IN THE SUPREME COURT OF FLORIDA

RANDALL SCOTT JONES,

Appellant,

v. CASE NO. 78,160

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE/ CROSS-APPELLANT

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STATEMENT OF THE CASE AND FACTS

The Appellee accepts the Appellant's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

Point 1: The trial court was not required to conduct a Faretta hearing since Jones never asserted the right to self-representation. The trial court was not required to conduct an inquiry into effectiveness of counsel since all the allegations referred back to the original trial and Mr. Pearl was no longer an honorary deputy. Nevertheless, the trial court conducted an inquiry and determined Jones' motion was insufficient. Mr. Pearl denied the allegations. Counsel was effective at resentencing. The inquiry was adequate.

Point 2: The trial court did not abuse its discretion in denying the second motion to suppress. The suppression issue was raised on direct appeal and decided adversely to Jones. He has raised no new arguments except one that has been decided adversely to Jones by the United States Supreme Court.

Point 3: Jones alleges no new grounds for reconsideration of his pretrial motions and this issue should be decided as previously in Jones v. State, 569 So.2d 1234 (Fla. 1990).

Point 4: The issue regarding a comment an the evidence is waived and has no merit. The trial judge pointed out the obvious on a diagram and called the witness "Chris" which is how the prosecutor and defense counsel had previously referred to the witness.

Point 5: The murder was cold, calculated and premeditated without a pretense of justification.

Point 6: The murder was committed for pecuniary gain where the primary motive was to kill the victims so Jones could take their truck.

Point 7: The trial court did not err in instructing the jury on 1) burglary with assault as a prior violent felony; 2) pecuniary gain and robbery; or 3) shooting into a vehicle as a prior violent felony. The first and third issues are not preserved and the second issue has been decided adversely to Jones on at least three prior occasions.

Point 8: The trial court did not abuse its discretion in allowing the State to present evidence relevant to an aggravating circumstance and to the circumstances of the crime.

Point 9: The trial court did not abuse its discretion in denying a motion for mistrial. and this issue was not preserved for appellate review.

Point 10: The trial court did not abuse its discretion in allowing the State to cross-examine Dr. Krop regarding Jones' background where Dr. Krop opened the door to this questioning. The issue was not preserved for appellate review.

Point 11: The trial court did not err in failing to instruct the jury on "substantially impaired capacity" where this instruction was never requested and Dr. Krop (the defense expert) testified Jones was not substantially impaired. The trial court did not err in rejecting this statutory mitigating circumstance because there was no evidence to support it.

Point 12: The trial court did not err in failing to instruct the jury on specific nonstatutory mitigating circumstances since this instruction was neither requested nor required by case law. The trial court did not err in weighing the nonstatutory mitigation. This was a double murder done for pecuniary gain.

Point 1 on Cross-Appeal: The trial court erred in refusing to appoint a state expert to examine Jones in order to rebut the defense expert regarding mitigating circumstances. This court has held that unless the state presents evidence to rebut the defense evidence, the defense evidence is uncontroverted and must be found in mitigation. By denying the State access to the defendant, the trial court prevented the State from presenting rebuttal evidence and left the State at the mercy of Dr. Krop.

Point 2 on Cross-Appeal: The trial court erred in refusing to instruct on and find the aggravating circumstance of pecuniary gain/during a robbery as to victim Perry. The reason Jones killed Perry was so he could take the truck, i.e. the primary motivation was pecuniary gain. Whether Perry had a financial interest in the truck is irrelevant.

POINT 1

THE TRIAL COURT CONDUCTED AN ADEQUATE INQUIRY INTO THE CONFLICT OF INTEREST ISSUE EVEN THOUGH NONE WAS REQUIRED.

In the original direct appeal, Case No. 72,461, Point X involved whether the trial court erred in denying Howard Pearl's motion to withdraw from the penalty phase (see Initial Brief, Case No. 72,461 pp. 69-75)[1]. The basis of the motion ta withdraw was that the office of the Public Defender represented Kevin Snyder and Edward Tipton on pending criminal charges. Snyder never testified, but Tipton testified at the original penalty phase (Initial Brief p. 74). Tipton did not testify at resentencing, so any conflict issue regarding Tipton is moot.

The basis for Jones' pro se Motion to Dismiss Counsel from resentencing was that Howard Pearl had a conflict of interest because until May 1, 1989 he was an honorary deputy sheriff in Marion County, a county in the Fifth Judicial Circuit (R 11-13). The basis for Mr. Pearl's motion to withdraw was basically irreconcilable differences (R 25-26), On March 11, 1991, the day of jury selection, approximately one month after the hearing on the above two motions, Jones filed a second pro se Motion to Dismiss Counsel based, again, on Howard Pearl's status as an honorary deputy sheriff in Marion County and alleging that, even though Mr. Pearl had relinquished that status in May 1989, he continued to suffer from an extreme legal and emotional conflict

[1] A copy of the point on appeal is attached as Appendix I for the court's convenience.

of interest (R 165-174). In this second motion, Jones made allegations of ineffective representation in the original trial.

The trial judge addressed this second pro se motion before jury selection at which time the State Attorney pointed out that any allegation of ineffectiveness referred to the original trial and not to any deficiency in the present, resentencing, representation (R 284). Mr. Pearl indicated that 1) it might be possible to find a lawyer with whom Jones would be satisfied, and

> 2) "although my advocacy is not diminished, I am not emotionally involved in any case in which I am appointed to represent a defendant. However, I cannot speak, obviously, for my subconscious. I hope that I haven't, in some way, been impaired in my advocacy in a manner that I, myself, am not aware of" (R 287).

The trial judge observed that the record would disclose the advocacy as the record unfolded (R 287). At sentencing Mr. Pearl stated that he believed the case had been infected by a conflict between himself and Jones which "may well have affected its outcome, although, I cannot quantify the extent of the damage" (R 1001). Mr. Pearl renewed his motion to withdraw. The State Attorney then expressed his opinion that Mr. Pearl was as aggressive and effective as ever and that he was shocked that Mr. Pearl would raise the issue (R 1002).

Jones claims the trial court failed to make an adequate inquiry to 1) determine whether there was reasonable cause to believe counsel was ineffective; and 2) advise Jones if trial counsel were discharged the State was not required to appoint substitute counsel.

The State would point out that the allegations in Jones' motions are based on Mr. Pearl's status as an honorary deputy and involve issues at the original trial. Mr. Pearl was not an honorary deputy at the time of resentencing so his status provides no grounds for relief. Claims regarding ineffective assistance at the original proceedings should be raised in a motion for post-conviction relief particularly since the only proceeding currently before this court is the resentencing hearing. See Ventura v. State, 560 So.2d 217, 220 (Fla. 1990).

That Jones did not receive notice of the hearing is irrelevant. In fact, Rule of Professional Conduct 4-4.2 prohibits contact with a person who is represented by counsel. Mr. Pearl apparently received notice since he appeared and did not object to inadequate notice.

Jones relies on Hardwick v. State, 521 So.2d 1071 (Fla. 1988). Hardwick first involved a defendant's request to represent himself and the issue was whether the trial court refused to let him represent himself. Id. at 1074. Jones concedes his motion specifically sought substitute counsel, not the right to represent himself (Initial Brief at p. 13). Jones was not exercising his right to self representation, even equivocally, and no Faretta inquiry was necessary. See Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Furthermore, this court found that the trial court in Hardwick did not err in refusing to dismiss court-appointed counsel.

Second, in Hardwick the defendant raised incompetency of counsel. Under Hardwick, when incompetency is raised, the trial judge should make a sufficient inquiry of the defendant and appointed counsel to determine whether or not there is reasonable doubt to believe counsel is not rendering effective assistance. If there is no reasonable basis, the trial court should so state on the record and advise the defendant that if he discharges counsel the state may not be required to appoint a substitute. Id. at 1075, citing Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973). If the motion to discharge alleges conflict rather than incompetency there is no obligation to conduct the inquiry set out in Nelson. See Johnson v. State, 560 So.2d 1239, 1240 (Fla. 1st DCA 1990), citing Nelson, supra.

Jones' case seems to fit in this last (Johnson) category - that Mr. Pearl was not doing what Jones wanted done insofar as calling witnesses impeaching witnesses, etc., not that he had been ineffective in his investigation or preparation for resentencing. In fact, Mr. Pearl indicated there was a problem with who controlled the case - him or Jones - and that he wanted control of the case and strategy (R 291, 294). No inquiry was required where the situation at resentencing was one of differences between Jones and Mr. Pearl, not that Mr. Pearl was being ineffective.

Nevertheless, the trial court conducted a hearing and inquired of the defendant and Mr. Pearl.

Mr. Pearl denied being a deputy sheriff and expressed indignation at Jones' allegations that his loyalty and character

were compromised (R 151-152). Mr. Pearl also addressed Jones' complaint that he had not received the trial transcript as promised (R 150-151). At sentencing Mr. Pearl also denied the specifics of what evidence was available that was not presented and particularly with respect to the quality of that evidence (R 1019). Jones admits he was given the opportunity to tell the court his complaints (Initial Brief at p. 14). His argument seems to be that the trial court did not ask him whether he wanted to represent himself and he was not advised the State was not required to provide substitute counsel. Jones concedes his objective was never to represent himself and the record shows he never asserted that right (Initial Brief at 13). Although a Faretta inquiry is appropriate when a defendant invokes the right to counsel, it is not appropriate where a defendant asks for new counsel. See Hill v. State, 549 So.2d 179 (Fla. 1989). This court found no error in the Hardwick inquiry even though there was no mention the trial court advised the defendant he may not be entitled to substitute counsel if present counsel were discharged.

Jones also cites Chiles v. State, 454 So.2d 726 (Fla. 5th DCA 1984) and Parker v. State, 423 So.2d 553 (Fla. 1st DCA 1982). In Chiles the defendant's motion was summarily denied which is not the case here. In Parker, the trial court refused to consider the defendant's pro se motion and failed to conduct an inquiry. In the present case, the court considered Jones' motion and did conduct an inquiry. Since Jones' claims were founded on Mr. Pearl's deputy status and he was no longer a deputy, the

claims were no longer viable, Furthermore, the specific claims either relate to the guilt phase of the trial or are incomprehensible. For instance, the claim that "Pearl only called Dr. Harry Krop, a psychologist, which is if not required legally is at least ethically required" (R 38) is incomprehensible. We are not told what character witnesses were not called and how this would have affected the proceedings. The record shows Dr. Krop had no family members to interview (Jones father was dead, his mother abandoned him to his father's care at an early age) but he did talk to Mr. Jeter at the Boys Ranch, Judy Watson, Jones' teacher, and obtained Jones' school, juvenile, psychological and military records (R 817-828). Jones' entire background was presented through Dr. Krop, so it is difficult to ascertain what more Jones wanted presented.

Jones' complaints regarding extradition, request for an attorney in Mississippi, the motion to suppress, impeachment evidence, ballistics expert, Hord's typing ability, nervous breakdown, car working, theory of defense, all were issues in the guilt phase and should be raised in a motion to vacate since they are collateral issues.

In Capehart v. State 583 So.2d 1009 (Fla. 1989) the defendant wrote the trial judge a letter the day after the jury returned a guilty verdict. Capehart complained that counsel did not adequately defend him, spoke like a prosecutor in closing argument, and "misrepresented" him. After a "brief inquiry" the court denied the request for new counsel. Capehart appealed, and claimed the court failed to conduct an adequate inquiry. This court found:

> Without establishing adequate grounds, a criminal defendant does not have a constitutional right to obtain different court-appointed counsel. See Hardwick v. State, 521 So.2d 1071, 1074 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988). Capehart at no time asked to represent himself: His letter indicated only a dissatisfaction with his counsel and the guilty verdict, and it clearly is addressed to the replacement of counsel. The court addressed his allegations in open court and found them to be insufficient. While the better Course would have been for the trial court to inform Capehart of the option of representing himself, see id., we do not find it erred in denying Capehart's request for new counsel.

Id. at 1014.

Similarly, in Ventura v. State, 560 So.2d 217 (Fla. 1990) the defendant claimed the trial court failed to conduct an adequate inquiry into his request for counsel to withdraw. The trial judge responded by letter that Ventura raised insufficient grounds to discharge the Public Defender's office. The Public Defender later filed a motion certifying a conflict. As evidence of the conflict the Public Defender appended copies of pro se motions Ventura had filed. The trial judge held a hearing and Ventura's attorney argued there was a conflict because of inability to form and maintain the attorney/client relationship and that Ventura's false accusations of wrongdoing adversely affected their relatianship. These arguments are almost identical to Mr. Pearl's arguments in the case sub judice (R 25-26). The trial judge in ~~Ventura did~~ not advise the defendant that the State was not required to appoint a substitute attorney although the judge did advise Ventura the attorney he requested could not be appointed because he was not the next on the list

and had worked for the State Attorney when the crime was committed. Id. at 220. In the present case, the trial judge informed Jones he could never appoint anyone else that knows the case as well as Mr. Pearl (R 156) and that another lawyer, no matter how good he was in reviewing records, could never have the feel for the witnesses and the way the case was tried (R 156). The trial judge also observed that he had never known Mr. Pearl's advocacy to be compromised, knew of no one who had Mr. Pearl's expertise in these cases, and knew of no one in Florida that was as up on the law except perhaps the prosecutors, and could not get a better lawyer for Jones, no matter what he did (R 286). The trial judge sub judice, like the judge in Capehart and Ventura, found the defendant's motion insufficient (R 29-30).

Finally, in Bowden v. State, 16 F.L.W. S614 (Fla. Sept. 12, 1991) this court held that Bowden was 1) not entitled to a Faretta inquiry since any request for self-representation was equivocal, and 2) the trial court conducted an adequate hearing in connection with the defendant's request to discharge court-appointed counsel. Id. at S615. Bowden's counsel informed the court there was a breakdown in the relationship and that the defendant had no faith in his representation, The court informed Bowden the lawyers he presently had were the best the defendant would find and he would not let them withdraw. Id. at S616. The Bowden inquiry was strikingly similar to Jones' hearing, and this court held it adequate. A review of the resentencing record shows that Mr. Pearl effectively thwarted the State's efforts to have an expert appointed (R 58-79, see cross-appeal issue), re-

litigated the suppression issue (R 81-82, 137 - the hearing on this was unreported), filed numerous pretrial motions (R 120-140), requested special instructions (R 175-76, 312, 582), objected where appropriate (R 302, 303, 598, 603, 605, 609, 615, 640, 648, 651, 684, 691, 933-35, 949) moved for a mistrial because Jones' statements were used (R 803) presented extensive testimony on Jones' background and mental health (R 813-860, 913-917), moved for a mistrial during the State's closing argument (R 950) and presented an effective closing argument (R 953-65). See Thomas v. Wainwright, 767 F.2d 738, 744 (11th Cir. 1985). There is nothing in the record to indicate Jones could have been better served by other counsel. See Koon v. State, 513 So.2d 1253, 1255 (Fla. 1987[2]. The trial court conducted an adequate inquiry under the circumstances of this case.

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[2] To show a violation of right to conflict-free counsel, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance, Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); Bouie v. State, 559 So.2d 1113 (Fla. 1990). This court has already found that Mr. Pearl had no actual conflict. Harich v. State, 573 So.2d 303 (Fla. 1990). This is particularly true since Mr. Pearl was no longer an honorary deputy. Unlike the defendants in Herring v. State, 580 So.2d 135 (Fla. 1991) and Wright v. State, 581 So.2d 882 (Fla. 1991), Jones has set forth no allegations of ineffective assistance of counsel; the only inference of such conies from a statement by Pearl after the jury recommendation, which has no force or effect. See Routly v. State, 16 F.L.W. 676, 679 n.4 (Fla. October 17, 1991).

POINT 2

THE TRIAL COURT DID NOT ERR IN DENYING THE SECOND MOTION TO SUPPRESS.

Point I on direct appeal from the original trial addressed the issue whether Jones requested an attorney before making statements. This court found that Jones' testimony conflicted with that of three law enforcement officers and with his awn written statements wherein Jones represented he neither requested advice from, nor the presence of, an attorney at any time before making the statement. Jones v. State, 569 So.2d 1234 (Fla. 1990).

Trial counsel filed a Second Motion to Suppress Statements (R 36). At the motions hearing, Mr. Pearl filed a docket sheet showing Jones had been appointed a Public Defender on an unrelated charge prior to questioning on the murder charge (R 81). Mr. Pearl also cited Walker v. State, 573 So.2d 415 (Fla. 5th DCA 1991) to support his motion (R 82). The motion was heard at an unreported hearing and denied (R 137-138). The trial court's order demonstrates that the Public Defender's representation terminated July 14, 1987 and Jones' statements were taken August 17 and 20, 1987 (R 137). The trial court ruled Walker inapposite. It appears the basis of the Second Motion to Suppress was that Jones had been appointed a Public Defender on an unrelated case, thus invoking his sixth Amendment right to counsel. This issue was recently resolved against Jones' position in McNeil v. Wisconsin, ___ U.S. ___, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). Furthermore, the respresentation of the

Public Defender ended on July 14, 1987 and Jones' statements were not made until August 17 and 20, 1987 (R 202, 211).

The trial court did not abuse its discretion in denying the motion to suppress. Reichmann v. State, 581 So.2d 133 (Fla. 1991); Medina v. State, 466 So.2d 1051 (Fla. 1985).

POINT 3

THE TRIAL COURT DID NOT ERR IN DENYING PRETRIAL MOTIONS,

Jones recognizes this court has previously denied relief on the motions at issue, but urges the court to reconsider its ruling. He alleges neither additional grounds nor provides additional case law. This court's rulings on the issue are correct and should not be reconsidered.

POINT 4

THE TRIAL COURT DID NOT COMMIT FUNDAMENTAL ERROR BY COMMENTING ON TESTIMONY AND THIS ISSUE WAS NOT PRESERVED FOR APPELLATE REVIEW.

Jones claims the trial court conveyed preferential treatment to Christopher Reesh by calling him "Chris" and by stating "that's correct, according to the previous witness, Mr. Stout" when the prosecutor stated "I believe this is the bathrooms" referring to a diagram.

There was no objection and the issue is waived. Castor v. State, 365 So.2d 701 (Fla. 1978).

The judge's comment on where the bathrooms were is not a comment on the evidence but rather a statement on a trivial issue which was apparent from the diagram.

Chris Reesh was referred to as "Chris" throughout the proceeding and before the trial judge called him "Chris" (R 588, 714, 715, 722, 726, 727, 728, 733, 735, 736, 737, 738, 739, 740, 741). Similarly, Randall Jones was referred to as "Randy" (R 589, 710, 712, 718, 734, 738, 754).

The trial judge did not make an impermissible comment on the evidence. See Gaskin v. State, 16 F.L.W. 5762 (Fla. December 5, 1981).

POINT 5

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON COLD, CALCULATED AND PREMEDITATED,

Jones admits this court affirmed the application of the aggravating circumstance cold, calculated and premeditated but argues the state did not prove this aggravating circumstance. The record shows that Jones made a conscious decision to shoot both victims, approached the truck for that purpose, wiped off the window, and coldly fired into the truck three times at close range, shooting both victims in the head,

The state presented Jones's statements in which he described the murders and drew a diagram (R 726, 736-37). Jones and Reesh hung out about one-half hour talking about waking the victims, then Jones told Reesh he was going to shoot the victims so they could use their truck. Jones shot through the window three times, hitting the man two times and the woman once after she started moving (R 203). The state also presented Chris Reesh who testified Jones told him he was going to shoot whoever was in the truck (R 736). Jones wiped off the window and fired into the truck (R 760).

This case was clearly cold, calculated and premeditated. See Gaskin v. State, 16 F.L.W. S762 (Fla. Dec. 5, 1991); Asay v. State, 580 So.2d 610 (Fla. 1991); Bruno v. State, 574 So.2d 76 (Fla. 1991); Gunsby v. State, 574 So.2d 1085 (Fla. 1991); Hayes v. State, 581 So.2d 121 (Fla. 1331); Robinson v. State, 574 So.2d 108 (Fla. 1991). Jones however, claims he had a "pretense" of justification because he thought he was justified. Any mental

problem Jones might have would be relevant to mitigation, but there was no testimony his mental state was so disturbed he could not premeditate. There was no pretense of justification for this murder. See, Klokoc v. State, 16 F.L.W. 5756 (Fla. Nov. 27, 1991); Cruse v. State, 16 F.L.W. 701 (Fla. Oct. 24, 1991).

Cold, calculated, and premeditated has been defined as a careful plan or prearranged design to kill. Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). Florida law requires that, before a murder can be deemed cold, calculated, and premeditated, it must be committed without any pretense of moral or legal justification. §921.141(5)(i), Fla. Stat. (1985). Past decisions of this court have established general contours for the meaning of the word "pretense" as it applies to capital sentencings. This court has found that where a colorable claim exists that the murder was motivated out of self-defense, albeit in a form clearly insufficient to reduce the degree of the crime, there is a pretense of moral or legal justification, see Cannady v. State, 427 So.2d 723, 730-31 (Fla. 1983); Banda v. State, 536 So.2d 221, 225 (Fla. 1988); Christian v. State, 550 So.2d 450 (Fla. 1989), except where the evidence shows that the victim had never been violent or threatening and was attacked by surprise. Williamson v. State, 511 So.2d 289, 293. Such pretense has been found where a victim jumps out at a defendant, Cannady, supra, at 730-31, or is violent and made threats against a defendant. Banda, supra at 225. Existing caselaw reflects that such pretense of justification must rebut the otherwise cold and calculating nature of the homicide. Banda, supra, at 225. The

offered pretense in this case not only **does not** do so but is without record support. It is clear that where a claimed "pretense" is wholly irreconcilable with the facts of the murder, the finding of this aggravating factor will be upheld. Williamson v. State, 511 So.2d 289, *293* (Fla. **1987).**

Where a murder is motivated out of self-defense the cold, calculated and premeditated aspects of the murder are rebutted. This court has never held, however, that mental states such as anger or irrationality are sufficient to rebut or negate a finding that a murder is cold, calculated and premeditated. Even if cases of unjustified self-defense the "calculated" and "premeditated" **aspects** of the crime cannot be negated, see, Christian v. State, 550 So.2d 450 (Fla. 1989), the trial court found:

> This aggravating factor has been proven beyond a reasonable doubt by the state.
>
> The Defendant's car became stuck in sand pits while he **was** target practicing with a high **powered** rifle. **He** happened upon Matthew Paul Brock **and** Kelly Lynn Perry sleeping in a truck at the Rodman Reservoir, near the sand pits. Jones had previously asked another individual to assist him in freeing his car, but this person was unable to **help** him. Jones was determined not to be turned down again. He approached the victims' truck, calmly wiped away the moisture on. the window, aimed and, at close range, shot Matthew Paul Brock in the **face** twice, execution style, and Kelly Lynn Perry directly between the ***eyes.*** Both victims had been sleeping. Jones' sole purpose for murdering the victims was to use the truck to extricate his car from the sand pits.
>
> There .is not even a hint of reason, justified ok unjustified, for these senseless murders. The Defendant's expert witness testified that the Defendant regarded the two victims as part of a world that had continually rejected him; one that

> would not reject him again. This is hardly a moral or legal justification for murdering two defenseless human beings.

(R 254-55). The trial court's findings are supported by competent substantial evidence, Reichmann v. State, 581 So.2d 133 (Fla. 1991).

POINT 6

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY IT COULD CONSIDER PECUNIARY GAIN AS TO VICTIM BROCK.

This court affirmed the application of the aggravating circumstance "pecuniary gain" when this case was before the court on direct appeal. Jones v. State, 569 So.2d 1234, 1238 Fla. 1990). This aggravating circumstance was found only as ta victim Brock who owned the vehicle (R 253), although it should have also been found as to victim Perry since she was also killed for the purpose of obtaining the truck (see Point 2 on Cross-Appeal). Jones now argues that he killed the victims because he only wanted to use the truck and the idea of keeping and selling the truck only arose after he had taken it to extricate the vehicle that was stuck in the sand. The purpose of the killing was to obtain the truck. This is pecuniary gain. Whether Jones kept the truck or tried to sell it is indicative of, but not dispositive of, the motivation. When Jones took the truck by force it was robbery and the taking (not necessarily the keeping or selling) by itself supplies the prerequisite intent for the aggravating circumstance pecuniary gain.

Jones' cases are not applicable. Here the taking was the purpose of the killing, not an afterthought. In Hill v. State, 549 So.2d 179 (Fla. 1989) the defendant committed the murder in the course of an attempted. sexual battery and there was insufficient evidence the defendant had planned to take the victims' billfold. Id. at 183. The record in Peek v. State, 395 So.2d 492, 499 (Fla. 1981) did not support the conclusion the

victim was murdered to facilitate a theft and the more reasonable inference was the defendant stole the car in order to escape. Peek also involved a sexual battery. Similarly, in Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988) the record did not support the conclusion the victim was murdered for her car.

In the case sub judice the trial court found this aggravating factor has been proven beyond a reasonable doubt by the State:

> Testimony and statements made by the Defendant and admitted in evidence at trial demonstrate that the murders were committed to effect the robbery of Matthew Paul Brock's pickup truck. The value of the truck was in *excess* of four thousand (4,000.00) dollars. The Defendant stole the vehicle after murdering its occupants and was attempting to sell it when apprehended by law enforcement personnel in Mississippi. The Court recognizes that this aggravating factor must be taken in conjunction with the previous factor and the Court has considered these two aggravating circumstances as a single aggravating factor.

(R 254).

This aggravating circumstance was merged with the aggravating circumstance of "committed during a robbery" so even if it were stricken, the aggravating circumstance would still be applied. Jones does not contest the murder was committed during a robbery.

In any case, the murder was committed for pecuniary gain. Jones stated he was going to kill the victims so he could use their truck (R 203). After he killed the victims, he took the truck (R 203). After they pulled the vehicle from the sand, Jones returned to the crime scene (R 204). Jones then drove the truck to Mississippi where he was arrested, He made no statement

indicating it was not his intention to keep the truck. To the contrary, he had lost his job and returned to the Lighthouse home where he had lived for a year and one-half (R 216, 829). The logical inference is that Jones intended to take and keep the truck to leave Palatka since he had just broken up with his girlfriend and lost his job (R 836-37). See Gilliam v. State 582 So.2d 610 (Fla. 1991). The State also presented evidence Jones wanted to sell the truck (R 690). The trial court's finding was supported by competent substantial evidence. See Henry v. State, 586 So.2d 1033 (Fla. 1991); Reichmann v. State, 581 So.2d 133 (Fla. 1991).

POINT 7

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY.

Jones raises three instances of alleged **error.**

1. Instructing the jury they could consider Jones had previously been convicted of a violent felony.

The trial court **instructed:**

> The aggravating circumstances that you may consider as to the murder of Kelli Lynn Perry are limited to any of the following that are established by the evidence. First, the defendant has been previously **convicted** of another capital offense or of a felony involving the use or threat of violence to some person. The crime of murder of the first-degree of Matthew Brock is a capital felony. The crimes of robbery, burglary while armed, with assault or shooting a deadly missile into an occupied conveyance are felonies involving the use of violence to another person. * * *
>
> The aggravating circumstances that you may consider as to the murder of Matthew Paul **Brock** are limited to any of the following that are established by the evidence. First, the defendant has been previously convicted of some other capital offense or of a felony involving the use or threat of violence to some person. The **crime** of first-degree murder against Kelli Lynn Perry is a capital felony. The crimes of burglary while armed, with assault, and shooting ok throwing a deadly missile into an occupied conveyance are crimes of violence against another person.

(R **967-68).**

Jones claims the instruction regarding **the** burglary with assault was error. Defense counsel objected to giving the instruction because the two murders were simultaneous but not on

the basis now presented, so the issue is waived. Henry v. State, 586 So.2d 1033 (Fla. 1991); Tillman v. State, 471 So.2d 32 (Fla. 1985). Although it is improper to utilize a contemporaneous felony as an aggravating circumstance when that felony is committed upon the same person that was murdered, Schafer v. State, 537 So.2d 988, 991 (Fla. 1989), it is not error to apply this aggravating circumstance when there are two victims. Wasko v. State, 505 So.2d 1314, 1317 (Fla. 1987). Even if the trial court shouldn't have instructed that the burglary with assault was a prior violent felony, it was harmless since the contemporaneous capital felony (the murder of both Bock and Perry) supplied the basis for this aggravating circumstance. See, Gaskin v. State, 16 F.L.W. S672 (Fla. Dec. 5, 1991); Zeigler v. State, 580 So.2d 127 (Fla. 1991); Tafero v. State, 561 So.2d 557 (Fla. 1990); Cook v. State, 542 So.2d 964 (Fla. 1989); LeCroy v. State, 533 So.2d 750 (Fla. 1989).

2. Doubling the aggravating circumstance of "pecuniary gain" and "committed during a robbery."

Jones claims that the trial court erred in instructing the jury they *may* consider both pecuniary gain and committed during a robbery (R 968-69). Defense counsel objected (R 935). The trial judge merged the robbery and pecuniary gain aggravating circumstance[3] (R 253-54). It was not error to instruct that the jury *may* consider either or both aggravating circumstance. Valle

[3] This aggravator was applied only to victim Brock.

v. State, 581 So.2d 40 (Fla. 1991); Hayes v. State, 581 So.2d 121 (Fla. 1991); Suarez v. State, 481 So.2d 1201 (Fla. 1985).

3. Shooting into a vehicle as an aggravating circumstance

Jones claims defense counsel objected to the use of "shooting into an occupied vehicle" for purposes of aggravation. The record cite provided shows that the only objection made was to using the contemporaneous capital felony as aggravation (R 1004-1007). This issue is waived. See, Henry, Tillman, supra. The issue has no merit for the reasons stated in section 1 herein.

POINT 8

THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO PRESENT TESTIMONY REGARDING A DEFENSIVE WOUND.

Jones claims the trial court erred in allowing the state to permit testimony regarding a defensive wound. There was no objection to this testimony which consisted of two sentences (R 779), a question regarding trajectory (R 782), and a question regarding stippling (R 784). The issue waived. Bertolotti v. Dugger, 514 So.2d 1095 (Fla. 1987). Defense counsel also asked questions regarding the wound (R 788, 791-95).

In Jones v. State., 569 So.2d 1234, 1238 (Fla. 1990), this court held that the trial court erred in giving the aggravating circumstance of heinous, atrocious and cruel since the record reflected no evidentiary support for this instruction. Resentencing proceedings are completely new proceedings. Hitchcock v. State, 578 So.2d 685, 693 (Fla. 1990). Although the state was precluded from arguing the murder was heinous, atrocious and cruel based on the sexual battery, this did not preclude them from trying to establish that aggravating circumstance by showing victim Perry was aware of Brock's death and tried to protect herself from a similar demise. Fear and emotional strain have long been recognized as contributing to the aggravating circumstance of heinous, atrocious and cruel. Hitchcock, supra at 693. The prosecutor told the trial judge he wanted to try to establish the aggravating circumstance of heinous, atrocious and cruel through testimony that victim Perry had a defensive wound (R 504). The trial. judge stated:

> I think you have the right to try to present evidence, argue any aggravators provided by statute. The fact that it didn't get done sufficiently for the supreme court the last time, does not preclude, in my judgment, your attempting to do it this time.

(R 505).

This is a correct statement of the law. As Jones concedes, the jury was not instructed on heinous, atrocious and cruel, nor did the trial court find this aggravating circumstance was established, so error, if any, was harmless, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Furthermore, the testimony was relevant to the trajectory and stippling questions so would have been admissible under the court's wide discretion. See, Chandler v. State, 534 So.2d 701, 703 (Fla. 1988). Jones has failed to show the trial court abused its discretion, Gaskin v. State, 16 F.L.W. S672 (Fla. Dec. 5, 1991).

POINT 9

THE TRIAL COURT DID **NOT** ERR IN DENYING THE MOTION FOR MISTRIAL.

Jones claims the prosecutor's statement for the jury to think about **the** effect the five seconds the murder took had on Chris Reesh's life was grounds for a mistrial. Defense counsel objected on the ground that the state was appealing **for** sympathy and asking the jury to consider the effect of the homicides on a third person who had **no** connection to the case. This does not **appear** to be an objection based on victim impact so any Booth[4] error is waived. Reichmann v. State, 581 So.2d **133** (Fla. **1991**); Bertolotti v. Duqqer, 514 So.2d 1095 (Fla. 1987). Even if it were a Booth objection, that case has been refined by Payne v. Tennessee, ___ U.S. **111** S.Ct. 2597, **115 L.Ed.2d 720 (1991).** Further, **Chris Reesh** was not a victim or related in any way to the victims. In the cases **cited** by **Jones,** this court did not find reversible error. Bertolotti v. State, 476 So.2d 130 (Fla. 1985); Jennings v. State, 453 So.2d **1109** (Fla. **1984**); Rhodes **v. State, 547** So.2d **1201** (Fla. **1989).**

Prosecutorial error alone **does** not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial they **can** never be treated as harmless, State v. Murray, 443 So.2d 955, 956 (Fla. 1984); Rhodes, supra at 1203; Bertolotti, supra at 133. The trial court did not abuse its

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[4] See, Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, **96** L.Ed.2d 440 (1987).

discretion in denying the motion for mistrial. Sireci v. State, 587 So.2d 450 (Fla. 1991).

POINT 10

THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO CROSS-EXAMINE DR. KROP REGARDING JONES RECORDS WHICH WERE USED IN ARRIVING AT A DIAGNOSIS.

Defense counsel advised the court and prosecutor he was not seeking the statutory mitigating circumstance "no previous significant criminal history'' and would think the defendant's criminal history was no longer relevant (R 858). The prosecutor advised the court he had information that Jones was hospitalized at age eleven or twelve as having some degree of depression. At that time he tried to burn his parents' house down (R 858). Three or four weeks later Jones was back in the hospital with depression after he was caught chasing a child with a hatchet (R 859). The court advised counsel:

> The only thing I can tell you, counsel is, that the witness has testified that he had all these medical records and he's based a lot of his opinions on them. Mr. Pearl knows about it. If you think you need to get into it, 1 don't see any real problem with it.
>
> MR. WHITSON: Thank you, Judge.
>
> THE COURT: I mean, legally, I don't see any real problem with it and you're the strategist in the case, so I don't have any business interfering your strategy.
>
> MR. WHITSON: Such as it is.
>
> MR. PEARL: Who knows, hopefully, we might skirt even close to a mistrial based on prosecutorial misconduct. I don't know where we're going to *go* with this.
>
> THE COURT: That's the prosecutor's problem, isn't it?

MR. PEARL: Yes sir.

(R 859). The State does not consider this an objection to the testimony and the issue is waived. Bertolotti v. Duqqer, 514 So.2d 1095 (Fla. 1987). The record shows that the defense presented testimony from Dr. Krop that he had considered Jones juvenile, psychological and psychiatric history (R 817-820). Dr. Krop testified Jones had mood swings, primarily depression, throughout his life and that evaluations since age eleven showed depression (R 822). When Jones was eleven he was hospitalized for three weeks, then one month later was hospitalized again (R 828-29). Dr. Krop diagnosed Jones as having borderline personality disorder (R 832). On cross-examination the State questioned Dr. Krop about a prior diagnosis that indicated Jones had an antisocial personality disorder (R 869). The prosecutor asked questions regarding Jones background and the materials the witness had reviewed (R 872-77). Dr. Krop denied the fact there were numerous references in the records of fights and physical altercations (R 878). It was at this point the prosecutor asked Dr. Krop whether the records showed Jones threatened a child with a hatchet and tried to burn his parents' house down.

Although Jones claims the State cross-examined Dr. Krop "extensively" about the house-burning and hatchet-chasing incidents, the record shows the following:

> Q. In your review of the records concerning Mr. Jones, isn't it a fact, Dr. Krop, that there were numerous references to fights and physical altercations that Mr. Jones would get into?

A. There are references, not necessarily for fighting. There were references to lying, and there were references to stealing. I don't recall a whole lot of references to fighting.

Q. Well, wasn't one of his hospitalizations as a result of his parents' concern for him having chased one of his neighbor kids, at a Boy Scout camp, with a hatchet?

A. According to the records, there was an accusation made at a Boy Scout camp, that he had threatened one of his peers with a hatchet. I was not aware that there was actually a fight involved.

Q. Now, on the first hospitalization, Dr. Ksop isn't it a fact that the parents were concerned about his behavior in striking the house upon fire while they were in it, asleep one night?

A. That's true,

(R 878-79). These was no contemporaneous objection and the issue is waived. Castor v. State, 365 So.2d 701 (Fla. 1978); Bertolotti, supra.

The cross-examination was proper since Dr. Krop had testified regarding Jones' mental history and had diagnosed him as having a borderline personality disorder. The state was entitled to explore that diagnosis, which is exactly what the prosecutor was doing at the time of the alleged error. A few sentences later, Dr. Krop was asked to examine the diagnostic criteria of antisocial behavior in the DSM-IIIR (R 881). The diagnostic criteria included "often initiated physical fights," "used a weapon in more than one fight," and "engage in fire

setting" (R 882). The questions asked were proper cross-examination, particularly since the defense opened the door with Dr. Krop's testimony regarding Jones' background. See Holton v. State, 573 So.2d 284, 288 (Fla. 1991). Mills v. State, 462 So.2d 1075, 1079 (Fla. 1985); McCrae v. State, 395 So.2d 1145, 1152 (Fla. 1980); Hernandez v. State, 569 So.2d 857 (Fla. 2d DCA 1990); Ashcraft v. State, 465 So.2d 1374, 1375 (Fla. 2d DCA 1985).

Error, if any, was harmless. The information regarding Jones setting his parents' bedroom on fire was contained in Jones' statement which was read *to* the jury prior to Dr. Krop's testimony (R 205). The hatchet incident was no more prejudicial than the other incidents of childhood behavior about which Dr. Krop testified.

POINT 11

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT AND FAILING TO FIND "SUBSTANTIALLY IMPAIRED CAPACITY" WHERE THERE WAS NO EVIDENCE TO SUPPORT THIS MITIGATING CIRCUMSTANCE.

Jones concedes that his own expert, Dr. Krop, testified he was not substantially impaired. (R 850-52) but claims the trial judge should have instructed on this statutory mitigating circumstance and should have weighed this mitigating circumstance in imposing sentence.

At the charge conference, defense counsel requested an instruction on the "extreme emotional disturbance" statutory mitigator but not on "substantially impaired capacity" and this issue is waived (R 926-28). Henry v. State, 580 So.2d 1033 n.6 (Fla. 1991); Bertolotti v. Dugger, 514 So.2d 1095 (Fla. 1987). Defense counsel did not object to the instructions before the jury retired, so this issue may not now be raised. Fla.R.Crim.P. 3.390(d)[5].

Although Jones claims there was evidence presented on this statutory mitigating circumstance, Dr. Krop specifically stated Jones was not substantially impaired (R 850). In Stewart v. State, 558 So.2d 416, 420 (Fla. 1990) this court found that there was no evidence presented to support a standard instruction on extreme disturbance, but there was testimony to support a standard instruction on impaired capacity. Here, the testimony

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[5] The court inquired whether there were any objections other than those previously noted (R 983). The only instruction previously requested by the defense was on "extreme mental or emotional disturbance" (R 926-28). The trial court's failure to instruct on "extreme emotional disturbance" is not raised on appeal.

negated the existence of the "substantially impaired capacity" and Jones falls into the first category in Stewart - that of no evidence to support the instruction, particularly when one was not requested.

Bath Dr. Krop's testimony and the circumstances of the crime show Jones was able to appreciate the criminality of his actions and was not substantially impaired, There was no drug or alcohol involved (R 205, 848). Jones made the decision to kill the victims so he could use the truck and proceeded to coldly, methodically carry out that plan. He cleaned the truck, pawned the rifle and left the state (R 213-215). Dr. Krop did present testimony which was the basis for the trial court considering four nonstatutory mitigating circumstances and the jury was instructed it could consider "any other aspect of the defendant's character or record and any other circumstances of the offense (R 257, 969).

Jones also faults the trial caurt for not finding "substantially impaired capacity". The trial court considered this mitigating circumstance a5 follows[6]:

> This mitigating factor has not been proven by a preponderance of the evidence. According to Dr. Xrop, the Defendant, although suffering from borderline personality disorder, was not so substantially impaired that he could not appreciate the criminality of his actions. Even if the Court were to assume, arguendo, that this factor has been proven, it would provide little mitigating value in light, of the

[6] The trial court entered findings for each victim. This section is the same for both victims,

> circumstances of these crimes and would not outweigh any one of the aggravating factors standing alone,

(R 256, 263).

This court recently outlined the procedure to be followed in considering mitigation:

> A mitigating circumstance must be "reasonably established by the greater weight of the evidence." Campbell v. State, 571 So.2d 415 (Fla. 1990); see also Fla. Std. Jury Instr. (Crim) at 81; Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. *See* Campbell. Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. A trial court may reject a defendant's claim that a mitigating circumstance has been proved, however, provided that the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances," Kight v. State, 512 So.2d 922, 933 (Fla. 1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988); Cook v. State, 542 So.2d 964, 971 (Fla. 1989)(trial court's discretion will not be disturbed if the record contains "positive evidence" to refute evidence of the mitigating circumstance); *see* also Pardo v. State, 563 So.2d 77, 80 (Fla. 1990)(this Court is not bound to accept a trial court's findings concerning mitigating if the findings are based on a misconstruction of undisputed facts or a misapprehension of law).

Nibert v. State, 574 So.2d 1059, 1061-62 (Fla. 1990).

Substantially impaired capacity was not established by the greater weight of the evidence. In fact, Jones' own expert testified this statutory mitigating circumstance did not exist. The trial court's rejection of this mitigating circumstance was supported by substantial competent evidence. *See* Sireci v. State, 587 So.2d 450 (Fla. 1991); Maquiera v. State, 16 F.L.W. S599 (Fla. Aug. 29, 1991); Shere v. State, 579 So.2d 86, 96 (Fla. 1991); Ponticelli v. State, 16 F.L.W. S671 (Fla. Oct. 10, 1991); and Bruno v. State, 574 So.2d 76 (Fla. 1991). Even if this factor had been found, the trial court stated it would not outweigh even one aggravating circumstance (R 256, 263).

POINT 12

THE TRIAL COURT DID NOT ERR IN FAILING *TO* INSTRUCT ON OR WEIGH *NONSTATUTORY* MITIGATING CIRCUMSTANCES.

Jones argues that the trial court should have instructed the jury on the individual nanstatutory mitigating circumstances to which **Dr.** Krop testified. Defense counsel did not request the jury be instructed as Jones now requests, and this issue is waived. Henry **v.** State, 587 So.2d 1033 n.5 (Fla. **Aug.** 29, 1991).

Furthermore, this **court** has repeatedly held the trial court is not required to instruct an each nonstatutory mitigating circumstance on which any evidence is presented. Randolph v. State, ***562*** So.2d 331, **339** (Fla. 1991); Jackson v. State, 530 So.2d 269, 273 (Fla. **1988).**

Jones also claims the trial court erred in the weight to be given the nonstatutory mitigation presented. The trial court found' :

> This Court has considered all the evidence with reference to consideration of nonstatutory mitigating circumstances including, but not limited to, those hereafter set forth and finds said factors even if proven would not outweigh any one of the aggravating factors standing alone.
>
> **Dr. Krop** set forth. four nonstatutory mitigating circumstances for consideration, three of which are interrelated. Dr. Krop testified that as a result of the Defendant's emotionally deprived and neglectful childhood, he suffers from borderline personality disorder and this disorder

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[7] Separate findings were made for each victim. This section is the same for both victims.

impairs his coping skills. There is no doubt that the Defendant's childhood was not perfect but many persons given worse situations have become great leaders, A less than utopian existence is no **excuse** or mitigation for two assassination-type murders, Furthermore, Dr. Krop testified that despite an impairment in coping skills, the Defendant **knew** what he was doing, knew the consequences of his actions and could distinguish between fantasy and reality. Absent a showing of significant deprivation and/or abuse to the Defendant or extreme emotional disturbance, the Court finds little mitigation value given the circumstances of these offenses.

Finally, Dr. Krop testified that the Defendant has the ability to be rehabilitated because of his age, intelligence, lack of a significant history of alcohol or drug-related problems and the fact that he has admitted his culpability for the murders. The Court does not dispute the fact that the Defendant is an intelligent young man, but the Defendant originally denied. culpability until confronted by law enforcement personnel with facts learned from Chris Reesh and other persons, facts that were inconsistent with his original statement. The Court finds that the Defendant's history demonstrates that he is not capable of rehabilitation, Despite extensive psychological assistance and a supportive family (since the age of five years), he murdered **two** young people while **they** slept merely to obtain possession of a truck.

THEREFORE, this Court having considered the aggravating factors proven by the state beyond a reasonable doubt and all mitigating factors established by the defense, along with all other relevant testimony and argument as to statutory and nonstatutory mitigating factors, this Court does hereby find, by law and evidence, that said mitigating factors do not outweigh the aggravating factors

> found to exist. In fact, any of the aggravating factors found to exist would outweigh all mitigating factors; statutory and nonstatutory.

(R 257-58, 264-66).

The trial court considered all the nonstatutory mitigation, carefully weighed the mitigating circumstances and entered a detailed order. The decision as *to* whether a particular mitigating circumstance is established lies with the judge. Reversal is not warranted simply because an appellant draws a different conclusion. Sireci v. State, 587 So.2d 450 (Fla. 1991) citing Stana v. State, 460 So.2d 890, 894 (Fla. 1984). See also Downs v. State, 572 So.2d 895 (Fla. 1990); Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991); Gilliam v. State, 582 So.2d 610, 612 (Fla. 1991); Hayes v. State, 581 So.2d 121, 127 (Fla. 1991); Valle v. State, 581 So.2d 40, 49 (Fla. 1991).

CROSS-APPEAL

ARGUMENT

POINT 1

THE TRIAL COURT ERRED IN DENYING THE STATE'S MOTION TO APPOINT A MENTAL HEALTH EXPERT AND ORDER A MENTAL HEALTH EXAMINATION OF JONES AND IN DENYING THE STATE'S MOTION TO STRIKE DR. KROP'S TESTIMONY.

The State filed a Motion to Appoint Mental Health Expert for the Purpose of Capital Sentencing Proceeding and to Order Mental Health Examination of the Defendant (R 118-119). The State requested that Dr. Mhatre be appointed to assist the State in the sentencing phase since he had previously examined the defendant. The defendant had a mental health expert, Dr. Krop, appointed to assist in presenting potential mental health mitigation evidence (R 118). The motion was heard on February 28, 1991 (R 58-83). At the hearing the State argued that it was entitled to appointment of an expert to examine the reports of the defense expert and to interview the defendant to *see* whether he agreed with the defense expert's findings. Since the defendant put his mental health at issue the State should be allowed to rebut any testimony (R 60).

The trial judge stated that the State could go out and hire all the experts they wanted to help them prepare their case and review the potential testimony of the defense experts, but they had no right to have the defendant examined (R 77). The motion was denied (R 112-13).

After Dr. Krop testified, the State moved to strike his testimony because the State was deprived of **equal** protection, and the State was denied the opportunity to rebut Dr. Krop's testimony (R 856). The motion to strike was denied (R 856).

Dr. Krop was appointed pursuant to Florida Rule of Criminal Procedure 3.216(a) to determine competency, sanity and the existence of mitigating circumstances (TT 21)[8] Rule 3.216(d) provides:

> **(d)** Upon the filing of such notice the court may, on its own motion, and shall upon motion of the State or the defendant, order that the defendant be examined by no more than three nor fewer than two disinterested, qualified experts as to the sanity or insanity of the defendant at the time of the commission of the alleged offense or probation or community control violation. Attorneys for the State and defendant may be present at the examination. Such examination should take place at the same time as the examination into the competence of the defendant to proceed, if the issue of competence has been raised.

Rule 3.216 does not provide for mental health assistance for the purpose of exploring mental health mitigation. However, this court has held a capital defendant is entitled to an appointed psychiatrist to determine whether mitigating circumstances exist. Perri v. State, 441 So.2d 606 **(Fla. 1983).**

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[8] "TT" is a cite to the original trial transcript from the record on appeal #72,461.

Rule 3.216 specifically provides that the State has an interest in the proceedings and is entitled to participate. Since Rule 3.216 has been extended to afford a defendant the right to mental health assistance in developing mitigation, it should likewise be extended to afford the right to participate in the examination. Case law supports this position.

In Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed. 359 (1981) the defendant asserted the insanity defense. The United States Supreme Court noted:

> When the defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist, See e.g., United States v. Cohen, 530 F.2d 43, 47-48 (CA5), cert. denied, 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed.2d 130 (1976); Karstetter v. Casdwell, 526 F.2d 1144, 1145 (CA9 1976); United States v. Bohle, 445 F.2d 54, 66-67 (CA7 1971); United States v. Weiser, 428 F.2d 932, 936 (CA2 1969), cert. denied, 402 U.S. 949, 91 S.Ct. 1506, 29 L.Ed.2d 119 (1971); United States v. Albright, 388 F.2d 719, 724-725 (CA4 1968); Pope v. United States, 372 F.2d 710, 720-721 (CA8 1967) (en banc), vacated and remanded on other grounds, 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317 (1968)[9].

[9] On the same theory, the Court of Appeals here carefully left open "the possibility that a defendant who wishes to use psychiatric evidence in his own behalf [on the issue of future dangerousness] can be precluded from using it unless he is [also]

Id. at 465.

In Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987) the United States Supreme Court acknowledged that in Smith the court recognized that when a defendant presented psychiatric testimony "then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution." Buchanan, 483 U.S. at 422-23.. The defendant in Buchanan was trying to establish he had an extreme emotional disturbance. The court held that the State (Commonwealth) could not respond to the defense unless it presented ether psychological evidence, and that introduction of the report for rebuttal purposes did not constitute a Fifth Amendment violation. Id. at 424.

Bannister v. State, 358 So.2d 1182 (Fla. 2d DCA 1978) involved a situation in which the state sought permission from the trial court to have a psychiatrist examine a defendant who was relying on the insanity defense. The Court observed that:

> Under Rule 3.210[10] when a defendant raises the defense of insanity at the time of the offense the court must allow the state attorney's psychiatric expert witness access to the defendant for examination and

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willing to be examined by a psychiatrist nominated by the state." 602 F.2d, at 705. (NOTE: This footnote is from note #10 in the opinion)

[10] The appointment of experts provisions of Rule 3,216 is designed to track the provisions of Rule 3.210. Committee note, to Rule 3.216, 1980 adoption, Section (d).

> observation, The court, however, cannot compel the defendant to cooperate with the psychiatrist by answering questions posed as part of the mental examination. Parkin v. State, 222 So.2d 457 (Fla. 1st DCA 1969); see State v. Battle, 302 So.2d 782 (Fla. 2d DCA 1974). Nonetheless, the state is not disadvantaged in this regard since in appropriate circumstances, such as total noncooperation with any psychiatrist save his own, the court may properly refuse to admit any evidence propounded by the defendant relevant to the issue of his sanity. McMunn v. State, 264 So.2d 868 (Fla. 1st DCA 1972).

Id. at 1183-84.

Therefore, since Rule 3.216 provides for the State psychiatrist to have access to the defendant in an insanity defense situation, (which under Smith requires certain protections), under Buchanan, when the issue is mental mitigation the State most definitely is entitled to access to the defendant once he indicates mitigation will be presented. In the present case Dr. Krop testified at the first penalty phase and the defense indicated he would testify at resentencing. When a defendant presents unrebutted testimony the trial court virtually cannot reject that testimony. Nibert v. State, 574 So.2d 1059, 1063 (Fla. 1991). By precluding the State from having it5 own mental health expert examine Jones, the trial court denied the State the right to rebut the defense expert. Much of Dr. Krop's testimony revolved around the diagnosis of borderline personality disorder. The State attempted to show that Jones had an antisocial personality disorder, a less serious diagnosis (R 881-

7). Without a State expert *to* rebut Dr. Krop, the trial court was virtually required to make a finding of borderline personality disorder, which he did (R 257).

Erickson v. State, 565 So.2d 332 (Fla. 4th DCA 1990) supports the State's position that once the defendant opens the door to rebuttal testimony, a "court-appointed psychiatrist" may testify as to his opinions or conclusions regarding the defendant's mental condition where such mental condition is in issue. Id. at 331[11].

Parkin v. State, 222 So.2d 457 (Fla. 1st DCA 1969) involved the question whether the Court can require a defendant who has raised the insanity defense to submit to a mental health examination. The Court states:

> the burden of proof is on the defendant to sustain the plea of insanity, and justice and fairness to the court and society demands that the state be afforded the same source of information, namely, confrontation of the defendant in conversational examination, by the court appointed experts which will not necessarily he in rebuttal to but may be in confirmation of the private expert's opinion as to the sanity of the defendant.

Id. at 461.

See also McMunn v. State, 264 So.2d 868, 870 (Fla. 1st DCA 1972)("It is well-settled that a defendant who relies on the defense of insanity must cooperate with court-appointed experts by answering questions propounded to him, or in the alternative,

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[11] The expert may nat disclose incriminating statements or directly divulge facts about the crime he may have elicited from the defendant during the examination.

be precluded from offering his independent expert testimony upon the subject").

A similar issue was presented to this Court in Burns v. State, 16 FLW S389 (Fla. May 16, 1991). Burns claimed it was error to allow the state's expert to remain in the courtroom during the defense psychologist's testimony. The trial court allowed the state expert to remain in the courtroom in light of the fact the defendant would not be required to submit to an examination by the state expert. This Court held that "under the circumstances, this was the only avenue available for the state to offer meaningful expert testimony to rebut the defense's evidence of mental mitigation". Id. at S392. This court declined the opportunity to pass on whether the trial court erred in denying the state's request to examine the defendant because there was no rule of criminal procedure that specifically authorized a state expert examination. The matter was brought to the attention of the Florida Criminal Rules Committee. Id. at S392 n.7.

The state requests an advisory opinion from the court on whether, in the future, the state is entitled to examine a defendant when he places mental mitigating circumstances at issue. It is the state's position the trial court should have allowed the state to examine the defendant or should have stricken Dr. Krop's testimony since the state was denied the opportunity to rebut that testimony.

POINT 2

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY IT COULD CONSIDER THE AGGRAVATING' CIRCUMSTRVCE OF PECUNIARY GAIN/DURING A ROBBERY AS TO VICTIM PERRY,

The trial court refused to instruct the jury that the aggravating circumstance of pecuniary gain/during a robbery could be considered since Jones "stole the truck from Brock. Perry didn't have a financial interest in the truck" (R 941). The trial court should have instructed the jury regarding this aggravating circumstance and should have found it applied to victim Perry.

Perry was murdered in order to obtain the truck. Whether she had a financial interest in the truck is irrelevant. See Zeigler v. State, 580 So.2d 127, 129 (Fla. 1991)(murder of Charles Mays committed in furtherance of plot to collect insurance on defendant's wife); Henry v. State, 16 F.L.W. S586 So.2d 1033 (Fla. 1991); (store employees murdered during robbery of store).

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully requests this court affirm the judgment and sentence of the trial court, issue an advisory opinion regarding cross appeal issue #1 and add the aggravating circumstance of pecuniary gain during a robbery to the aggravating circumstances that apply to victim Perry.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee/Cross-Appellant has been furnished by U.S. Mail to Gilbert A. Schaffnit, Esquire, 719 Northeast First Street, Post Office Box 1252, Gainesville, Florida 32602, this 12 day of December, 1991.

Barbara C. Davis
Barbara C. Davis
Of Counsel

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

ATTACHMENT 1

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.