IN THE SUPREME COURT
OF FLORIDA

CLARENCE JAMES JONES,

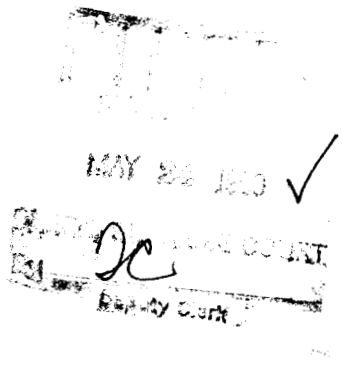
Defendant/Appellant,

vs. CASE NO.: 74,866

STATE OF FLORIDA,

Plaintiff/Appellee.

_____/



INITIAL BRIEF OF APPELLANT CLARENCE JAMES JONES

ON APPEAL FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CASE NO.: 88-3111-CF

CLIFFORD L. DAVIS
1105 Hays Street
Tallahassee, Florida 32301
(904) 224-8429

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PRELIMINARY STATEMENT

Appellant, CLARENCE JAMES JONES, was the Defendant at the trial in this cause. Mr. Jones will be referred to in this brief by his proper name or as the "Appellant".

The State of Florida was the prosecution in the trial in this cause and will be referred to herein as the "State".

The record will be referred to by the use of the symbol "R-".

All emphasis is supplied unless the contrary is indicated.

REQUEST FOR ORAL ARGUMENT

The Appellant, CLARENCE JAMES JONES, hereby requests oral argument in this cause, pursuant to Fla. R. App. P., 9.320.

TABLE OF CONTENTS

CASES AND AUTHORITIES

STATEMENT OF THE CASE

Appellant, Clarence Jones was indicted, along with Irvin Griffin, and Henry Joseph Goins, by the Grand Jury with first degree murder of Tallahassee Police Officer, Ernest Ponce De Leon. (R-1). In addition, they were charged with attempted murder of Tallahassee Police Officer Greg Armstrong in Count II, and of robbery of Officer Ponce De Leon by taking his pistol after his death. In Count IV Appellant and Griffin were charged with burglary of a dwelling, and the two were charged in Count V with aggravated assault on a civilian. (R-2).

The Goins case was disposed of by pleas to lesser charges prior to trial. Griffin was tried with Appellant, convicted and sentenced to life.

Prior to trial, the State added a charge of aggravated assault to Appellant by information (R-214) and Count V was nolle prossed. (R-160).

After a trial, Appellant and Griffin were found guilty as charged of murder in the first degree. (R-129). Appellant was also convicted of Count IV attempted murder (R-130), robbery (R-131), burglary of a dwelling (R-132), and aggravated assault with a firearm (R-133).

The jury re-convened to hear the penalty phase and a vote of eleven to one recommended a sentence of death for Appellant. (R-161).

On September 26, 1989, Appellant was sentenced to death

on Count I, life on Count II, life on Count III, life on Count IV, and five years on Count I of the consolidated information. (R-105-209).

The Court made findings to support an upward departure from the sentencing guidelines, (R-294) a timely appeal was filed herein. (R-293).

STATEMENT OF THE FACTS

Due to the nature of the case and the large amount of the pre-trial publicity the parties agreed to a juror questionaire covering critical issues in the case. Pre-trial publicity, extreme feelings based on the fact that Appellant was an escaped convict and the victim a police officer, and whether or not individual jurors had religious, moral or personal views concerning the death penalty.

On the subject of the death penalty, jurors were asked if they had scruples against the death penalty itself. Secondly, they were asked whether or not those views were such that they would not consider a verdict of guilty, and finally if they were to consider a verdict of guilty were their views such that they would not under any circumstance vote to impose the death penalty.

Jurors who answered yes to the question of opposition to the death penalty fell into three basic categories. One category stated that under no conditions would they vote for a guilty verdict. The jurors who answered in this fashion did not draw objections by the defense to the States challenge for cause. (R-541, R-569, R-571, R-664, R-701, R-717, R-900, R-987, R-1001, R-1049). Another group of jurors stated that they were opposed to the death penalty, but could consider the evidence and return a verdict of guilty. In this category some stated they could vote to impose the death penalty and some stated that they would have difficulty or could not vote to impose death.

In the last two categories the defense posed objections to challenges for cause. Jurors in these two categories were systematically excluded by the Court. (R-891, R-900, R-950, R-966, R-974, R-988). In addition, the State systematically challenged for cause any juror that voice opposition to the death penalty. In those cases where the juror clearly stated that it would not interfere in any fashion in his ability to reach a verdict of guilty and to return a recommendation of death, the Court overruled these challenges. (R-577, R-846, R-1001, R-1015).

In some instances the defense did not object because there were other grounds considered by Appellant to be proper grounds for cause. (R-541, R-1046).

The effect of the Courts rulings were to completely eliminate from the jury pool potential jurors with scruples against the death penalty, but who could consider the evidence at both the trial and penalty phase.

On the morning of July 8, 1988, Tallahassee Police Department dispatcher received a call from the Lake Bradford Laundromat. (R-1451). The caller advised that there was a car parked behind the laundromat and there were a lot of guys in the car. The caller advised that there were black and white males. Officer Greg Armstrong was dispatched to the scene. (R-1453). He was backed up by Tallahassee Police Officer, Ernest Ponce De Leon.

The dispatcher's tape of that morning was played for the

jury in the ensuing half hour Officer Ponce De Leon was dead and three subjects, including the Defendant herein, were taken into custody. All of the Defendants were suffering from gunshot wounds of varying degrees of severity. (R-1468). In the next twenty minutes of the dispatcher's tape there was additional discussion, including discussion of the possibility of other suspects in the area. (R-1387).

Greg Armstrong began his testimony at page 1490. He testified that he was dispatched to the scene at 1918 Lake Bradford Road behind the laundromat. (R-1494). Officer Ponce De Leon was in the area and voluntarily agreed to back up Officer Armstrong. (R-1495). He related that he was the first to arrive at the scene and observed a green Chevrolet Capri parked toward the rear of the laundromat. (R-1499). He walked up to the vehicle and observed four people in the car. A white male behind the driver seat, later identified as Henry Joseph Goins, a black female, later identified as Beverly Harris, in the rear seat behind him, a person in green hospital scrubs on the passenger side rear, and a black male sitting across from the driver in the front. (R-1501).

Officer Ponce De Leon went to the passenger side of the vehicle and eventually moved to the rear to attempt to run a tag on the computer. (R-1592). While attempting to check the identification and bag of the white male and black female on the driver's side of the vehicle, he looked up across the roof

of the car to the passenger side, and saw a black male fire two rounds in the direction where he had last seen Officer Ponce De Leon. (R-1510). He recalls seeing a six inch blue steel revolver in the hand of the assailant. (R-1510). Officer Armstrong drew his weapon and returned fire at the person he saw fire the shots and then engaged the other occupants of the vehicle in a gun battle. (R-1515).

At some point in the gun battle the vehicle had begun to move until it struck another vehicle in the parking lot. (R-1528). At that point the two black males left the vehicle and ran from the scene. (R-1529).

When Officer Armstrong was able to check on Officer Ponce De Leon again, he found him lying on his back toward the rear of where the vehicle had originally been parked. (R-1533). He had two bullet holes in his chest. He looked for Officer Ponce De Leon's gun and was unable to find it on his body or in the area. (R-1534). He knew Officer Ponce De Leon to carry a nine millimeter Beretta semi-automatic pistol. (R-1535).

He stayed with the stricken officer until Sergeant Dozier arrived. (R-1536). Shortly thereafter numerous other officers arrived on the scene and assisted in the search for evidence and for suspects. (R-1538).

Numerous witnesses from various law enforcement agencies were called to describe the scene and blood trail that eventually led to the house where Appellant and Defendant Griffin were captured.

Without objection a view of the scene was conducted and a large number of exhibits presented to the jury relating to the physical evidence seized in the case, including the autopsy of the deceased.

Dr. Greg Alexander testified that he had reviewed the autopsy report off Dr. Wood. That report concluded, and he concurred, that the cause of death of Officer Ponce De Leon was a gun shot wound to the chest. He identified two wounds in the chest area of the victim. He testified that the effect of a person receiving that kind of wound to the heart would be the blood pressure to immediately to go to zero, and the patient would be rendered unresponsive virtually immediately. (R-2566).

A number of civilian witnesses testified about events in the area contiguous to the Lake Bradford Road location. Lynn Black, Jr., age ten, testified that he lives at 2017 Warwick Street on July 8, 1988. (R-1759). He and a friend, La Duane, were alone in the house watching T.V. when two black men entered the house, one of them had a gun. (R-1761). When one of them went in the kitchen and the other in the bedroom trying to hide the gun, Black testified that he and La Duane shot out the screen door. (R-1753).

Sindy Clarence Earle testified that he was presently sleeping in Lawty, Florida compliments of the Florida Department of Corrections. He had been convicted of a felony or a crime involving dishonesty and false statements seven times. In July 1988 he

was living at 2009 Warwick. (R-1811). Early that morning he heard a knocking at the door. (R-1813). He saw blood on the steps and for some reason that caused him to check on the Black's house. (R-1816). He approached the Black's house, and one of the persons therein stuck a gun in his face and told him to go in. (R-1817). Another man was sitting on the corner of the sofa on the left side by the air conditioner; there was blood on both of the occupants. (R-1818). The black male with the green doctor suit was holding a gun. Earle told him he would do whatever he wanted him to do. He was directed to assist in pulling the clothing off of the individual. He was told if he didn't do what he said he would be killed. (R-1820).

He described the gun as looking like a nine millimeter, that it was big and it was silver. (R-1810). After being shown a photograph of the weapon, he recalled that it was black. (R-1811).

Appellant proffered a line of cross examination of Mr. Earle. (R-1854-R-1874). When he attempted to cross examine Sindy Earle to connect Mr. Earle to Beverly Harris and Carolyn Roberts, and being at Lake Bradford Road on the morning of July 8, 1988, for the purpose of finishing a crack cocaine deal that they had begun earlier on the evening of July 7, 1988, there was objection by the State.

A proffer was made of Appellant's theory of defense. Appellant tried to show the motive and credibility of the witnesses Sindy

Earle and Beverly Harris; and to show that Mr. Earle was co-perpetrator of the crime. On page 1874 the Court restricted counsel from that line of cross examination despite the ruling of Coxwell v. State, 361 S.2d 148 (Supreme Ct. of Fla., 1978), and Rule 612 paren 2 of the evidence code. Again at page 1877, Appellant proffered two questions that he specifically wished to ask Mr. Earle, 1) whether or not he was a crack dealer, and 2) had he ever dealt crack cocaine. After a bench conference that request was denied. (R-1877-R-1878).

Beverly Harris testified commencing at page 2382. She is currently in the custody of the Department of Corrections for violation of parole. She had been convicted four times of a felony or crimes involving dishonesty or false statements.

She testified that she had met Appellant, co-defendant Goins, and co-defendant Griffin in St. Augustine, that none of those individuals had ever been to Tallahassee, Florida and that she agreed to travel with them. She stayed in the room with Irvin Griffin. Goins and Appellant stayed together during the course of their travel. She was familiar with the Tallahassee area, having endured one or more of her criminal convictions in that jurisdiction. On the morning of July 8, 1988, she related she was in the car with Griffin, Goins, and Appellant. They had gone to the laundromat on Lake Bradford Road according to her to do some laundry. She described what happened when Officer Armstrong and Officer Ponce De Leon came to the scene and related

that Clarence Jones is the man who shot Officer Ponce De Leon.

Griffin had shown her the gun in the car and related that they were escapees from prison in Maryland. (R-2412).

Counsel had proffered a question to the Court to cross examine Ms. Harris on prior drug dealings from 1984-1988. It was Appellant's position that by her previous drug dealings she obtained knowledge of drug dealers in the French Town area, and thereby knew through the contacts. The Court denied Appellant the opportunity to ask those questions. (R-2458).

Ms. Harris testified that while in the Bomd area looking for drugs, she saw an individual known to her as Carolyn. It was Carolyn, she testified, who took Jones and Goins to find drugs. She stated that Carolyn use to be a client of hers at ECHO. (R-2466).

Harris testified that it was her idea to go to the Lake Bradford Road area to wash clothes, although when they arrived at the laundry, she did not start doing any laundry, (R-2472), and according to Mr. James Ebeling there was a laundry a block away from the motel where the group was staying. (R-2518).

Harris testified that she had previously identified the gun that Jones had at the time of the killing to be a silver hand gun. (R-2490). She related that she had been in shock and confused, but was not so confused to where she could give a false name to avoid arrest for parole violation. (R-2488).

The State made a proffer of the testimony of Larry Bennett

at page 2721. Mr. Bennett was the lieutenant with the Baltimore City Police Department. In March of 1978 while on uniformed patrol, he had been shot and severely wounded by a person identified as co-defendant Griffin. During the incident he was checking the registration and identification of the occupants of the vehicle. (R-2725). The evidence was admitted as Williams Rule evidence against the Defendant Griffin only. After the proffer at page 2748, Appellant through counsel objected on the grounds that the evidence was inadmissible and being irrelevant as to the Defendant Jones. Due to the nature of the evidence there was an extreme prejudicial spill over that should have been excluded under Rule 403. (R-2749). After a conference in which Mr. Bennett's evidence was limited somewhat by the Court, he was permitted to testify commencing at page 2766, that he had been shot by Irvin Griffin under circumstances similar to those that existed in the instant case. This evidence was extremely prejudicial to Appellant due to the fact that Griffin and Jones were tied together by being prison inmates, by having a record for violent crimes, and by being traveling companions and in the same vehicle at the time in which Officer Ponce De Leon was murdered.

Appellant proffered at page 2837 the testimony of Officer Berkley Clayton. He identified as series of tape recorded statements under oath taken from Beverly Harris the day of the murder in which she made statements contrary to her trial testimony. The statements were taken by Clayton and Assistant State Attorney,

Pottinger, who is now trial counsel. (R-2838). The sworn statements were offered as impeachment and as exceptions under Rule 801.

The State objected citing Jennings v. State, 512 So.2d 169 (Fla. 1987), and Delgado Santos v. State, 471 So.2d 74 (Fla. App. 3 Dist. 1985). The Court did not allow the testimony to be admitted.

Jones called a series of witnesses who were present at the scene commencing at page 2851 thru page 2936. These witnesses placed a number of individuals at the scene in addition to the two people that Officer Armstrong said he saw run from the area. Carolyn Roberts was then called by Appellant. (R-2936). She testified she knew Beverly Harris. In July 1988 she was at a friends house on Apalachee Ridge, and saw Beverly with Irvin Griffin and Clarence Jones. (R-2937). They were in a car driven by Ms. Harris. (R-2938). Roberts got in the car and was taken to the Travel Lodge Motel on West Tennessee, where she met an individual she referred to as the white dude. (R-2910). She testified that Clarence and the white dude took her to the Whataburger on Lake Bradford Road to pick up her god-daughter. (R-2941). She did not buy any drugs for them or take them to French Town or Bomd Community. (R-2912).

Appellant testified in his own defense commencing at page 2955. He testified that while on escape status from the Maryland State Penitentiary he met Beverly Harris in Jacksonville. She

directed the group, including himself, Griffin, and Henry Goins to Tallahassee. (R-2969). She had obtained drugs for the group in Jacksonville before they left. (R-2970). During the course of the events that culminated with the arrest of Appellant on July 8, 1988, she, Goins, and Jones used drugs frequently if not constantly.

He stated that on the first day they were in Tallahassee, Beverly Harris took him and Mr. Griffin to somewhere around Joe Lewis Street and some projects to obtain drugs. (R-2973). He stated that Carolyn Roberts rode around with the group showing them people from whom they could buy drugs. (R-2974). He, Roberts, Harris, and Goins did drugs including crack cocaine, powder, rock, reefer, and drank alcohol back at the motel. (R-2974). On the night the group stayed in the Travel Lodge, Ms. Harris again took them to buy drugs. (R-2975). They went to an area in French Town near a pool hall, Ms. Harris directed them to two or three areas near the pool hall where they ultimately bought some powdered cocaine, and marijuana. (R-2979).

Later that evening, Ms. Harris again took Jones back to French Town, and introduced him to somebody for the purpose of buying drugs. (R-2981). He and Harris went back and forth several times that evening to French Town to buy crack, powder, and reefer. (R-2983).

At some point in the evening Mr. Griffin became concerned about the continuing drug use of his companions and decided that

PAGE(S) MISSING

they would leave the next morning for New Orleans. (R-2998). Ms. Harris again took Appellant and Griffin to the pool hall to make arrangements to buy drugs. (R-2999).

The next morning the group went to a restaurant near the area of the Travel Lodge and bought some coffee. (R-3001). After obtaining coffee, Ms. Harris took the group to an area with a laundromat, which turned out to be the murder scene. (R-3004). Her purpose in taking them there was to see if a guy could get some more drugs before they left. (R-3005). Once they arrived there was no effort made to take out any laundry bags or to go inside the laundry. (R-3005).

Ms. Harris left the car and came back shortly with a black male. (R-3007). It was the same person that they had earlier met in the area near the pool room, where the group had purchased some drugs from him. (R-3007). The intention of the group was to trade some of the guns to that individual for drugs. (R-3008). He was sitting in the passenger seat looking at the .357 when the officers arrived. During the time the officers were inquiring of the occupants of the car that individual got up and shot Officer Ponce De Leon. (R-3013).

Appellant and Griffin had both been shot. They left the area and went up the street. (R-3018). At that point Jones had the nine millimeter Beretta that he had picked near the slain officer's body. (R-3019).

They went into a house that a little boy was coming out

of which had the door open. The same man that he had earlier seen in French Town, whom he met that morning at the laundromat, was the man who shot the policeman. This man assisted him in removing his clothing. (R-3021-R-3022). He testified that he did not shoot the policeman.

In the penalty phase, the State introduced evidence of Appellant's prior convictions. (R-3431). Jones called Dr. Laurence Annis, forensic psychologist, for the purpose of establishing his medical and mental history. He testified from interviews and prison records from the State of Maryland. He described Appellant as borderline retarded or dull normal. (R-3439-R-3447).

The State was permitted to argue and the Court instructed over objection that the following improper aggravating factors existed (1) the murder constituted a great risk of harm to other persons, (2) the murder was for the purpose of effecting a robbery; (3) that Jones' conviction of burglary while armed and aggravated assault at the instant trial were applicable. (R-3499-R-3502).

POINTS ON APPEAL

POINT I

WHETHER OR NOT THE COURT ERRED IN EXCLUDING AS JURORS THOSE WHO WERE OPPOSED TO THE DEATH PENALTY, BUT COULD REACH A VERDICT OF GUILTY?

POINT II

WHETHER OR NOT THE COURT ERRED IN RESTRICTING CROSS EXAMINATION OF SINDY EARLE AND BEVERLY HARRIS?

POINT III

WHETHER OR NOT THE COURT ERRED IN ADMITTING WILLIAMS RULE EVIDENCE AGAINST THE CO-DEFENDANT?

POINT IV

WHETHER OR NOT THE COURT ERRED IN DENYING APPELLANTS USE OF WILLIAMS RULE EVIDENCE INVOLVING STATE WITNESSES SINDY EARLE AND BEVERLY HARRIS?

POINT V

WHETHER OR NOT THE COURT ERRED IN DENYING APPELLANTS PROFFER OF PRIOR SWORN TESTIMONY BEVERLY HARRIS?

POINT VI

WHETHER OR NOT THE COURT ERRED IN PERMITTING EVIDENCE OF AGGRAVATING FACTORS AND INSTRUCTING THE JURY AS TO THOSE IMPROPER AGGRAVATING FACTORS?

POINT VII

WHETHER OR NOT THE COURT ERRED IN SENTENCING APPELLANT WHO IS BORDERLINE RETARDED OR DULL NORMAL, TO DEATH?

POINT I

WHETHER OR NOT THE COURT ERRED IN EXCLUDING AS JURORS THOSE WHO WERE OPPOSED TO THE DEATH PENALTY, BUT COULD REACH A VERDICT OF GUILTY?

The prosecution in this case systematically excluded for cause all persons who indicated that they were opposed to the death penalty. Where the venireman was so adamantly opposed to the death penalty that they could not in good faith bring a verdict of guilty against the defendant, the defense had no objection to the challenge. However, several veniremen indicated that although they were opposed to the death penalty in theory, they felt that they could, in fact, bring a verdict of guilty against the defendant if the facts warranted such a verdict. It is Appellants contention that these veniremen were improperly excluded from the jury.

The systematic exclusion of jurymen opposed to the death penalty is based on footnote #21 of Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88S.Ct. 1770 (1968). According to Witherspoon, jurors maybe excluded for cause if they make it

> "unmistakably clear (1) that they would **automatically** vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's **guilt.** (emphasis in original).

The Witherspoon test does not suggest that jurors be excluded simply because they are against the death penalty; rather, it is only when this belief will prevent them from making an impartial decision as to guilt that they should be removed from the panel. The jurors in question in the instant case made it perfectly clear that although they were against the death penalty, they would be able to find the defendant guilty if the facts warranted such a verdict. They therefore did not meet the requirements for exclusion set forth in Witherspoon.

The Supreme Court in Adams v. Texas, 448 U.S. 38, 65 L.Ed.2d 581, 100 S.Ct. 2521, further made this distinction by explaining that

> [A] juror may not be challenged for cause based on his views about capital punishment **unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.** Id., at 45. (emphasis added)

In Wainwright v. Witt, 469 U.S. 412, 83 L.Ed.2d 841, 105 S.Ct. 844, the Court addressed the obvious discrepancies between the Witherspoon test and the Adams test. In this case, the Court pointed out that

> [T]he statements in the Witherspoon footnotes are in any event dicta. The Court's holding focused only on circumstances under which prospective jurors could not be excluded; under Witherspoon's facts it was unnecessary to decide when

they could be. This Court has no other occasions similarly rejected language from a footnote as "not controlling." Id., at 422. See also McDaniel v. Sanchez, 452 U.S. 130, 141, 68 L.Ed.2d 724, 101 S.Ct. 2224 (1981).

The Court went on to explain that the "Adams standard is proper because it is in accord with traditional reasons for excluding jurors and with the circumstances under which such determinations are made," and that the above-quoted standard from Adams was "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment." Id., at 424. According to this test, it is clear that the jurymen in question were improperly excluded. The appropriate remedy is for the Court to reverse the judgment and sentence of death and remand for new trial.

POINT II

WHETHER OR NOT THE COURT ERRED IN RESTRICTING CROSS EXAMINATION OF SINDY EARLE AND BEVERLY HARRIS?

During the cross examination of State witnesses Sindy Earle and Beverly Harris, Appellant sought to cross examine each on a line of questions which constituted his entire defense. The questions were proffered and the relevancy established in hearings outside the presence of the jury.

The questions related to prior relationship between the parties, whether either were drug dealers and whether or not the two arranged drug transactions which led to the drama on Lake Bradford Road.

This Court in Coxwell v. State, 361 So.2d 148 was faced with a very similar circumstance and Appellant's conviction should be reversed on that rationale.

> "[1] Coxwell suggests that the trial court abused its discretion in sustaining the state's objection, and that the court's curtailment of defense inquiry at this crucial juncture constituted a deprivation of his absolute and fundamental right to cross-examine a witness who testifies against him, as guaranteed by the sixth amendment of the federal constitution. The ruling of the trial court that the question on cross-examination went beyond the scope of direct examination, Coxwell argues, was not merely erroneous as being plainly related to Kilpatrick's testimony regarding the

plans and conversations with Coxwell on the day of the crime, but was also prejudicial to Coxwell's defense because it forestalled the development of the defense theory that Judy Barnes had procured Mrs. Coxwell's death, as to which Kilpatrick obviously would have first-hand knowledge. In urging that curtailed cross-examination was reversible error, appellant basically relies on Coco v. State, 62 So.2d 892 (Fla.1953)."

Appellant attempted to develope his theory of defense by this cross-examination and attempted to use Williams rule evidence against Sindy Earle and Beverly Harris to corroborate his testimony in his case in chief. (See Point IV).

Likewise in Moreno v. State, 418 So.2d 1233, the court reversed the trial judge for excluding cross-examination of State witnesses about charges for which they received immunity in exchange for their testimony.

There the court stated:

"[3-6] There is authority supportive of appellant's argument that his proffered evidence should be admitted. Where a defendant offers evidence which is of substantial probative value and such evidence tends not to confuse or prejudice, all doubt should be resolved in favor of admissibility. Holt v. United States, 342 F.2d 163 (5th Cir. 1965); Commonwealth v. Keizer, 385 N.E.2d 1001 (Mass. 1979). Where evidence tends, in any way, even indirectly, to prove a defendant's

innocence, it is error to deny its admission. Chandler v. State, 366 So.2d 64 (Fla. 3d DCA 1979); Watts v. State, 354 So.2d 145 (Fla. 2d DCA 1978). In Commonwealth v. Keizer, supra, the court permitted defendant to show that crimes of a similar nature had been committed by some other person so closely connected in point of time and method of operation as to cast doubt upon the identification of the defendant as the person who committed the crime. The evidence appellant sought to have admitted herein is of a crime alleged to have been subsequently committed by the State's key witnesses which is so similar, in its method and circumstances, to the events surrounding the defendant's alleged offense that it could, if heard by the jury, raise a reasonable doubt as to the defendant's guilt. Because the similar crime evidence is relevant, non-prejudicial, and not admissible by any rule of law, it should have been admitted. One accused of a crime may show his innocence by proof of the guilt of another. Lindsay v. State, 68 So. 932 (1915); see Barnes v. State, 415 So.2d 1280 (Fla. 2d DCA 1982); Pahl v. State, 415 So.2d 42 (Fla. 2d DCA 1982)."

Failure to permit Appellant to fully cross-examine these witnesses about relevant matters and thus to establish his theory of defense deprived him of a fair trial.

POINT III

WHETHER OR NOT THE COURT ERRED IN ADMITTING WILLIAMS RULE EVIDENCE AGAINST THE CO-DEFENDANT?

The Court admitted evidence co-defendant Irvin Griffin of an earlier conviction for shooting a police officer in Maryland. The jury was properly instructed that the evidence did not relate to Appellant. The subsequent motion for mistrial and to sever was denied.

The evidence at trial tied Appellant and Griffin together as prison inmates in Maryland, as escapees and fugitives on the run. There was evidence of prior convictions, while unrelated, that were so similar as to make it appear to the jury that the two co-defendants at trial were mirror-images of each other.

The evidence of Griffin's prior attempted murder of an officer while a passenger in a vehicle was of such an inflammatory and outrageous nature to prejudice Appellant despite the admonition of the courts curative instructions.

While Williams rule evidence is concededly admissible within the constraints of the rule and case law, the court is required to apply the balancing test of F.S. 90.403(1) and not permit the evidence if the prejudice substantially outweighs the probative value, Chapman v. State, 417 So.2d 1028.

Since the evidence had no probative value as to Jones, any prejudice would necessarily outweigh the probative value, and since the evidence was clearly admissible against Griffin, Jones

was not unlike Rowe and Crum [Rowe v. State, 404 So.2d 1176 (1st DCA 1981), Crum v. State, 398 So.2d 810 (Fla. 1981)] in getting a double portion of prosecution. Appellant received the evidence properly admitted against him and had to contend with the evidence properly admitted against Griffin, with whom his case was joined, soley to accommodate the convenience and expense to the State of separate trials.

> "The existence of prejudice depends upon the facts of each case, and the test to determine prejudice is whether the jury can keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to each. Tillman v. U.S., 406 F.2d 930, 935 (5th Cir.), vacated in part on other grounds, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969)."

The prejudicial spill-over of Williams rule evidence against the co-defendant, prevented Appellant from enjoying a fair trial.

POINT IV

WHETHER OR NOT THE COURT ERRED IN DENYING APPELLANTS USE OF WILLIAMS RULE EVIDENCE INVOLVING STATE WITNESSES SINDY EARLE AND BEVERLY HARRIS?

At trial, counsel for the defense attempted to introduce into evidence the existence of prior convictions against Beverly Harris and Sindy Earle for various charges involving violence against a police officer and for drug related offenses. (R-2458). This evidence was necessary in order to impeach the witness' credibility; in addition, the evidence went to the heart of the defense of this case in that it was vital in order to corroborate defendant's version of the events that led to the eventual murder. The convictions were not introduced to merely cast an unfavorable light on the witness' moral character.

The court informed the defense counsel that evidence of Harris' prior convictions could not be entered as evidence. He would, however, allow evidence to be entered concerning the "acts" which led up to these convictions. This was in error.

According to Ehrhart, F.S. 90.404(2)(b)(2) is equally applicable to evidence offered by a defendant as to that by the prosecution.

Ehrhart on Evidence §409.9 @ p. 124.

F.S. 90.404 states that character evidence is generally not admissible with some exceptions. Exception (c) is that the character of a witness is admissible as provided in §90.608-610.

In Williams, the court commented that the exceptions had

become the rule and the evidence should be admitted if relevant. Williams v. State,110 So.2d 654 (Fla. 1959) cert. den. 361 U.S. 847. See also, Green v. State, 190 So.2d 42 (2d DCA 1966) which analyzed the Williams rule, to mean that evidence of other offenses is admissible if:

1) it is relevant and has probative value in proof of the instant case or some material fact or facts in issue on the instant case;

2) its sole purpose is not to show the bad character of the accused;

3) its sole purpose is not to show the propensity of the accused to commit the instant crime charged;

4) its admission is not precluded by some other specific exception or rule of exclusion.

In Wallace v. State, 41 Fla. 547 and Hair v. State, 428 So.2d 760, we find that interest, motive, and animus are never collateral and cross-examinations are always proper. Likewise 404.9 codifying Williams id states that evidence of other crimes is admissible if it is probative of a material issue other than bad character or propensity.

F.S. 90.404.10 provides that similar fact evidence is admissible to prove identity.

jones testified that State's witnesses Beverly Harris and Sindy Earle knew each other, arranged a drug deal and that Earle shot the officer instead of Appellant. This testimony is con-

sistent with that of Greg Armstrong who testified that the black male with green hospital scrubs on occupied the rear passenger seat. It is also consistent with Carolyn Roberts testimony that Harris arranged the drug purchases in the hours preceding the homicide.

Jones attempted to show as similar fact evidence that Harris and Earle were drug dealers and had been convicted of crimes of violence against police officers. In fact, one intake sheet proffered by Appellant showed Earle's occupation as drug dealer.

These crimes indicated that Earle and Harris have been convicted of the very thing that Appellant testified they were doing and certainly had a motive to testify falsely to impute the crimes to another. The court in Moreno also addressed this issue:

"Neither Williams v. State, supra, nor Section 90.404(2) which codifies Williams, states any new rule of law. Even before Williams, the general rule of evidence was that any fact relevant to the issue is admissible into evidence unless precluded by a specific rule of exclusion. See, e.g., Wallace v. State, 41 Fla. 547, 26 So. 713, 718 (1899); Roberson v. State, 40 Fla. 509, 24 So. 474, 476 (1898); Maikin v. Attorney General of New South Wales (1894) A.C. 57. Essentially, Williams holds that evidence of another crime is irrelevant unless it has direct probatiive value to the crime charged. See Lovely v. United States, 169 F.2d 386 (4th Cir. 1948), which the court in Williams, supra at 655, cites as authority for its rule that the question

to be decided is not whether the evidence tends to point another crime but rather whether it is relevant to the crime charged. Further, it is clear from reading of the entire statute that it applies only to the use of similar crime evidence by the state against the defendant in a criminal trial. It is Section 90.402, Florida Statutes (1979) which applies to this case: it provides that 'All relevant evidence is admissible except as provided by law.'"

Failure to permit this evidence deprived Appellant of any opportunity to support his own testimony with other evidence.

POINT V

WHETHER OR NOT THE COURT ERRED IN DENYING APPELLANTS PROFFER OF PRIOR SWORN TESTIMONY OF BEVERLY HARRIS?

Shortly after the murder of Officer Ponce De Leon, the prosecutor along with police officers took sworn statements from Beverly Harris, who was later called at trial as a State's witness. (R-2838). In fact, she was the only witness who testified that Clarence Jones shot the officer. The judge would not allow this prior inconsistent statement to be entered as evidence on the basis that it was not a statement made during a prior judicial proceeding. (R-2838). That ruling was in error, and prejudicial to the defendant.

Section 90.801, Florida Statutes provides in relevant part as follows:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> (a) Inconsistent with his testimony and was given **under oath subject to the penalty of perjury** at a trial, hearing, or other proceeding or in a deposition.

Prior inconsistent statements which meet the requirements of this section are excluded from the definition of hearsay and are admissible as substantive evidence. Diamond v. State, 436 So.2d 364 (Fla. 3d DCA 1983). Beverly Harris did testify at the trial, so therefore meets the first prong of the test. The

question, then, is whether the prior inconsistent statement was "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition."

A statement not given under oath is inadmissible under F.S. §90.801(2)(a) as substantive evidence. Mazzara v. State, 437 So.2d 716 (Fla 1st DCA 1983). However, the statement given by Beverly Harris to the prosecutor and police was sworn to by her and notarized. It was therefore given under oath and Harris was subject to the penalty of perjury under section 837.012, Florida Statutes.

The remaining question is whether a police interrogation, in which both the police and the state attorney are present, and which is not "a trial, hearing, or ... deposition" comes within the phrase "other proceeding" as used in section 90.801(2)(a). In Diamond v. State, supra, the Third District held that "an inconsistent statement given under oath to a state attorney was admissible as substantive evidence under the statute." In addition, the First District, in Kirkland v. State, 495 So.2d 831 (Fla. 1st DCA 1986), specifically held that a sworn complaint made by victim for express purpose of initiating criminal prosecution, executed in presence of police officer who was also notary, could be said to have been executed in "other proceeding" within meaning of exception to hearsay rule for statements given under oath, subject to penalty of perjury, at trial, hearing, or other proceeding which are inconsistent with testimony of declarant at trial."

(at 832).

Exclusion of Beverly Harris' prior inconsistent sworn testimony was, therefore, improper and prejudicial to the defendant. The prejudice was particularly acute for Appellant due to other rulings of the Court restricting cross-examination of Beverly Harris and Sindy Earle, and the failure of the Court to permit evidence of prior convictions of Beverly Harris and Sindy Earle. These convictions were relevant to show that they were perpetrators of a drug deal and murder as testified about by Appellant.

Since Beverly Harris was one of only two witnesses who claimed to be present at the scene where the murder occurred, her early totally inconsistent testimony as to the description of the weapon was vital to Appellants defense. Thus, it is difficult to imagine how this error could be considered harmless.

Appellant's conviction should be reversed and remanded for a new trial.

POINT VI

WHETHER OR NOT THE COURT ERRED IN PERMITTING EVIDENCE OF AGGRAVATING FACTORS AND INSTRUCTING THE JURY AS TO THOSE IMPROPER AGGRAVATING FACTORS?

According to the evidence, Appellant shot Officer Ponce De Leon at point blank range. Although they were in the parking lot of a laundromat, and therefore in a public place, the only persons present at the time of the shooting were the people inside the car in which Appellant was sitting and the two police officers. There was no one within the line of fire who could have been hurt.

F. S. §921.141(5)(c) reads, "The defendant knowingly created a great risk of death to many persons." According to Kampff v. State, 371 So. 2d 1007(Fla. 1979),

> "Great risk" means not a mere possibility but a likelihood or high probability. The great risk of death created by the capital felon's actions must be to "many" persons. By using the word "many," the legislature indicated that a great risk of death to a small number of persons would not establish this aggravating circumstance. We hold that the trial court erred in finding that the appellant created a great risk of death to many persons.

It could also be argued that the "great risk of death to many persons" would have occurred during the ensuing shoot-out. In determining whether the defendant "created a great risk of death to many," the only conduct that can be correctly taken

into account is that conduct surrounding the felony for which the defendant is being sentenced. Elledge v. State, 346 So. 2d 988(Fla. 1977). Any danger accruing to others as a result of the shoot-out is, therefore, irrelevant.

The evidence shows clearly the Officer Ponce De Leon's gun was stolen after the murder. Since Appellant was already armed, or he could not have shot the victim in the first place, it seems unlikely that the murder was committed for the purpose of stealing the gun or, as the statute puts it, "while the defendant was engaged ... in the commission of, or an attempt to commit ... any robbery" F.S. §921.141(5)(b). The robbery was merely incidental to the murder; it was an after thought, and therefore does not support the finding that the murder was committed during a robbery. Parker v. State, 458 So. 2d 750(Fla. 1984).

The trial court held the burglary of the Black home, following the murder, to be an aggravating circumstance pursuant to F.S. §921.141(5)(b), which deals with prior convictions. Although Appellant was, in fact, convicted of burglary prior to sentencing for the murder, the burglary is an offense that occurred contemporaneously with the murder. In fact, the burglary occurred some time after the murder. According to Meeks v. State, 339 So. 2d 186(Fla. 1976), contemporaneous convictions do not qualify as an aggravating circumstance.

In all fairness, however, it must be noted that the same court has also held that "it was not error to find aggravating

circumstance that defendant was previously convicted of another capital felony or felony involving use or threat of violence to person, even though offenses occurred subsequent to capital felon for which defendant was sentenced." Daugherty v. State, 419 So. 2d 1067(Fla. 1982) (emphasis added). The court goes on to explain that "it is clear from a reading of section 921.141 (5)(b), Florida Statutes (1975), that the legislature referred to 'previous convictions' and not to 'previous crimes.' ... The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance." See also Elledge v. State, 346 So. 2d 998 (Fla. 1977) and Ruffin v. State, 397 So. 2d 277 (Fla. 1981).

We need to look to the widely-held doctrine that states that the court cannot double up aggravating circumstances based on one set of evidence; it must choose only one. Perry v. State, 395 So. 2d 170 (Fla. 1980) is representative of the many cases in support of this doctrine.

Ernest Ponce De Leon was a police officer. By shooting Officer Ponce De Leon, Appellant accomplished several things: He avoided or prevented a lawful arrest or effected an escape from custody; he disrupted or hindered "the lawful exercise of any governmental function of the enforcement of laws. From this same fact, the murder of a police officer, three separate aggravating circumstances apply. The court must choose one; it

cannot apply all three.

It is clear, however, that the following were applied in error:

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

(b) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit ... any robbery ....

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

In Schafer v. State, 537 So. 2d 988 (Fla. 1989), the Supreme Court held that the "trial court's utilization of three improper aggravating circumstances precluded approval of imposition of death penalty, where trial court had found five aggravating circumstances." As in the present case, the court in Schafer found that although there were still two improper aggravating circumstances and no mitigating circumstances, the case was remanded for resentencing. See also Lewis v. State, 377 So. 2d 640 (Fla. 1979).

Appellant demonstrated mitigating factors both statutory and otherwise. The court permitted the jury to consider improper aggravating factors which tipped the scales in favor of death. The sentence of death should be reversed.

POINT VII

WHETHER OR NOT THE COURT ERRED IN SENTENCING APPELLANT WHO IS BORDERLINE RETARDED OR DULL NORMAL TO DEATH?

The death penalty should not be imposed on Appellant due to his low I. Q. and inability to function in society. Appellant's problems stemming from drugs, alcohol, and having to deal with the death of those around him make it a violation of the 8th and 14th amendments to the constitution of the United States. Penry v. Laynaugh, 109 S.C. 2934 (1989).

CONCLUSION

For the arguments stated in Points I-VII above, Appellant respectfully urges that this Court should reverse the judgment and sentence above and order a new trial herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery to Office of the Attorney General, Honorable Robert Butterworth, The Capitol Building, Tallahassee, Florida 32399-1050, on this 23rd day of May, 1990.

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