Q. (by prosecutor): And who is that?
>
> A. (Mrs. Carbo): It's my brother, Paul.
>
> Q. Okay. Why did Paul have a truck, Mrs. Carbo.
>
> A. I guess every guy wants a truck.
>
> Q. Was generally, was Paul the type of person who would help people with his truck if asked?
>
> A. I'm sure he would.
>
> MR. PEARL: Objection, that's totally irrelevant and inflammatory and has no part of any proof of any manner connected with the proof in this case. The personality, I'd be willing to admit and say to this jury that probably Paul Brock was probably one of the nicest persons that ever lived. But it's not part of the proof of the murder case. It's inflammatory, prejudicial and should not be exposed to the jury because it is not evidence.
>
> PROSECUTOR: We'll accept a stipulation if that's being offered.

MR. PEARL: I'm offering nothing at this time.

MR. MCCLEOD: At the same time, I have an element known as premeditation and I think this is important.

MR. PEARL: Well Your Honor you have my objection.

THE COURT: I see the relevance. The objection is overruled.

MR. MCCLEOD: I believe she has answered the question.

(R1055-56). Mrs. Carbo next testified that "one of my brothers that lived in Green Cover Springs found Paul's truck at the Handy Way and he called my older brother and told him." (R1056). A hearsay objection was sustained (R1056). She stated that she did not call the Sheriff's Department but that she went down there on July 27, 1987 because Brock was missing (R1056-57).

Following Mrs. Carbo's testimony, the state presented the testimony of William Cook. The substance of his testimony was as follows: William Cook was Brock's brother and they lived together for approximately six months (R1058-59). Cook identified his brother's truck depicted in a state's exhibit 3 (R1059). When Cook identified his brother shown in a state's exhibit 2, the following objection occurred, "Your Honor, objection. I made the same objection before at the bench that this is prejudicial and inflammatory for the deceased person to be identified in the presence of the jury and family members. I must make that objection with respect to Mr. Cook and very respectfully I would move for a mistrial." (R1059). The objection was overruled and motion for mistrial denied (R1060).

Cook then testified that the last time he saw his brother was on the night of July 26 at approximately 11 o'clock and at that time he was with his girlfriend, Ms. Perry (R1060). Cook identified Perry as Brock's girlfriend (R1060). He testified that his brother and Perry had previously spent the night together at Rodman Dam (R1061). When Brock left that evening he took with him his bedding, meaning a couple of blankets and a couple of pillows (R1061). This was an indication that he was going to spend the night under the trees (R1062). Brock worked for PWW and did not have much money (R1062). Brock had a trial in Jacksonville the day after he had gone to Rodman Dam (R1062). Brock kept a steel cable, possibly post hole diggers and a shovel in the back of his truck (R1062). The steel cable was kept for pulling out logs and pulling people out of mud holes (R1063). Cook was unable to identify a shovel the state contended belonged to his brother (R1063). His brother had purchased the vehicle approximately two months before this incident happened for approximately $8,000 (R1064). The vehicle had been paid for in cash as a result of a workman's compensation dividend received by Brock; Brock smoked Marlboro cigarettes in a regular box (R1064-65). At the conclusion of this testimony, the following examination occurred:

> Q. (Mr. Pearl): Good morning, Mr. Cook.
>
> A. Good morning.
>
> Q. Sir, were you one of the people who was responsible to bring Mr. Brock to court in Jacksonville the following day?
>
> A. Yes sir.

Q. Was he suing somebody?

MR. MCCLEOD: Objection, relevance.

MR. PEARL: The state opened the door by talking about his having to go to court. I didn't bring it out.

MR. MCCLEOD: Well, fine. I withdraw the objection, then, if that's some legal evidence in the murder.

MR. PEARL: What is counsel mumbling, Your Honor?

THE COURT: If you didn't hear it, hopefully nobody else did either.

MR. PEARL: Well, mumbling gets me a little bit upset.

MR. MCCLEOD: Sorry to upset you Mr. Pearl.

MR. PEARL: Thank you, I'm going to withdraw the question. I don't think it's important either. Thank you Mr. Cook.

(R1066-67).

An individual named Kenneth Burns was a carpenter who worked for Bloomingstock Enterprises, he was unrelated to Brock (R1068). He identified Brock from state's exhibit 2 (R1068), and the shovel as having been in Brock's pick-up truck (R1069-1070). He further identified Perry as being the girl that Brock was dating (R1070), that he had been to Rodman Dam with Brock a "bunch of times'' (R1071), and that the pick-up truck depicted in state's 3 is Brock's pick-up truck (R1072). Without objection, the state presented the testimony of Terry Chesser Warren, who was the 29 year old sister of Perry (R1078-81). Mrs. Warren established that her sister left her house at approximately 10:30 to 11:00 on July 26, 1987 while in the company of Brock (R1079).

She was wearing her jeans, tennis shoes and a half top (R1079). They left together in the truck (R1080). Her sister wore an engagement ring on her left hand, an engagement ring and a sweetheart ring on her right hand, and earrings (R1080).

The state also presented the testimony of Richard Brock (R1287-96). Richard Brock is Brock's 29 year old brother who observed Brock's pick-up truck in Green Cove Springs on July 27, 1987 (R1288). Richard Brock talked to the individual who was driving that truck and further observed bullet holes and a 30-30 rifle inside the truck (R1290-93). The state presented the testimony of Richard Brock's wife, who was with Richard Brock when the truck was observed in Green Cove Springs (R1297-1301). She identified Jones as the person driving the truck in Green Cove Springs on that date (R1300-1301).

Pursuant to Booth v. Maryland, 482 U.S. __, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) the impact of a victim's death on the victim's family is irrelevant to imposition of a death sentence, and consideration of that information to impose a death penalty violates the Eighth Amendment. Florida has long held that the fact that a deceased may have had a family is wholly irrelevant, immaterial and impertinent to the elements of murder. See Rowe v. State, 120 Fla. 649, 163 So. 22 (1935). The harm that stems from having family members testify to irrelevant matters and/or identifying the victim of a murder is that it interjects irrelevant and prejudicial considerations to the jury. See Ashmore v. State, 214 So.2d 67 (Fla. 1st DCA 1968). This Court has consistently held that it is error to allow family members to

identify the victim of a homicide when their testimony is unnecessary in that identification should be made by another independent source. See Welty v. State, 402 So.2d 1159 (Fla. 1981); Lewis v. State, 377 So.2d 640 (Fla. 1979). This Court has held that such identification is not fundamental error, See Dougan v. State, 470 So.2d 697 (Fla. 1985), but timely objections were made in this case.

The testimony of Brock's family members and Perry's sister was wholly unnecessary and irrelevant. It was used by the prosecutor solely to establish that the victims had families and in the instance of Brock quite a large family. As such, the improper use of that testimony over the timely objection of defense counsel rendered the subsequent death penalty violative of the Eighth Amendment. See Booth, supra. See also Scull v. State, 13 FLW 545, 547-548 (Fla. Sept. 8, 1988) Further, sanctions against the prosecutor are in order due to the intentional nature of this ploy.

It is manifest that all of the information conveyed by the testimony of Brock's relatives (with the exception of the incident in Green Cove Springs) could have been ~~and was~~ established by the testimony of other witnesses unrelated to the victims. Everything that Brock's relatives testified to was established two witnesses later by Mr. Burns. Even assuming that it was necessary for the one brother to testify as to what transpired in Green Cove Springs, that brother also could have identified the photographs of Brock, Perry and Brock's truck. The timely objection by defense counsel should have been

sustained. The motions for mistrial should have been granted. Reversible error has occurred, because the interjection of the consideration of a large family to the jury interfered with the reasoned recommendation process by inflaming their emotions contrary to the Eighth Amendment. Scull, supra. A new penalty phase is required due to the unreliability of the jury recommendation.

POINT X

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION TO WITHDRAW MADE WHEN IT WAS REVEALED THAT A STATE WITNESS TESTIFYING AGAINST THE DEFENDANT WAS BEING REPRESENTED BY DEFENSE COUNSEL'S LAW FIRM ON PENDING CRIMINAL CHARGES.

On March 8, 1988 (two weeks before trial) the state provided defense counsel with the names of two Putnam County jail inmates the state proposed to call at trial (R224). Citing a conflict of interest, defense counsel moved to withdraw from representing Jones because the Office of the Public Defender at that time represented one of those inmates (Kevin Snyder) on pending criminal charges (R233-234). Counsel further sought a continuance in the matter, stating that he believed the other proposed witness (Edward Tipton) was represented by Huntley Johnson, Jr. of Gainesville and that he could not communicate with Tipton until his counsel could be notified and present (R235-237). The motions were denied (R245,247) following argument (R254-272), where the assistant state attorney represented that Mr. Johnson, Esq. did represent Tipton and that he had waived his presence during any interview to be conducted (R260).

Snyder never testified. However, at the penalty phase, the state sought to introduce the testimony of Tipton. Defense counsel renewed his objection, arguing that the state had failed to provide discovery concerning Tipton's testimony (R1662-63). The state countered that defense counsel had equal access to information concerning Tipton because Tipton was being represented by the Public Defender's Office in Daytona Beach on

current and pending trafficking charges (R1664). Defense counsel immediately moved to withdraw from Jones' case, pointing to the conflict in interest between clients and his inability to cross-examine Tipton should he be presented as a witness (R1664-65). The motions were denied (R1665).

The state thereafter presented Tipton as a witness (R1685-87); Tipton testified that while incarcerated he talked with Jones, who stated that the reason he killed the people was because he had been turned down once when he asked for help in pulling his car out and he was not going to be turned down any more (R1686). Defense counsel cross-examined Tipton concerning the charges he faced in Volusia County (R1687-92) and discovered that he was being represented by the Public Defender in Putnam County on those charges as well as in Daytona Beach (R1692). Defense counsel sought but was refused permission to approach the bench to make an objection at sidebar, so he renewed in front of the jury the motion to withdraw on the basis of conflict of interest; the motion was denied (R1693-94). Defense counsel started to cross-examine Tipton (R1695-98), but stopped, stating, "Your Honor, I cannot impeach him for the reasons which I have explained to you. I cannot cross-examine this witness with respect to the statement made in the jail for the reasons which I have explained to you, and decline to do so." (R1698).

A lawyer forced to represent clients with conflicting interests cannot provide the adequate legal assistance required by the Sixth Amendment. Holloway v. Arakansas, 435 U.S. 475, 481-482, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). "In order to

demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). "An actual conflict of interest that adversely affects a lawyer's performance violates the Sixth Amendment and cannot be harmless error." Barclay v. Wainwright, 444 So.2d 956, 958 (Fla. 1984).

In Foster v. State, 387 So.2d 344 (Fla. 1980), this Court held that a defendant in a first-degree murder trial was denied his right to effective assistance of counsel by joint representation of the defendant and a state witness.

> To deny a motion for separate representation, where a risk of conflicting interests exists, is reversible error. (citation omitted). Even in the absence of an objection or motion below, however, where actual conflict of interest or prejudice to the appellant is shown, the court's action in making the joint appointment and allowing the joint representation to continue is reversible error. See Belton v. State, 217 So.2d 97 (Fla. 1968).

Foster, 387 So.2d at 345.

The key to whether an attorney is subject to a conflict of interest such as would deprive the defendant of effective assistance of counsel is not whether an attorney's two clients are co-defendants, but rather whether the attorney must seek dual and adverse stewardship. See Bellows v. State, 508 So.2d 1330 (Fla. 2d DCA 1987).

> In previous cases, we have recognized that multiple representation of criminal defendants engenders special dangers of which a court must be aware. While

> "permitting a single attorney to represent co-defendants. . . is not per se violative of constitutional guarantees of effective assistance of counsel," Holloway v. Arkansas, 435 U.S. 475, 482, 55 L.Ed.2d 426, 98 S.Ct. 1173 (1978), a court confronted and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflict warrants separate counsel. See also Cuyler v. Sullivan, 446 U.S. 335, 64 L.Ed.2d 333, 100 S.Ct. 1708 (1980).

Wheat v. United States, 486 U.S. __, 108 S.Ct. __, 100 L.Ed.2d 140, 149 (1988). In Wheat, the United States Supreme Court held that the state may effectively object to substitution of counsel and override a defendant's request for a specific counsel who is willing to represent the defendant even though he also represents co-defendants in the same conspiracy. "Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing . . . . [A] conflict may . . . prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another." Wheat at 149, quoting Holloway v. Arkansas, 435 U.S. at 489-490. The court went on to hold that, where a court justifiably finds that an actual conflict of interest exists, the trial court can decline a waiver of that conflict by the defendants and insist that they be separately represented. Wheat, 100 L.Ed.2d at 150.

In this case, defense counsel perceived a conflict arising from joint representation of Tipton and Jones. He

alerted the trial court of that conflict and moved to withdraw, doing so immediately when the conflict was revealed to him. Perhaps the matter could have been resolved by waivers of the conflict by both Tipton and Jones. Unfortunately, Judge Perry never inquired as to whether they were willing to waive that conflict. Rather, Judge Perry required that defense counsel proceed with dual representation of Jones and Tipton. This resulted in defense counsel's ultimate refusal to meaningfully cross-examine Tipton due to the conflict of trying to simultaneously represent the interests of both clients. The trial court should have been more sensitive to the ethical dilemma with which appointed defense counsel was faced.

In Jennings v. State, **413** So.2d **24** (Fla. 1982) this Court granted the defendant a new trial where defense counsel absolutely refused to even attempt cross-examination of a prison inmate who provided testimony concerning what the defendant had told him while in prison. In Jennings, the prison inmate/witness was not at that time presently represented by the Office of the Public Defender, but rather had in the past been represented by the Office of the Public Defender. This Court stated, "the opportunity for full and complete examination of critical witnesses is fundamental to a fair trial, which Jennings did not receive. (citation omitted). We do not, in this proceeding, determine the correctness of the Public Defender's position because such resolution does not affect the fact that Jennings did not receive a fair trial. That question is better answered in some other proceeding." Jennings at 26.

When faced with Judge Perry's ruling denying the motion to withdraw, defense counsel was placed in the untenable position of protecting the interests of both Jones and Tipton. Obviously, defense counsel at that late stage had to obey the court's order. See Rubin v. State, 490 So.2d 1001 (Fla. 3d DCA 1986). The problem, as noted in Wheat by the United States Supreme Court, is that a conflict may cause a defense counsel to refrain from doing something. That is what occurred here, where defense counsel, after very superficial cross-examination of Tipton, refrained from further active cross-examination, stating that he ethically could not go on after learning that his office represented the witness not only on the Daytona Beach charges but also for the charges pending in Palatka.

Defense counsel prior to trial moved to withdraw due to conflict of interest generated by representation of one of the proposed state witnesses (Kevin Snyder), and the motion was denied without inquiry by Judge Perry. Fortunately, Snyder did not testify at either the guilt or penalty phase of trial. Unfortunately, Tipton testified during the penalty phase. When the prosecutor revealed that Tipton was represented by the Public Defender's Office in Daytona Beach, an office within the same circuit (Seventh Circuit) as defense counsel's, defense counsel immediately moved to withdraw citing the conflict of interest that would arise when he sought to cross-examine and impeach Tipton. Judge Perry summarily denied that motion. When defense counsel sought to cross-examine Tipton, Tipton further revealed that he was presently represented by the Public Defender's Office

in Putnam County on current and pending charges in that county. Again, defense counsel sought to withdraw, this time being forced to do so in front of the jury. Again, that motion was summarily denied. Thereafter, defense counsel refrained from cross-examining Tipton further on the subject of charges and possible deals that he would receive as a result of his testimony.

It could not be more clear that defense counsel's performance at the penalty phase was affected by dual representation of both the defendant (Jones) and the state witness (Tipton). The scenario was wholly avoidable and unnecessary. Pursuant to the express language of the United States Supreme Court in Holloway v. Arkansas, supra, Jones received less than adequate legal assistance as required by the Sixth Amendment due to his counsel's dual representation of Jones and the state witness. The timely motion to withdraw should have been granted. At the very least the judge, when put on notice of the conflict, should have acted to resolve it. Jones has been denied his Sixth Amendment right to effective representation of counsel by the trial judge's ruling. Accordingly, the death sentences must be reversed and the matter remanded for a new penalty phase before a new jury.

POINT XI

THE TRIAL COURT ERRED IN CONDUCTING AN INQUIRY OF A JUROR OUTSIDE THE PRESENCE OF THE DEFENDANT AND IN HAVING THE PEREMPTORY CHALLENGES EXERCISED OUTSIDE THE PRESENCE OF THE DEFENDANT.

The peremptory challenges were exercised by defense counsel and counsel for the state outside the presence of the defendant. The record does not contain an affirmative waiver of the defendant's right to be present during the exercise of the challenges. Rather, the judge indicated to counsel each time that he may confer with the defendant, and directed, "When you're ready come up to side bar, please." (R873,969-974,1021-24).

After the jurors and alternates were selected but before they were sworn, an overnight recess was taken. When court reconvened the next morning Judge Perry stated, "Ladies and Gentlemen, as they say, the best laid plans of mice and men will go awry, Ladies and Gentlemen, and we thought we had completed the jury selection process for this case yesterday. We have had two folks who have had major problems in their personal lives overnight and I've had to excuse them and therefore we are back once again in search of persons to assist us in the case that I'll be trying this week.'' (R864). The two previously selected alternates were substituted for the excused jurors; one of those alternates was Mrs. McKinney. During the last bench conference when the final alternates were selected, Judge Perry, in the absence of Jones, indicated that Mrs. McKinney had informed the bailiff "that she may know Dave Stout which is of no great concern. She also may know some of the relatives or have heard

of some of the relatives." (R1022). Dave Stout is a deputy with the Putnam County Sheriff's Office who testified three times at trial (R1146-92,1240-44,1344-78). Defense counsel asked at the bench if an inquiry could be conducted privately (R1022), and thereafter an unrecorded inquiry of Mrs. McKinney was conducted by the court at the bench with counsel for the state and the defense in the absence of Jones (R1025). Mrs. McKinney was a juror who participated in rendering the guilty verdicts (R1653) and the death recommendations (R1833).

A defendant has a constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Snyder v. Massachusettes, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934); Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982). This Court has held that a defendant in a capital trial can waive his presence during critical stages of trial. Peede v. State, 474 So.2d 808 (Fla.1985); this Court has further held that such a waiver can occur through counsel and acquiescence of the defendant with actual or constructive notice. Amazon v. State, 487 So.2d 8 (Fla.), cert denied __U.S. __, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986); Ferry v. State, 507 So.2d 1373 (Fla. 1987).

It is initially submitted that a defendant in a capital trial cannot waive his presence during critical stages of that trial. See Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884). Assuming that a defendant can waive his presence at a capital trial, an effective waiver is not shown under these facts. There are two pertinent stages where the

waiver is required under these facts, the first being at the exercise of all of the peremptory challenges by defense counsel at the bench and the second being where the inquiry and ultimate acceptance of Mrs. McKinney as a juror occurred in the absence of Jones at the bench after revelation of facts unknown to Jones.

"Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. Brady v. United States, **397** U..S **742, 748, 90** S.Ct. **1463,** 25 L.Ed.2d **747 (1970).**

> The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights (citations omitted), and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." (citation omitted).

Brookhart v. Janis, **384** U.S. 1, **4, 86** S.Ct. **1245, 16** L.Ed.2d **314 (1966).**

Insofar as the waiver of Jones' presence when the peremptory challenges were made by defense counsel at sidebar, the record does not show an affirmative waiver: the record shows mere acquiescence by defense counsel and Jones to the procedure whereby Jones remained at the counsel table and the challenges were exercised at the bench. The court did not inquire or show any concern about the defendant's right to be present when the challenges were made. Compare Ferry, supra at **1374.** The jury selection process is very dynamic and changes dramatically by the

removal of a particular juror by either party. Considerations involve not only the prospective juror being challenged, but also the qualifications of those prospective jurors who are next in line to serve on the jury. The defendant's presence when the challenges were made by the state, which challenges could not have been effectively anticipated by defense in the discussions that occurred prior to exercising the challenges, was essential as a matter of fundamental fairness whereby the defendant could have meaningful input into the jury selection process.

Assuming that the defendant's absence during the actual exercise of the challenges can be deemed waived by his presence in the courtroom, the same cannot be said concerning the judicial inquiry of Mrs. McKinney. The record fails to show any knowledge, actual or constructive, of Jones that Mrs. McKinney knew Detective Stout or that Mrs. McKinney knew some relatives of the victims. Clearly these are grave considerations that could reasonably have affected Jones' acceptance of Mrs. McKinney as a juror. The burden is on the state to show an adequate waiver by Jones of his right to be present during that inquiry that was conducted at sidebar. The state cannot do so. Accordingly, the convictions must be reversed and the matter remanded for retrial.

POINT XII

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO USE TESTIMONY CONCERNING DNA IDENTIFICATION WHERE THE PREDICATE FOR THE USE OF SUCH SCIENTIFIC EVIDENCE WAS INADEQUATE.

Dr. Gardner has a bachelor's degree in chemistry and a doctorate "in the medicinal aspect." (R1387). He has been involved in forensic science for fifteen years (R1388). He has had articles published over twenty times, the last five of which were in the area of DNA (R1388). He has testified "in criminal courts in the State of Florida, it was years ago, in the area of forensic serology, not in specific DNA" (R1390). Dr. Gardner could not remember the number of times he has testified, but claims to have testified as an expert in Florida, Virginia, Maryland, Utah, California, and Alaska (R1390), and he believes that he is recognized in his field of science as an expert (R1390). He has never testified as a DNA expert in a criminal case in Florida (R1394).

The discovery of DNA dates back to the early 1950's (R1391), whereas DNA "fingerprinting" only dates to 1984 (R1392). Dr. Gardner works for "Cellmark Diagnostics", which is a private organization operated for profit (R1396). In reference to the "science' of DNA fingerprinting, Dr. Gardner testified:

> The term fingerprinting, DNA fingerprinting, was actually coined by Dr. Jeffreys when he discovered these particular probes, and he was *so* excited about the potential use as an individual's identification tool that he used that particular term and it has given us problems.

It's a totally different area than regular fingerprinting. DNA is a well-established science. It finds itself in the area of molecular biology, which is the actual science area that it's found in.

Within the scientific community the way that we have assurance that something is reliable is not only to do the research but to publish it in a scientific journal in what we call a peer review scientific journal, and then to have other scientists throughout the world read that, try to duplicate, try to tear holes in it, try to find the weaknesses in what we have published.

Jeffreys did this back in 1985. There was a series of about three or four or five different publications that came out in the scientific journal called Nature, and that was the initial publication of this work using DNA fingerprinting. We talked about the genetics, Dr. Jeffreys, the man that discovered this is a geneticist in England, so he studied the genetics, he published that. This was all, again, subjected to intense peer review by the scientific community.

There has now been a tremendous amount of collaboration with other scientists throughout the world. We've given 6,000 scientists these particular probes to use and to evaluate and just to duplicate Dr. Jeffreys' original work. Those publications are also coming out or these independent workers are duplicating and verifying what Dr. Jeffreys has published.

Two weeks ago, as a matter of fact, there was an article that came out in Lancet from some people in Helsinki who are paternity testers. They do determine if a person is the father of a particular child. These people use the classical technique HLA typing and enzyme probes, and what we want to do is compare the old reliable techniques with the new science, this new DNA technology and they published the results a couple of weeks ago and their findings, you know, sustained what Jeffreys said, that

> it is useful and you can use it in that particular application.
>
> Now, in addition to that, we have done joint research projects here in this country. Two of these we reported at the American Academy. One with the Minneapolis American Blood Center and the other one was with Dr. Gerome Gottshall of the Southeast Wisconsin Blood Center, Incorporated and we did two, I think, studies where, again, we compared DNA testing with results these people obtained using other techiques and we looked over 200 cases like this that we just reported on recently in which we obtained the same results that we did, which is part of our process for making sure it is good science.
>
> Also, these publications, not only Jeffreys' publications, there's probably sixty different publications of which I did bring along the bibliography describing not only some of Jeffreys' work but other research out of ICI Center done in the area of DNA for identification purposes.
>
> These include publications by the FBI, by the forensic lab in Canada, the home office in England, which is comparable to the FBI. Also included is work done by Australians in the forensic labs as well.
>
> So I have a list of about sixty different publications and presentation of scientific papers that these people have made over the last few years, all on the point of DNA as a valid technique for identification purposes.

(R1407-1410).

Defense counsel objected to the testimony, arguing that the science was too new and too incomprehensible to lay people to be fairly used in this first-degree murder case (R1411-1412). The objection was overruled as follows:

> JUDGE PERRY: I have considered the testimony of the witness. I am mindful that one Judge in another type of case

> has accepted this testimony at the trial court level. There are no appellate decisions in the matter in the country and certainly none in the State of Florida that I'm aware of.
>
> It is new. We are living in a faster age. It took Bertillon a long time to get his human measurements test accepted and fingerprinting took a longer time to further. But the computer helps these days.
>
> Newness is not a reason for exclusion of the testimony. The jury will be adequately instructed with regard to expert testimony. I will allow him to proceed in the areas of forensic serology and the testing and processing of samples for DNA and for DNA identification purposes.

(R1414). Thereafter Dr. Gardner testified that DNA found in the vaginal swabbings of Perry matched those of Jones (R1435). Blood samples from Perry and Brock were unsuitable for DNA testing (R1425-26).

Since at least 1923 the test for admissibility of scientific evidence has been whether the reliability and results of the test have been widely recognized and accepted among scientist. Frye v. United States, 293 F.2d 1013 (1923); Stevens v. United States, 419 So.2d 1058, 1063 Fla. (1982). The admissibility of a test or experiment lies within the discretion of the trial judge. Hisler v. State, 52 Fla. 30, 42 So. 692 (1906).

> Evidence of this nature should be received with caution, and only admitted when it is obvious to the court, from the nature of the experiments, that the jury will be enlightened, rather than confused. In many instances, a slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as

> evidence, and make it harmful, rather than helpful.

Hisler at 695.

Approval to use hypnosis-related testimony was given using a relaxed admissibility standard of relevancy in Brown v. State, 426 So.2d 76, 86 (Fla. 1st DCA 1983). Subsequently, this Court determined that, though perhaps relevant, "the concerns surrounding the reliability of hypnosis warrant a holding that this mechanism, like polygraph and truth serum results, has not been proven sufficiently reliable by experts in the field to justify its validity as competent evidence in a criminal trial." Bundy v. State, 471 So.2d 9, 18 (Fla. 1985).

Generally, serology is accepted as reliable and accurate by the district courts of appeal in Florida. See E.M.V. - L. v. M.M.D., 462 So.2d 23 (Fla. 4th DCA 1984); McQueen v. Stratton, 389 So.2d 1190 (Fla. 2d DCA 1980); Cardlyn v. Weeks, 387 So.2d 465 (Fla. 1st DCA 1980). This is not to say, however, that all variations of blood testing evidence is to be considered competent proof in trials.

By way of example, courts and lay peop e have long recognized the scent discrimination abilities of animals. Early on, evidence concerning the trailing of certain persons by dogs was deemed competent and admissible evidence so long as a predicate was initially put forth to establish the reliability of the performance of a particular dog. Tomlinson v. State, 129 Fla. 658, 176 So. 543 (1937). This has developed to the point

where evidence concerning a dog's ability to detect controlled substances has become acceptable, again based on reliability of the results ov r a long period of time. See Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). This Court, however, recently rejected the admissibility of scent-discrimination line-up evidence:

> We find there must be a proper predicate to establish the reliability of dog-scent-discrimination line-ups before this type of evidence may be admitted at trial. Courts have properly been cautious to accept new methods of proof which have not been shown to be reliable. (citation omitted). The only evidence presented regarding the reliability of the type of scent-discrimination line-ups used in this case was the testimony of the dog handler and the police officer. We hold that this testimony, by itself, under the facts of this case, is insufficient to establish the reliability of dog scent-discrimination line-ups as a method of proof.

Ramos v. State, 496 So.2d 121, 123 (Fla. 1986).

Judge Perry in this case stated, "Newness is not a reason for exclusion of testimony." (R1414). The undersigned disagrees, expecially where the expert in this case testified that the way this type evidence is proved reliable is to have other experts attempt the process and refute it. DNA was discovered in the early 1950's, but this procedure of identification only began in 1985. The testimony reveals that the process is highly intricate and involved, taking almost two weeks to conduct one test (R1417). Use of radioactive materials is required (R1420), and interestingly Cellmark is evidently the only company supplying the chemicals/materials ("probes") that

are an essential step in the identification, which may explain why the same results are routinely obtained. It is respectfully submitted that three years is not a sufficient amount of time to establish a history of reliability of this scientific concept, where those who would refute the results have not had the opportunity to fully, independently test the theory and publish their own results and conclusions using their own materials. Also, what are the consequences of blood transfusions? Organ transplants? Exposure to radiation or chemicals? These are but a few of the unknowns that require exploration before a history of reliability can be established.

It is further submitted as an independent consideration that the potential of this technical evidence to confuse and overwhelm the jurors should discourage its admissibility. With the probability-of-recurrence ratio purportedly to be one in **9,390,000,000 (R1436),** except for identical twins **(R1410),** the court must be sure of the absolute reliability of the evidence before placing its stamp of approval on its use as reliable competent evidence in a first-degree murder trial. It is respectfully submitted that the state failed to show the reliability of the scientific evidence in this case. The scientific evidence is just too untried and new. Because Jones' statements must be suppressed based on the argument set forth in Point I, supra, the state cannot show that the erroneous use of this testimony was harmless error. Accordingly, the convictions must be reversed and the matter remanded for retrial without the use of such scientific evidence.

POINT XIII

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT AND THE JURY TO CONSIDER OVER OBJECTION TESTIMONY AND ARGUMENT CONCERNING JONES' "LACK OF REMORSE" IN COMMITTING THE CRIMES.

During the prosecutor's closing argument in the guilt phase of trial, the following occurred:

> PROSECUTOR: What's being put before you now and what was put before you during the course of this case in the cross-examination is how cooperative the Defendant was, and I guess because of the cooperation that that means he didn't premeditatively kill these people, that he did it for some other reason that's somewhere out here and, Ladies and Gentlemen, look out here at this other reason that you can't see while justice goes the other way regarding premeditation. Don't do that. Remorse, cooperation. Did you see any remorse?
>
> DEFENSE COUNSEL: Objection. That is a comment having nothing to do with the issues in this cause and it constitutes prosecutorial misconduct and I object to it.
>
> PROSECUTOR: May I continue?
>
> THE COURT: Objection is overruled.
>
> PROSECUTOR: Ladies and Gentlemen, the individual was cooperative because he just doesn't give a damn about human life or about anything else. That's why he was cooperative.

(R1608-1609). After laying the ground work in the guilt phase, for this erroneous consideration, the prosecutor presented in the penalty phase the testimony of Captain Miller, Chief of Detectives of the Putnam County Sheriff's Office (R1672), as follows:

Q. Captain Miller, did you have occasion on 20 August of 1987 to accompany Detective Stout and the Defendant to the scene of the crime?

A. Yes, sir.

Q. And could you relate to the jury exactly what you did during that time, what went on?

A. We drove to the Rodman Area.

MR. PEARL: Your Honor, at this point I must object, because it does not appear that this testimony is relevant to the -- to Phase 11, it seems more relevant to the guilt innocence phase, which is over.

MR. MCLEOD: Your Honor, it is relevant, if he could be allowed to continue.

THE COURT: Subject to connection, the objection is overruled.

A. We went to the area. And Mr. Jones very matter-of-factly indicated where the vehicle had been stuck, his vehicle, where they had shot limbs off the trees in order to endeavor to free the vehicle.

MR. PEARL: Your Honor, I must renew my objection. May I have a continuing objection to this testimony upon the ground that it is not relevant to Phase II and is merely a repetition of what has gone before? I don't want to keep interrupting the witness or Counsel, but this testimony seems to me to have nothing to do with the mater now before the jury.

MR. MCLEOD: If he could be allowed to --

THE COURT: I see the relevancy, Mr. Pearl, the objection is overruled.

MR. MCLEOD: Thank you.

Q. Could you please continue.

A. We proceeded to the dam area. Mr. Jones showed us where the weapon had been secreted, where the pick-up truck had been parked, demonstrated where he had stood, approximately where Mr. Reesh had stood, how the bodies were dragged from the vehicle to the area which they were found,

We drove around to the area where they had been located, he pointed out the approximate area where he had deposited them.

And as we were just driving off, he was -- showed no remorse. In fact, he --

MR. PEARL: Objection. Your Honor, in Robinson versus State, published at 13 Florida Law Weekly, page 63, a very recent decision by the Florida Supreme Court, resentencing was required after the imposition of the death penalty because of an argument of lack of remorse. I'm afraid that that fatal error has occurred in this case, I object to it, and have a motion for the Court.

THE COURT: Mr. McLeod, are you familiar with the State -- Robinson versus the State?

MR. MCLEOD: Yes, Your Honor, and I don't believe that it has been or is to be made a feature during the part of this sentencing phase.

THE COURT: Come up to side-bar.

(The following side-bar conference was had out of the hearing of the jury:)

THE COURT: This is the quote from the subsequent case that they are obviously following. The mention of that word scares me to death.

MR. MCLEOD: Yeah, and in this case it was made a feature. Detective Miller has indicated that he showed no lack of remorse respecting his attitude. We're not going to make a feature at the

sentencing phase the fact that there was a lack of remorse, and we're not arguing as an aggravating circumstance the lack of remorse, we're arguing aggravating circumstance, cold, calculated, no pretense of moral or legal justification. We're going to show acts occurring after the time of the crime incident to his mental attitude at the time.

MR. PEARL: Your Honor, it is true, as Counsel says, that lack of remorse is not a statutory aggravating factor, and that is the reason why it is not to be mentioned. It has been made a feature of this case by the testimony of this witness. And, as far as I'm concerned, a fatal error has been made by making -- by doing exactly what the State shouldn't have done.

THE COURT: Do you have a motion?

MR. PEARL: Yes, sir I have a motion for mistrial of the sentencing phase.

MR. MCLEOD: Can I briefly be heard regarding that, Your Honor?

THE COURT: Yes.

MR. MCLEOD: Your Honor, if you read this case, the remorse aspect here was a feature at penalty phase, it was argued as an aggravating circumstance. I am not arguing the lack of remorse as aggravating circumstances.

THE COURT: Is he going to use the word again?

MR. MCLEOD: No.

THE COURT: Are you going to use the word again?

MR. MECLEOD: No.

THE COURT: Motion is denied and the objection is overruled.

Thank you. I appreciate you bringing that to my attention.

MR. PEARL: Your Honor, having overruled my objection and denied my motion, it is my duty of the Court -- as an officer of the Court to suggest that a cautionary instruction should be given to this jury.

THE COURT: I'll do at the time the instructions are appropriate.

(At the conclusion of the side-bar conference, the following further proceedings were had.)

Q: (BY MR. MCLEOD) Captain Miller, you indicated that he explained these to you in a matter-of-fact approach.

A. Yes, sir.

Q. What do you mean by that?

A. Very calm, and thoroughly explained what had happened at that scene.

Q. Did he have sufficient memory and detailed memory as to what he had done?

MR. PEARL: Objection. Once again, all we're going -- This is evidence having to do with the guilt or innocence phase and has nothing to do whatever with Phase II of this trial. Now, the jury's already found the Defendant guilty of murder in the first degree on two counts, and this evidence goes to no statutory aggravating circumstance.

MR. MCLEOD: Your Honor.

MR. PEARL: Now, if we're talking about cold -- especially cold, calculated, premeditated, certainly no evidence subsequent to the crime is relevant or competent to show that.

MR. MCLEOD: May I be heard?

THE COURT: Yes, sir.

MR. MCLEOD: I am sure, if I am guessing correctly, based upon witnesses I see outside, that one of the mitigating circumstances proffered to this Court and to the this jury is going to be the --

MR. PEARL: Well --

MR. MCLEOD: -- influence of extreme mental --

MR. PEARL: Your Honor --

MR. MCLEOD: -- or emotional disturbance, and this goes to that issue.

MR. PEARL: This is mere speculation. He doesn't know what any witness of mine is going to say. He hasn't taken the deposition of any witness of mine, so I don't think that guessing is appropriate.

THE COURT: Subject to connection, the objection is overruled.

Q. (BY MR. MCLEOD): Captain Miller, did he have sufficient memory and detail in recounting these facts?

A. Yes, sir.

Q. And what did he do on his way away from the scene?

A. As we were driving from the scene he had a joke which he told.

Q. A joke?

A. Yes, sir.

MR. PEARL: Your Honor, I have another objection.

THE COURT: Yes, sir.

MR. PEARL: That is, once again, in different words, a repetition of exactly what was objected to before -- May

counsel approach the bench, because I have further motions to make? Or shall I make them in the presence of the jury?

THE COURT: Are they going to be relatively simple, Mr. Pearl?

MR. PEARL: Simple, Your Honor, and short. It might be better to just come to the bench, if Your Honor doesn't mind. I'm sorry for the interruption, but I'm compelled to do this.

THE COURT: No, sir, I don't attempt to call it that. Madam Reporter, come up, please.

(The following side-bar conference was had out of the hearing of the jury:)

MR. PEARL: Your Honor, this testimony is improper if it is intended to show especially cold, calculated and premeditated killing as one of the statutory aggravating circumstances, because this testimony relates to matters which took place a month after the killing and not prior to the killing, and, therefore, it is incompetent and prejudicial.

However, my main objection goes to the fact that this is just another way that the State through this witness is trying to show the jury that the Defendant lacked remorse.

They're making a feature of lack of remorse, and this is after the State has promised not to bring it up again.

Therefore, I am going to renew my motion for mistrial, because I do not think that this can be cured.

MR. MCLEOD: Your Honor, two mitigating circumstances what I believe will be proffered by the Defense was that the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. Surely conduct at the murder scene even a month after the murder, recounted certain aspects of it, go to that issue, if he was so mentally or emotionally under duress.

THE COURT: Our problem is we do not have the report of Doctor Krop so that we might make an educated judgment on it.

MR. PEARL: May I tell you something?

MR. MCLEOD: I'll tell you what he told me on the phone last week.

MR. PEARL: This is what he told me this morning, right from his mouth, and I expected something different. Which was, that after a lot of consideration, he was having a lot of trouble trying to say that there was emotional disturbance. And he does not think that professionally he can offer that as a statutory mitigating circumstance based on his entire study of this Defendant, and he's not going to testify to that.

MR. MCLEOD: Monday or Tuesday of last week he told Mr. Browning over the phone, and Mr. Browning transcribed that, that his opinion was going to be that he was under emotional distress.

MR. PEARL: He told me the same thing.

THE COURT: The only thing I can tell you, if he's going to testify to that, then some of this evidence is germane. If he is not going to testify to that, then it is not.

MR. MCLEOD: Perhaps we'll hold Captain Miller until after he testified.

MR. PEARL: He will testify to an emotional distress and emotional disturbance. What his testimony will be that it does not rise to a stature of a statutory mitigating circumstance, this is what he told me less than an hour ago.

MR. MCLEOD: Then I'll hold off any further.

THE COURT: The motion -- the objection is overruled, the motion is denied at this time.

> (At the conclusion of the side-bar conference, the following further proceedings were had.)
>
> MR. MCLEOD: Thank you, Captain Miller, I have no further questions.

(R1673-1683) (emphasis added).

For the prosecutor, when confronted with a timely objection, to immediately admit that he was aware of the holding of this Court in Robinson and yet contend that this testimony did **not** become a feature at trial shows the deliberateness of the state in presenting this improper testimony and argument. The witnesses who stated that Jones showed no remorse were police officers under clear direction and control of the prosecutor. It is well established that lack of remorse is a totally irrelevant consideration and does **not** pertain to *any* of the statutory aggravating circumstances, as is affirmatively and unequivocally stated by this Court in Robinson v. State, 520 So.2d 1 (Fla. 1988):

> **In** Sireci v. State, 399 So.2d 964, 971-72 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982), this Court held that lack of remorse may be considered in finding that a murder was especially heinous, atrocious and cruel. However, as a result of the 1981 revision of the standard jury instructions in criminal cases as well as the consistent misapplication of the Sireci holding, this Court subsequently held that any consideration of a defendant's remorse was extraneous to the question of whether the murder was especially heinous, atrocious or cruel. Pope v. State, 441 So.2d 1073, 1077-78 (Fla. 1983). Citing McCampbell v. State, 421 So.2d 1072 (Fla. 1982), the Court in Pope noted that lack of remorse is not

an aggravating factor, in and of itself, and held:

> [Hlenceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor.

441 So.2d at **1078.**

Robinson, 520 So.2d at **6** (emphasis added). The argument by the prosecutor that conduct that was perceived by police a month after the crime was relevant to establish that the murder was cold, calculated and premeditated is specious and untenable. The prosecutor was simply intentionally placing unfairly prejudicial evidence and argument before the jury over repeated objection by trial counsel. The overruling of defense counsel's vocal objections made in the presence of the jury reasonably caused the jurors to conclude that lack of remorse could properly be considered. Though indicating that a cautionary instruction would be forthcoming, none was given **(R1678).** This error resulted in an unreliable death recommendation by the jury in violation of the Sixth, Eighth and Fourteenth Amendments. A new penalty phase is required, and the deliberate crowding of the line of ethical prosecution by the assistant state attorney warrants reprimand.

POINT XIV

THE TRIAL COURT ERRED IN FAILING TO COMPLY WITH SECTION 921.241, FLA. STAT. (1987) WHEN ADJUDICATING JONES GUILTY OF FIRST-DEGREE MURDER.

In pertinent part, Sections 921.241, Fla. Stat. (1987) provides:

> 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 guilty 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 judges signature to such judgment. Beneath such judgments shall be appended a certificate to the following effect: "I hereby certify that the above and foregoing fingerprints on this judgment are the fingerprints of the defendant, _____, and that they were placed thereon by said defendant in my presence, in open court, this the ___ day of _____, 19__." Such certificate shall be signed by the judge, whose signature thereto shall be followed by the word "Judge."

(emphasis added). The trial court in this case prepared its own judgment and sentence in reference to the first-degree murder convictions wherein he recorded the findings of fact in reference to the aggravating and mitigating circumstances pursuant to Section 921.141, Fla. Stat. (1987) (R685-692 . Those judgments do not contain the fingerprints of Jones nor a certificate by the judge. Due to the failure of the court to comply with a controlling statute, the judgments and sentences must be vacated and the matter remanded for compliance with Section 921.241.

POINT XV

CONVICTIONS FOR MURDER, BURGLARY OF A CONVEYANCE WITH AN ASSAULT, ARMED ROBBERY, AND SHOOTING OR THROWING A DEADLY MISSILE INTO AN OCCUPIED VEHICLE ARE DUPLICITOUS AND OTHERWISE VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AND ARTICLE I, SECTION 9 FLORIDA CONSTITUTION.

The state charged Jones with two first-degree murders. He was also charged with armed robbery, in that he took from Brock a motor vehicle by force or violence. He was also charged with burglary of a conveyance while armed and/or with an assault, in that he entered the pick-up truck with the intent to commit either murder or robbery, and with maliciously shooting at an occupied motor vehicle (R5-6). These convictions address basically two evils. The evil done to the victims is properly addressed by separate convictions for first-degree premeditated murder. The evil done to the property is addressed by the separate robbery conviction. The separate charges of burglary of a conveyance and shooting into an occupied vehicle are duplicitous and otherwise address the same evils remedied by convictions for murder and robbery.

Specifically, the shots fired into the pick-up truck were those that effected the deaths of the two victims. They are an integral element of the first-degree murder charges. Such duplicitous punishment is proscribed under the Fifth Amendment to the United States Constitution, Article I, Section 9 of the Florida Constitution and this Court's decision in Carawan v. State, 515 So.2d 161 (Fla. 1987). In Carawan, this Court noted

in footnote 8: "We emphasize that our holding applies only to separate punishments arising from one act, not one transaction. An act is a discreet event arising from a single criminal intent, whereas a transaction is a related series of acts." Carawan 515 at 170. In this case, the single criminal intent was to effect the deaths of both victims. The discreet event was the death of each victim effected by the shots that accomplished that criminal intent. These acts are being separately punished by convictions for first-degree murder; a separate punishment for shooting into an occupied vehicle is duplicitous.

Similarly, Jones is being punished for taking the vehicle by having been convicted of robbery. That robbery conviction is enhanced due to the amount of force that was used. Separate punishments for burglary with an assault is duplicitous, in that the criminal intent was the taking and use of the truck; the discreet event that accomplished that criminal intent was the taking of the truck through force. A separate conviction for burglary with an assault is duplicitous. Accordingly, the convictions for shooting into an occupied vehicle and burglary of a conveyance with an assault should be vacated and the matter remanded for resentencing based on new scoresheets for the crime of robbery.

CONCLUSION

Based on the foregoing arguments and authorities, this Court is asked in Points I, XI, and XII, to reverse the convictions and to remand for a new trial; in Point 11, to reverse the conviction for sexual battery, to vacate all sentences and to remand for a new penalty phase and resentencing; in Points 111, IV, V, VI, VII, IX, X, XIII, to vacate the death sentences and to remand for a new penalty phase; in Point VIII to reverse the death sentences and to remand for imposition of life sentences; in Point XIV to remand for resentencing; and, in Point XI to reverse the convictions for burglary with an assault and shooting into an occupied vehicle.

Respectfully submitted,

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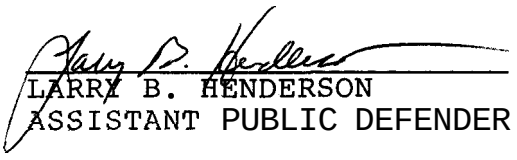
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014 in his basket at the Fifth District Court of Appeal and mailed to Mr. Randall Scott Jones, #111508, P.O. Box 647, Starke, Fla. 32091, on this 13th day of October 1988.



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