IN THE SUPREME COURT OF FLORIDA

RANDALL SCOTT JONES,

Appellant/Cross-Appellee,

vs. CASE NUMBER: 78,160

STATE OF FLORIDA,

Appellee/Cross-Appellant.

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

CASE NUMBER: 87-1695-CF-M

HONORABLE ROBERT R. PERRY, CIRCUIT JUDGE

INITIAL BRIEF OF APPELLANT/CROSS-APPELLEE

Respectfully submitted,

LAW OFFICES OF GILBERT A. SCHAFFNIT

GILBERT A. SCHAFFNIT, ESQUIRE
[illegible] Northeast First Street
Post Office Box 1252
Gainesville, Florida 32602
(904)378-6593/(904)374-4998 (FAX)
Florida Bar Number: 249769

ATTORNEY FOR APPELLANT JONES

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PRELIMINARY STATEMENT

Appellant/Cross-Appellee, RANDALL SCOTT JONES, was the Defendant in the trial court and will be referred to herein as either the "Appellant" or by surname. Appellee/Cross-Appellant, the State of Florida, was the Plaintiff in the trial court, and will be referred to as either the "Appellee" or as the State.

The Record on Appeal filed in this Court from the resentencing proceeding consists of seven (7) volumes and one thousand thirty-six (1,036) pages. References to the Record shall be made by use of the symbol (R. _____), followed by the volume and page number.

STATEMENT OF THE FACTS AND CASE

This cause represents a direct appeal by Appellant from the Judgment and Sentence of Death imposed by the trial Court (R. 11, 252-266) pursuant to a resentencing hearing held under the mandate of this Court in Jones v. State, 569 So. 2d 1234 (Fla. 1990). This Court's jurisdiction is mandatory. Art. V, §3(b)(1), Fla. Const.

In Jones, supra., this Court affirmed Appellant's two (2) convictions for first-degree murder as well as his convictions for armed robbery, burglary of a conveyance and shooting into an occupied vehicle, but reversed the sexual battery conviction and vacated the two (2) sentences of death remanding the cause for a new sentencing hearing before a different jury. Id. at 1241.

On November 21, 1990, the Honorable Robert R. Perry, Circuit Judge, entered an Order pursuant to receipt of this Court's mandate scheduliny a new evidentiary sentencing hearing (R. I, 1), and subsequently rescheduling same for March 11, 1991 (R. I, 107).

Prior to said resentencing hearing, Appellant filed his Motion to Dismiss (sic) Counsel (R. I, 11-23), urging the trial Court to "dismiss" his court-appointed attorney and appoint "private counsel" (R. I, 11). As one of his points on appeal from his original trial and sentencing proceeding, Appellant had urged as error the denial of the same defense counsel's Motion to Withdraw from the penalty phase proceeding. Jones, at 1240. However, this Court found it unnecessary to address this claim in view of its disposition of other issues. Id.

Defense counsel, upon resentencing, likewise again sought leave to withdraw (R. I, 25-26). Upon hearing (R. I, 147-163),

both motions were denied (R. I, 29-30). On March 11, 1991, the day of the commencement of the resentencing hearing, Appellant filed a renewed Motion to Dismiss (sic) Counsel realleging factual matters raised in his previous motion, alleging new factual grounds for his claim of ineffective assistance of counsel, and requesting dismissal of court-appointed counsel as well as other substantive relief including dismissal of the charges or, in the alternative, a retrial as to the guilt phase (R. I, 165-174). The Motion was denied through issuance of a Clerk's docketing sheet, with no factual findings therein (R. I, 179).

On February 25, 1991, Appellant filed his Second Motion to Suppress Statements, Confessions or Admissions Illegally Obtained (hereinafter, Second Motion to Suppress) (R. I, 1-36) which was argued at an unreported hearing, and subsequently denied (R. I, 137-140). The trial Court likewise denied Appellant's pre-hearing Motion for Use of Special Verdict Form (R. 1-140); Motion to Declare Florida Statutes, §775.082(1) and §921.141 Unconstitutional (R. I, 120-136), (R. I, 140), and Motion to Prohibit Reference to Advisory Role of the Jury (R. I, 140). Appellant's requested "Preliminary Instruction re: Voir Dire About Penalty" was denied on the day of the commencement of the resentencing hearing (R. I, 175-176), as were his objections to the Court's Order allowing the taking of judicial notice as to those matters stated in paragraphs four (4) and five (5) of the State's Notice of Request for Compulsory Judicial Notice (R. I, 177-178).

On March 11, 1991, a resentencing hearing commenced with the selection of a new jury (R. 111, 317-480; R. IV, 481-576), which

was found acceptable to both parties and sworn (R. IV, **577).**

Upon completion of preliminary instructions and opening statements of counsel (R. IV, 577-596), the trial Court entertained arguments upon the issues of judicial notice and potential doubling of aggravating circumstances (R. IV, 597-619).

The State then presented evidence in the form of testimony and exhibits in support of its obligation to demonstrate the nature of the crime (R. 11, **581** through R. III, 801); **§921.141(1)(1987),** Fla.Stat. **The State's** first witness was Putnam County Sheriff's Department (PCSD) Investigator, David Stout (R. 11, 621), who testified as to the condition of the crime scene, the positioning of the bodies and the circumstances surrounding the eventual apprehension and interrogation of the Appellant, RANDALL SCOTT JONES. Stout's testimony supported the introduction, without ultimate objection, of a videotape of the crime scene, several photographs and other exhibits (R. II, 621 **through R. 111, *706).***

Tbe State's second witness, PCSD Lt. William Hord primarily testified as to the apprehension of the Defendant in Mississippi and thetaking of type-written statements, which were admitted into evidence, of the Defendant on at least two (2) occasions. Lt. Hord testified from the two (2) different statements and identified the circumstances under which each statement was taken. He related the internal inconsistencies between the statements themselves and compared the initial statement to the one obtained from the co-defendant, CHRISTOPHER REESH (R. 111, **707-749).**

The co-defendant's testimony was then presented. REESH testified that on July 27, **1987,** he and Appellant were at the

Rodman Dam park area target practicing at which time the vehicle they were in became stuck in sand (R. 111, 755). After an attempt to secure aid from a fisherman failed, REESH testified as to the Appellant's words and actions as they related to the securing of the pick-up truck occupied by the sleeping victims herein. REESH described the shooting by Appellant of a 30/30 rifle into the vehicle and the removal of the bodies therefrom and their subsequent disposal in nearby woods. REESH further described his own apprehension, questioning and ultimate plea negotiation and sentence for his role in the crimes he described (R. 111, 753-770).

The medical examiner who conducted an autopsy upon the bodies of the decedents, Dr. Bonosacio T. Floro, was the State's final witness. Floro described the trauma to the bodies and provided opinion evidence concerning the probable trajectory of the bullets, the positioning of the sleeping victims at the time of impact as well as the immediacy of death. A great deal of Dr. Floro's direct and cross-examination was devoted to the issue of whether an injury to a finger on victim Perry's left hand was a defensive wound or whether the injury was sustained during the earlier shooting of victim Brock (R. 111, 775-801).

Upon the State announcing rest (R. 111, 801), Appellant presented the testimony of Dr. Harry Krop, a forensic clinical psychologist, who testified as to the character of the accused (R. 111, 801 through R. IV, 921); §921.141(1)(1987), Fla.Stat., and provided extensive background information in support of non-statutory mitigation.

Dr. Krop testified to having examined Appellant on four (4)

prior occasions and having reviewed a significant psychiatric intake history which included a family history of parental divorce during Appellant's very early years (R. 111, 826). Krop testified that interviews and intake history information supported the fact that Appellant was allowed to be alone for long periods of time with little or no supervision prior to age five (5) (R. 111, 827). Krop noted that when Appellant was returned to the custody of his father at age five (5), his demeanor was described as "animalistic" (R. 111, 827). According to Krop, Appellant's father and stepmother indicated that Appellant had not been toilet trained, had no table manners or social skills and displayed significant behavioral and interpersonal problems while in their care (R. 111, 827). Krop described as "unusual" the three (3) week in-patient hospitalization of Appellant at age eleven (11) (R. 111, 829). Krop further opined that his post-mortem diagnosis of borderline personality disorder was consistent with the final discharge diagnosis of Appellant at the age of twelve (12) (R. 111, 832).

Dr. Krop testified that Appellant was in and out of group homes and private residences during a five (5) year period from 1981 through 1986 (R. 111, 829), but that he managed to graduate from high school and join the military from which he received an honorable discharge under general conditions (R. 111, 830). During his brief military service, Krop noted that Appellant had seen a military psychiatrist four (4) to five (5) times (R. 111, 830).

Krop thereafter testified as to Appellant's mental condition immediately prior to the shootings. Krop advised the jury that several highly stressful events preceding the murders acted in

conjunction with the Defendant's mental disease, contributing to the behavior which brought him before the Court.

First, Krop testified that Appellant's father, who was ill for some time with a heart ailment, died approximately eight (8) months prior to the murders, while Appellant was still in military service (R. 111, 836). Krop further noted that Appellant had planned to be married but that a few weeks prior to the murders Appellant's fiancee's mother committed suicide and his fiancee thereafter broke off the relationship (R. 111, 835). Krop noted that during the same time period, Appellant lost his job at Wal-Mart and was unable to locate substitute employment as of the date of the incident herein (R. III, 837). All of these factors, according to Dr. Krop, were significantly stressful to Appellant (R. 111, 836).

Krop testified that Appellant's psychiatric diagnosis of borderline personality disorder was characterized by difficulty in coping with stress (R. 111, 839), extremely low self-concept and self-esteem (R. 111, 842), hypersensitivity to "perceived" rejection (R. 111, 843), rage-type reactions (R. III, 841) and distorted perception (R. 111, 846). Krop testified that a person carrying Appellant's diagnosis could morally justify committing what otherwise would be perceived as a senseless, violent crime upon strangers (R. 111, 845-847).

Krop testified, however, that Appellant's mental condition did not so "substantially impair" him, nor was his condition so "extreme", as to qualify him for consideration for either statutory mitigating circumstance (R. 111, 850-852). He did, however, identify numerous areas of non-statutory mitigating circumstances

including emotional deprivation and neglectful early environment, ongoing emotional disturbance, acute depression at the time of the offense, as well as Appellant's ability to be rehabilitated as demonstrated by his ready acknowledgement of guilt, intelligence level, youth and no significant history of alcohol or drug intake. Krop also described Appellant as a model inmate and not a prison management problem (R. 111, 848-855).

Upon the conclusion of Dr. Krop's testimony, the Defendant announced rest (R. IV, 921). The State offered no rebuttal testimony (R. IV, 921). After a brief charge conference where multiple objections to proposed instructions on aggravating circumstances were lodged by the Defendant (R. IV, 933-935), each side presented closing arguments during which time a Motion for Mistrial by the Defendant was made and denied (R. IV, 949-950).

The Court instructed the jury as to the aggravating circumstances applicable to the murder of victims Perry (R. IV, 967-968) and Brock (R. IV, 968-969). Aggravating circumstances common to each victim included Appellant's previous conviction of either a capital felony or a felony involving use or threat of violence (§921.141(5)(b) (1987)), Fla.Stat., Appellant's commission of the capital felony while in engaged in the commission of a statutorily enumerated offense (§921.141(5)(d) (1987)), Fla.Stat., and that the homicides were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (§921.141(5)(i) (1987)), Fla.Stat. An additional aggravating factor applicable solely to victim Brock was that the capital felony committed against him was for Appellant's pecuniary

gain (§921.141(5)(f) (1987)), Fla.Stat.

The trial Court instructed the jury upon two (2) mitigating circumstances, to wit: the age of the Defendant at the time of the crime (age 19) (§921.141(6)(g) (1987)), Fla.Stat. and "any other aspect of the Defendant's character or record and any other circumstances of the offense." (R. IV, 969). The jury, upon deliberation, recommended that the Court impose a sentence of death, by a vote of ten (10) to two (2), for the murders of victims Perry and Brock (R. IV, 984-985; R. 11, 226-227).

Appellant filed his Motion for New Sentencing Hearing (R. 11, 238-240; R. V, 997), which was denied (R. 11, 251; R. V, 1003) along with the contemporaneously renewed motion by Appellant's counsel to withdraw (R. II, 251; R. V, 1004).

On May 28, 1991, Appellant was brought before the Court for imposition of sentence pursuant to the jury's advisory recommendation as stated above (R. VII, 996-1036). The trial Court entered its Judgement and Sentence of Death as it related to the murder of Matthew Paul Brock (R. 11, 252-2591, as well as the murder of victim Kelly Lynn Perry (R. II, 260-266).

A timely Notice of Appeal was filed herein (R. II, 273).

SUMMARY OF ARGUMENT

The trial court, with full knowledge of Appellant's long standing position that his trial counsel was ineffective and suffered from a conflict of interest, consistently denied Appellant the opportunity to present his allegations in a full evidentiary hearing conducted upon proper notice. The trial court denied Appellant due process and a fair trial by failing to address specific allegations of ineffectiveness which bore directly upon the admissibility of confessions of guilt to law enforcement and the content of his mitigation presentation to the jury. The Court ignored clear demonstrations of animosity between Appellant and his counsel and failed to advise Appellant of his constitutional rights and options pursuant to the criteria set forth in Nelson v. State, 274 So.2d 256, *258-259* (Fla. 4th DCA 1973), as adopted by this Court in Hardwick v. State, 521 So.2d 1071 (Fla. 1988).

The trial court further erred in denying Appellant an opportunity to establish a factual basis in support of his Second Motion to Suppress Statements and further erred on the substantive issue of the admissibility of those statements under the doctrine announced in Edwards v. Arizona, 451 U.S. 477 (1981). These errors resulted in the admission of damaging, otherwise inadmissible statements to law enforcement which were used by both the jury and the Court in determining to recommend, and subsequently impose, respectively, the sentences of death.

The trial court further erred in denying a variety of pretrial motions (R. I, 120-128; 129-133; 134-135; 140) which are realleged

herein for purposes of requesting that the Court reconsider its prior rulings which contributed to the trial court's error.

Fundamental error was further committed by the trial court when it improperly commented upon the testimony of a critical witness for the State of Florida, the co-defendant herein, having treated the witness deferentially and bolstering his creditability in the eyes of the jury. The trial court did not uphold its unique obligation to maintain an appearance of impartiality and clearly prejudiced Appellant's position when it affirmed the correctness of the co-defendant's statements by making reference to a previous State witness's testimony. The error is fundamental and is preserved in the absence of a contemporaneous objection. Ross v. State, **386** So.2d 1191, **1195** (Fla. **1980).**

The trial court further erred in instructing the jury that it could consider as an aggravating circumstance the fact that the capital felony **was** committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification (R. IV, 968), and thereafter basing its own judgments and sentences of death in part thereon. Appellant's crime did not display the heightened state of premeditation necessary for the application of this circumstance, and the unrefuted testimony of Dr. Krop demonstrated that Appellant's mental illness allowed him to view his acts with at least a pretense of moral justification.

The aggravating circumstance which applies when the capital offense was committed for pecuniary gain was likewise inapplicable to the facts of this case in that the initial purpose for the

killings was not the theft of the victim's truck for pecuniary gain, but merely for its use to extricate Appellant's vehicle from the sand. The subsequent taking of the truck after the murders was either an afterthought or merely a means of escape for Appellant. Hill v. State, 549 So.2d 179 (Fla. 1989).

The trial court erred in instructing the jury to consider multiple aggravating circumstances arising out of the same aspect of Appellant's conduct and compounded the error by ultimately imposing its sentences of death through utilization of improper doubling of aggravating circumstances.

This Court's prior ruling in this case specifically found that the aggravating circumstance that the capital felony was especially heinous, atrocious and cruel did not apply. The trial court erred in allowing the State of Florida the opportunity to present highly inflammatory and irrelevant testimony as to the injuries received by victim Perry which had no relation to an admissible statutory aggravating circumstance.

The trial court's denial of Appellant's midhearing Motion for Mistrial due to highly improper prosecutorial comment upon victim impact evidence was reversible error in that the resentencing proceeding herein was governed, at the time, by the dictates of Booth v. Maryland, 107 S.Ct. 2529 (1987).

The trial court further erred in permitting the State of Florida, over objection of counsel, to explore aspects of Appellant's pre-teen delinquent behavior which was not in rebuttal to a mitigating circumstance propounded by the Appellant.

The trial court further erred in refusing to instruct the jury that they should consider the statutory mitigating circumstance of "substantially impaired capacity" despite the fact that Appellant's expert's testimony did not support same in that the overwhelming weight of the expert's testimony supported substantial mental impairment for a period of eight (8) years preceding the offense, as well as at the time of the offense. Stewart v. State, 558 So.2d 416 (Fla. 1990).

The trial court finally erred in refusing to instruct the jury as to the existence of multiple non-statutory mitigating circumstances which were clearly identified in the unrefuted testimony of Appellant's expert witness. The Court itself failed to properly identify the non-statutory mitigating circumstances, or assign them due weight.

Each of the errors alone, or taken as a whole, require vacation of the sentences of death imposed by the trial court and a remanding of the cause for a new resentencing evidentiary hearing before a different jury. Lucas v. State, 490 So.2d 943 (Fla. 1976).

ARGUMENT

I. THE TRIAL COURT DEPRIVED APPELLANT OF DUE PROCESS OF LAW BY FAILING TO CONDUCT A FULL EVIDENTIARY HEARING, UPON PROPER NOTICE, INTO APPELLANT'S ALLEGATIONS OF TRIAL COUNSEL'S CONFLXCT OF INTEREST AND INEFFECTIVENESS AND MAKE REQUIRED INQUIRY.

Prior to this court's opinion in Jones, supra. remanding this cause to the trial court for a new evidentiary sentencing hearing, the conflict between Appellant and his court-appointed counsel was already well documented in the record. **Id. at 1240.** The denial of defense counsel's Motion to Withdraw due to conflict of interest was a point raised in Jones' initial appeal which remained unresolved due to this Court's ruling **as** to other trial errors which necessitated resentencing. Id.

Indeed, a full month prior to the resentencing hearing itself, Appellant once again preserved the issue by filing a **pro se** Motion to Dismiss (sic) Counsel (R. I, 11-23). The Motion alleged a factual basis for discharge of his court-appointed counsel, to wit: conflict of interest through dual office holding and a long standing affiliation with law enforcement (R. I, 11-23). In addition, the Motion generally challenged trial counsel's effectiveness, and specifically charged that trial counsel ''refused to call to the stand or even contact any of numerous character witnesses for the Defendant" (R. I, 13). The Motion specifically sought substitute counsel, **as** opposed to the right of self-representation (R. I, 11,13).

Two (2) days later, on February 13, 1991, Appellant's trial

counsel filed his Motion for Leave to Withdraw wherein he stated that Appellant's allegations created an "irreconcilable conflict of interest" precluding the re-establishment and maintenance of an "effective attorney-client relationship" (R. I, 25).

At a hearing conducted on February 15, 1991, in the absence of a prior, written Notice of Hearing, Appellant was given the opportunity to offer additional grounds to the Court for discharging his trial counsel (R. I, 148) at which time Jones responded as follows:

> "MR. JONES: Your Honor, at this time, I did not know the hearing was going to be today on this motion until approximately four hours ago, at which time I've only had 45 minutes to myself, which time to eat and shower, eat and shave and review all of this. Furthermore, I got Mr. Pearl's motion last night and barely had a chance to think about it, much less study it. I have asked Mr. Pearl, the last time he saw me on the 8th of March, to supply me with the record on appeal. I know he was ill over the weekend and he may have forgotten about it. But, for some reason I haven't received that yet or had a chance to go over it.
>
> Also, at the Putnam County Jail, I have asked Captain Winkleman for access to the law library. He has denied me access to the law library, stating that I have an attorney of record. I explained to him that I filed a pro se motion asking access to the law library and he has denied it. So, I have not really had a chance to study Mr. Pearl's motion, the legal ramifications and such, and at this time would ask for a continuance on those grounds.
>
> Further (sic) than that, I'm, really, basically, unprepared except for what is already written in the motion." (R. I, 148-149).

Trial counsel, on the other hand, was not at a loss for words. He clearly stated to the trial court in support of his Motion to Withdraw that he wanted "nothing further to do with Mr. Jones" (R. I, 151), and that the two (2) of them "very badly need a divorce" (R. I, 152). Trial counsel's feelings about his client were indeed never more clearly stated than when, after the Court denied the requested "divorce" (R. I, 156), trial counsel observed that "(C)hances are that he's going to file a motion asking me to admit that my mother bore me out of wedlock" (R. I, 162).

The trial court, during the course of the unnoticed "hearing" upon Appellant's Motion to Dismiss (sic) Counsel filed February 11, 1991, and counsel's Motion to Withdraw, never addressed the substantive issue of the conflict of interest created by counsel's alleged holding of honorary special deputy status or how Jones' situation varied, if at all, from that outlined in Harich v. State, 573 So.2d 303 (Fla. 1990). Equally important in view of the pending resentencing hearing, the trial court never made inquiry into the names of the character witnesses allegedly supplied by Appellant to his counsel that were never called to the witness stand in his original proceedings, nor did the trial court attempt to proffer their testimony from the mouth of the Appellant. Instead, the trial court merely attempted to impress upon Appellant that based upon the Court's thirty (30) year relationship with trial counsel, no lawyer could do a better job in the time allotted to prepare (R. I, 155). The written Order upon the "hearing" is equally devoid of factual findings with respect to the issue of

counsel's alleged ineffectiveness for failure to call character witnesses (R. I, 29-30). No character witnesses were called by trial counsel at the resentencing hearing.

Moreover, on March 11, 1991, Appellant filed an expanded Motion to Dismiss (sic) Counsel replete with specific, factually-based allegations of impropriety by, and ineffectiveness of, trial counsel (R. I, 165-174). Once again, the trial court and counsel for the respective parties failed to address any of the specifics of the Motion (R. I. 284-288) which was this time denied without providing Appellant an opportunity to speak (R. I, 284-288).

Immediately prior to the Court's pronouncement of the sentences of death upon the Appellant herein, trial counsel himself noted that despite his efforts to remain objective, the case was "infected by a conflict of instance (sic) between myself and Mr. Jones which may very well have affected its outcome..." (R. VII, 1001).

This Court has adopted the holding in Nelson v. State, 274 So.2d 256, 258-59 (Fla. 4th DCA 1973) which set forth the procedures required of trial judges where defendants seek to discharge court-appointed counsel based upon alleged ineffectiveness. Hardwick v. State, 521 So.2d 1071 (Fla. 1988). First, the trial court herein failed to make a "sufficient inquiry" of the Appellant to determine whether there was "reasonable cause" to believe counsel was ineffective. Id. at 1074. Second, the trial court failed to advise Jones that if trial counsel were discharged, the State may not thereafter be required to appoint a

substitute. Id. at 1075. As this Court noted:

> "We recognize that, when one such as appellant attempts to dismiss his court-appointed counsel, it is presumed that he is exercising his right to self-representation. Jones v. State, 449 So.2d 253, 258 (Fla.), cert. denied, 469 U.S. 893, 105 S.Ct. 269, 83 L.Ed.2d 205 (1984). However, it nevertheless is incumbent upon the court to determine whether the accused is knowingly and intelligently waiving his right to court-appointed counsel, and the court commits reversible error if it fails to do so. Faretta, 422 U.S. at 835, 95 S.Ct. at 2541; Smith v. State, 444 So.2d 542 (Fla. 1st DCA 1984). This particularly is true where, as here, the accused indicates that his actual desire is to obtain different court-appointed counsel, which is not his constitutional right. Donald v. State, 166 So.2d 453 (Fla. 2d DCA 1964). Id. at 1074.

No self-representation inquiry was ever made of Jones by the trial court, and the Nelson procedure was clearly not followed below. See, also, Chiles v. State, 454 So.2d 726 (Fla. 5th DCA 1984); Parker v. State, 423 So.2d 553 (Fla. 1st DCA 1982).

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S SECOND MOTION TO SUPPRESS STATEMENTS AND DEPRIVED APPELLANT OF *AN* OPPORTUNITY TO ESTABLISH A PROPER FACTUAL BASIS FOR HIS DENIAL OF COUNSEL CLAIM.

In Jones, supra., this Court held that the trial court, based upon the totality of the record, did not err in denying Appellant's motion to suppress statements Appellant gave to law enforcement allegedly in violation of his stated request for counsel. Id. at 1237. Noting that there was a conflict in the testimony between the officers and the Appellant as to this issue, and conceding that statements should be suppressed if obtained in violation of his right to counsel, this Court nonetheless ruled that "the necessary

factual basis for relief has not been established." Id.

Accordingly, in his Motion to Dismiss (sic) counsel dated March 11, 1991 (R. I, 165-174), Appellant recited a number of factual matters concerning the issue of waiver of counsel in Mississippi which he claimed were known to trial counsel and never raised, or not explored by trial counsel in the first place (R. I, 165-174). None of these allegations were addressed by counsel or the Court below, despite the fact that Jones' two (2) statements were testified to orally by Officer Hord (R. 111, 707-749), and admitted into evidence for the jury's consideration (R. 11, 202-216) at Appellant's resentencing hearing.

Even though the issue of Appellant's guilt or innocence was not before the jury during the advisory resentencing hearing, the evidentiary importance of Appellant's conflicting statements, admissions and confessions to the application of the aggravating circumstances inquiry cannot be dismissed. Indeed, this very Court relied, in large part, upon Appellant's statement of August 20, 1987 in rejecting Jones' argument that the trial court erred in finding two (2) aggravating circumstances - "pecuniary gain" and "cold, calculated and premeditated." Jones, at 1238.

The trial court further erred in denying Appellant's Second Motion to Suppress (R. I, 137-139) based upon the documentary evidence admitted in support of his argument under Edwards v. Arizona, 451 U.S. 477 (1981); Walker v. State, 16 FLW D260 (Fla. 5th DCA 1991).

Clearly, given the above, should this Court find error upon

this issue the error cannot be harmless under the DiGuilio standard, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), and therefore reversal is mandatory.

III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR SPECIAL VERDICT FORM, HIS CHALLENGE TO THE CONSTITUTIONALITY OF THE DEATH PENALTY STATUTE, AS WELL AS OTHER PRE-HEARING MOTIONS.

Appellant realleges and reavers the grounds stated in his Motion to Declare Florida Statutes, §775.082(1) and §921.141 Unconstitutional (R. I, 120-128) and, in recognition of this Court's prior rejection of said claim, Jones at 1238, nevertheless urges this Court to reconsider its ruling thereon.

Likewise, Appellant realleges and reavers the grounds stated in his Motion for Use of Special Verdict Form (R. I, 129-133) and, in recognition of this Court's prior adverse ruling upon said claim, Jones at 1238, nevertheless urges this Court to reconsider its position with respect thereto.

Appellant realleges and reavers the grounds stated in his Motion to Declare Florida Statutes, §775.082(1) and §921.141 Unconstitutional (R. I, 120-128) and, in recognition of this Court's prior rejection of said claim, Jones at 1238, nevertheless urges this Court to reconsider its ruling thereon.

Appellant further alleges that the trial court erred in denying his Motion to Prohibit Any Reference to the Advisory Role of the Jury (R. I, 134-135; 140), and maintains that this Court should revisit its holding in Combs v. State, 525 So.2d 853 (Fla. 1988).

IV. THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY IMPROPERLY COMMENTING UPON THE TESTIMONY OF A CRITICAL STATE WITNESS AND OTHERWISE BOLSTERING THE WITNESS IN THE EYES OF THE JURY.

Aside from the Appellant's statements to police, perhaps the most damning evidence the State could offer in support of it's argument for the application of certain aggravating circumstances was the testimony of the only other living witness to the crime - Appellant's co-defendant, CHRISTOPHER REESH. Appellant and REESH were friends dating back to their days together at the Rodeheavor Boy's Ranch (R. 111, 754).

In determining whether the motive for the killings, if any, involved pecuniary gain, REESH's testimony was essential (R. 111, 756). His observation, over objection, that Appellant manifested a "no big deal" demeanor when discussing the prospect of killing the sleeping couple to obtain the use of their truck obviously impacted both the jury and the Court in its decision to recommend, and impose, respectively, a sentence of death which was based in part upon the view that the murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R. 11, 252-266).

However, despite being twenty-one (21) years of age at the time of his testimony (R. 111, 754), and having served time in state prison (R. 111, 765), even the cold record of REESH's statements convey the emotionalism of his testimony (R. 111, 766).

The cold record also conveys the preferential and deferential treatment accorded the witness by the trial judge. The Court continually referred to the witness through use of a shortened,

juvenile version of his first name (Chris) (R. 111, 758; 761; 763). The Court gently reminded "Chris" to keep his voice up and to "say yes or no," in response to questions (R. 111, 763), and to "just take a deep breath and answer the question" (R. 111, 761).

However, by far the most inexcusable moment in the trial court's improper rapport with the witness came when the Court affirmed the correctness of REESH's testimony by commenting upon its corroboration through the testimony of a prior state witness, Putnam County Sheriff's Investigator Stout:

> Q. Okay. If I may be indulged Judge, I would like to put the map here onto board and ask, if I may -- Mr. Reesh, to come down and assist the jury in understanding where the boys were when --
>
> THE COURT: Mr. Brock, get the overhead projector out of the courtroom, if you would please. Mr. Bailiff, help him bring the easel forward.
>
> Ladies and gentlemen, can you all see the easel? (Some jurors respond affirmatively.)
>
> THE COURT: Okay. You can see it clearly from there?
>
> Chris, you may step down and use the marker if you would, please. Please remember to keep your voice up.
>
> BY MR. WHITSON:
>
> Q. Chris, does this look at all in any way familiar to you with regard to the layout of Rodman Dam? Can you locate yourself on that map?
>
> A. Back over this way there the bathrooms were. I believe I was -- I believe that's the bathrooms?
>
> THE COURT: That's correct, according to the previous witness, Mr. Stout. (R. 111, 758)

(emphasis supplied)

The trial judge occupies a sensitive and unique position in a criminal trial and error is committed if the judge shows undue favoritism toward a witness or comments upon evidence in the presence of the jury. Raulerson v. State, 102 So.2d 281 (Fla. 1958).

Whereas this Court normally requires that the improper comments be followed by a contemporaneous objection to permit review, a comment can, taken alone or in context, be so improper as to constitute "fundamental error." Ross v. State, 386 So.2d 1191, 1195 (Fla. 1980). The importance of the witness' overall testimony to the State, the prejudice of that testimony to the Appellant as well as the justification, if any, for the Court's actions and comments seem to be relevant considerations to this Court's determination as to whether the error was fundamental, depriving Appellant of a fair trial.

It is respectfully suggested that while mere familiarity by a trial judge with a critical state witness may not be sufficient, the verbal affirmance as correct of the witness' testimony through a positive comparison with the testimony of a previous state witness is certainly fundamental error. Even if the trial court's action is in relation to non-essential testimony, the message to the jury concerningthe Court's perception of the remaining portion of the witness' testimony is beyond dispute - and not subject to a curative, generic instruction at trial's end.

V. THE TRIAL COURT ERRED IN INSTRUCTING TEE JURY THAT IT COULD CONSIDER EITHER MURDER TO HAVE BEEN COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, AND FURTHER ERRED IN IMPOSING IT'S SENTENCES OF DEATH IN PART THEREON,

The trial court, at the conclusion of the evidence, instructed the jury upon resentencing that it was to weigh the aggravating circumstance that the murders of the sleeping victims, Perry and Brock, were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R. IV, 968). §921.141(5)(i) (1987), Fla.Stat. Likewise, upon rendition by the jury of its advisory verdict, the trial court, over objection of counsel (R. VII, 1007), found that the State had proven the existence of this aggravating factor, as to both victims, beyond a reasonable doubt (R. VIII, 1023). The original sentencing court likewise found the existence of this aggravating circumstance, and its decision therein was upheld by this Court due in large part to the testimony of the co-defendant, REESH, and the statements of the Defendant himself. Jones at 1238.

However, assuming the admissibility of Appellant's post-arrest statements, and further assuming that the facts of the case as testified to by the co-defendant are accurate in detail, the murders herein simply do not involve anything more than the near-impulse killing of two (2) sleeping persons in order to obtain, initially, the temporary use of their vehicle. Although the proof clearly showed that Appellant intentionally and deliberately murdered these individuals, the heightened state of premeditation was simply not shown. Maxwell v. State, 443 So.2d 967 (Fla. 1983).

The evidence in the light most favorable to the State of

Florida reveals no long term planning or stalking of either victim by Appellant. Middleton v. State, 426 So.2d 548 (Fla. 1982). Nor was there any evidence that this case involved a murder for hire or contract-style murder, McCray v. State, 416 So.2d 804 (Fla. 1982), or that the killings involved any degree of torture. Bolender v. State, 422 So.2d 833 (Fla. 1982).

However, of equal importance is the fact that the unrebutted testimony of Dr. Krop demonstrated that due to the Appellant's pre-existing mental disease and defect, coupled with his statements to the co-defendant at the time of the shootings, Appellant exhibited an irrational response to a series of personal rejections which led him to justify, in his own mind, what might otherwise be called the senseless and irrational execution of two (2) sleeping strangers (R. 111, 843-847). Dr. Krop's unrefuted testimony established at least a pretense of moral justification sufficient to overcome the application of this aggravating circumstance. Banda v. State, 536 So.2d 221 (Fla. 1988) (existence of a "colorable claim" sufficient); Harris v. State, 438 So.2d 787 (Fla. 1983); Canady v. State, 427 So.2d 723 (Fla. 1983).

The trial court accordingly erred reversibly in finding this aggravating circumstance to have been proven beyond a reasonable doubt, necessitatingthe remanding of this cause for a resentencing hearing.

VI. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IS COULD CONSIDER AS *AN* AGGRAVATING CIRCUMSTANCE AS TO THE MURDER OF ONE VICTIM THE FACT THAT THE OFFENSE WAS COMMITTED FOR PECUNIARY GAIN, AND FURTHER ERRED IN IMPOSING ITS SENTENCE OF DEATH IN PART THEREON.

The trial court instructed the resentencing jury, at the conclusion of the evidence, that it could consider the fact that Appellant committed the capital felony upon victim Brock for Appellant's "pecuniary gain", presumably based upon Appellant's statements to police and the testimony of the co-defendant, that the killing of the owner of the truck was motivated from a desire to obtain the truck (R. IV, 969).

A close examination of the Record, including the statements of the Appellant and the testimony of the co-defendant, reveals that Appellant initially merely desired use of the truck for the purpose of extricating the vehicle that Appellant and REESH arrived in which was stuck in sand. The subsequent taking of the truck by Appellant is consistent with the reasonable hypothesis that Appellant was frightened after the murders and needed a method to immediately leave the scene of the crime. It is the State of Florida's burden to exclude every reasonable hypothesis of innocence as it relates to the aggravating circumstance of commission of a capital felony for pecuniary gain. §921.141(5)(f) (1987), Fla.Stat.; Simmons v. State, 419 So.2d 316 (Fla. 1982).

Where the evidence is consistent with the reasonable hypothesis that a taking of property from a murder victim may have been an afterthought, the aggravating circumstance should not, and cannot, be applied. Hill v. State, 549 So.2d 179 (Fla. 1989)

(taking of victims billfold might have been an afterthought); Peek v. State, 395 So.2d 492 (Fla. 1980) (larceny of victim's vehicle as afterthought; Scull v. State, 533 So.2d 1137 (Fla. 1988), (taking of vehicle as possibly necessary for escape).

The evidence that the State introduced at trial concerning a hand-written note allegedly made by the Appellant in an effort to advertise the sale of the truck in Mississippi (R. 11, 201) is incompetent as evidence to support the fact that the capital felony was committed for purposes of pecuniary gain in that this court has consistently held that events transpiring after a murder may not be considered in aggravation of the murder for capital sentencing purposes. Jones at 1238 (sexual battery upon victim Perry after her death); State v. McCall, 524 So.2d 663, 665 n. 1 (Fla. 1988); Halliwell V. State, 323 So.2d 557, 561 (Fla. 1975).

In that the evidence clearly demonstrates that the State of Florida failed to prove the existence of this aggravating circumstance beyond a reasonable doubt, the jury was improperly instructed thereon and the trial court's sentence of death in connection with the murder of victim Brock is subject to reversal thereby.

VII. THE TRIAL COURT ERRED BY INSTRUCTING THE JURY AS TO MULTIPLE AGGRAVATING CIRCUMSTANCES INVOLVING THE SAME ASPECT OF CONDUCT, AND FURTHER ERRED IN IMPOSING SENTENCES OF DEATH BASED UPON IMPROPER DOUBLING OF AGGRAVATING CIRCUMSTANCES.

The trial court instructed the jury at the conclusion of the resentencing evidentiary hearing that the jury could consider the fact that as to victim Perry, the Appellant had been previously

convicted of another capital felony or violent felony pursuant to §921.141(5)(b) (1987), Fla.Stat. The Court specifically advised the jury that one of those prior convictions was for the offense of burglary of a conveyance while armed, with the making of an assault (R. IV, 967). The Court immediately thereafter advised the jury that it could consider as an aggravating circumstance the fact that the Appellant was engaged in the commission of a burglary of a conveyance while armed, with an assault pursuant to §921.141(5)(d) (1987), Fla.Stat. This instruction allowed the jury to improperly double the application of a single aspect of the offense to its consideration of aggravating circumstances. Menendez v. State, 419 So.2d 312 (Fla. 1982). The Court's ultimate sentence as it relates to the murder of victim Perry likewise utilized improper doubling of aggravating circumstances (R. VII, 1028; R. 11, 252-269).

As to the Court's instruction to the jury relating to the murder of victim Brock, the trial court instructed the jury that it could consider the fact that the Appellant was engaged in the commission of a robbery of Brock, while at the same time advising the jury that it could consider the fact that the killing of victim Brock was for pecuniary gain (R. IV, 968). This instruction allowed the jury to base its recommendation of death upon an improper doubling of aggravating circumstances relating to a single aspect of the Appellant's crime to-wit: the taking of Brock's vehicle. Although the Court did ultimately treat the fact that the Appellant was engaged in the commission of the felony of armed robbery and the fact that the capital felony was committed for

pecuniary gain as one aggravating circumstance (R. VII, 1022), the Court nonetheless utilized Appellant's previous (contemporaneous) conviction of robbery as a basis for finding that the State proved said aggravating circumstance, thus engaging in improper doubling.

Finally, the evidence presented by medical examiner Floro, upon resentencing, supported the proposition that whereas three (3) shots were fired, two (2) hitting victim Brock and one (1) hitting victim Perry, it could not be said with certainty which of the two (2) shots fired at Brock caused his death, and thus one of the shots fired at Brock should not have been punished as a separate evil from the murders, or used to aggravate them in any fashion (R. 111, 775-801); Jones at 1040. The objection to the use of the circumstances of shooting into an occupied vehicle for purposes of aggravation was clearly made throughout the proceedings (R. VII, 1004-1007).

VIII. THE TRIAL COURT ERRED BY PERMITTING THE STATE OF FLORIDA TO PRESENT TESTIMONY *AND* EVIDENCE IN SUPPORT OF *AN* AGGRAVATING CIRCUMSTANCE THAT WAS FOUND BY THIS COURT TO HAVE BEEN INAPPLICABLE AS A MATTER OF LAW.

This Court previously held that the State's evidence clearly did not justify instructing the trial jury that the murder of victim Perry was especially heinous, atrocious or cruel. Jones at **1238; §921.141(5)(h)** (1987), Fla. Stat. Undeterred, the State of Florida argued for the application of this aggravating circumstance through extensive argument of counsel based upon a nick on the finger of victim Perry's left hand which the State insisted was a defensive wound. (R. II, 505; R. III, 775-801). Whereas the Court ultimately did not instruct the jury upon this aggravating circumstance, (R. IV, 967, 968), nor did the Court itself base its sentences of death thereon, **(R. II, 252-266),** the jury clearly was subjected to inflammatory testimony which could have, and should have, been excluded as irrelevant to the application of a statutory aggravating circumstance.

IX. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL DUE TO PROSECUTORIAL MISCONDUCT DURING FINAL ARGUMENT.

During the State's final argument to the jury, the prosecutor stated as follows:

> "And, I believe a suggestion was made to you that, perhaps, this homicide was not **so** terrible in the overall scheme or plan of things. As you weigh that and you consider that, ladies and gentlemen, I want you to go back there and think about the effect that period of five seconds (the time period for the firing of three shots) has had on Mr. Jones' life, on Chris Reesh's life, on Paul Brock's life--" (R. IV, 949) (emphasis supplied)

This highly improper prosecutorial comment drew an immediate objection from defense counsel, and a motion for mistrial, which was denied (R. IV, 950). Inviting the jury to imagine the pain and suffering, of a victim, or a prosecutorial request to have the jury put itself in the place of a victim with respect to suffering, or "the effect" on one's life, has consistently been held to constitute 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). The United States Supreme Court's decision in Payne v. Tennessee, 111 S.Ct. 2597 (1991), which reversed the long standing rule against victim impact evidence enunciated in Booth v. Maryland, 107 S.Ct. 2529 (1987) had not been handed down at the time of Appellant's resentencing hearing. Moreover, this Court has consistently followed the rule against introduction of testimony or argument concerning victim impact. Patterson v.State, 513 So.2d 1257 (Fla. 1987).

The error herein clearly cannot be said to have been harmless beyond a reasonable doubt, necessitating a reversal of each sentence of death and a remanding of this cause for further proceedings.

X. THE TRIAL COURT ERRED IN PERMITTING THE STATE OF FLORIDA, OVER OBJECTION OF COUNSEL, TO EXAMINE APPELLANT'S MITIGATION WITNESS AS TO ASPECTS OF UNCHARGED CRIMINALITY ALLEGEDLY COMMITTED DURING APPELLANT'S PRE-TEEN YEARS.

During midhearing colloquy of counsel and the Court, the State

advised of its intention to explore uncharged criminality allegedly attributed to the defendant, to-wit: chasing a child with a hatchet and setting fire to his parents' house (R. 111, 857-861). Defense counsel objected to the proposed inquiry and noted that the inquiry was not in response to a proposed argument by the defense that the defendant qualified for consideration of the statutory mitigating circumstance of "no significant history of prior criminal activity," §921.141(6)(a) (1987), Fla.Stat., and that it would constitute error nonetheless (R. 111, 857-861).

The State of Florida questioned defense witness Dr. Harry Krop on cross-examination extensively about the prior uncharged criminal activity where it was clear from the context that the inquiry was not in support of any argument that the doctor's diagnosis was affected, or inaccurate, thereby (R. 111, 801 through R. IV, 921).

In Dragovitch v. State, 492 So.2d 350 (Fla. 1986), a new jury trial as to the penalty phase was ordered by this Court where the defendant's reputation as an arsonist was allowed to negate a mitigating factor of no significant history of criminal activity. This Court noted, as it had in Robinson v. State, 487 So.2d 1040, 1042, (Fla. 1986), that the State may not do indirectly what this Court has held that it cannot do directly.

The State's cross-examination of Dr. Krop exposed the resentencing advisory jury to inflammatory information about Appellant's background which clearly cannot be considered to have been harmless beyond reasonable doubt.

XI. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY TO CONSIDER THE STATUTORY "SUBSTANTIALLY IMPAIRED CAPACITY" MITIGATING CIRCUMSTANCE, AND FURTHER ERRED IN NOT CONSIDERING THIS STATUTORY MITIGATING CIRCUMSTANCE IN IT'S OWN JUDGMENT AND SENTENCE AND WEIGHING SAME AGAINST ANY AGGRAVATING CIRCUMSTANCES.

Forensic clinical psychologist, Dr. Harry Krop, presented the only evidence concerning the Appellant's mental condition throughout life, as well as at the time of the offenses (R. 111, 801 through R. IV, 921). Dr. Krop advised the jury of significant information he had obtained from Appellant's clinical history as well as from four (4) clinical interviews. Krop's ultimate diagnosis of borderline personality disorder was relayed to the jury, as well as the bases therefore (R. III, 839). However, despite having described a history which included parental divorce at an early age (R. 111, 826), inadequate supervision (R. 111, 827), and "animalistic", antisocial behavior (R. 111, 827), as well as a series of psychologically stressful events immediately preceding the murders including a failed military career (R. 111, 830), death of Appellant's father (R. 111, 836), unexpected cancellation of marriage plans (R. III, 835), and the loss of employment (R. 111, 837), Krop testified that, in his professional opinion, Appellant's mental condition did not "substantially" impair his capacity to appreciate the criminality of his conduct or to conform same to the requirements of law (R. III, 850-852). Dr. Krop similarly declined to give the expert opinion that the capital felonies were committed by Appellant while under the influence of "extreme" mental or emotional disturbance (R. III, 850-852).

However, as pointed out by defense counsel in his argument to the Court in support of the Court's instruction to the jury upon the statutory mitigating circumstances, as well as the time the trial court imposed its own sentence, a trial court commits reversible error by failing to instruct the jury on the mitigating factor of "substantially impaired mental capacity" where evidence on that factor was presented and the instruction was requested, despite the fact that the defense's expert had rendered the opinion that the mental impairment of the Appellant was not "substantial." Stewart v. State, 558 So.2d 416 (Fla. 1990). The rationale behind the decision in Stewart is applicable here; that the trial court should not allow an expert's opinion as to what constitutes "substantial" to invade the provence of the jury. Id. at 420. The trial court is required to instruct on all mitigating circumstances "for which evidence has been presented." Dr. Krop identified at least four (4) major psychologically stressful events which occurred less than one (1) year prior to the commission of these senseless murders by a nineteen (19) year old individual who had been diagnosed with a borderline personality disorder since the age of eleven (11) years (R. 111, 836). Krop's unrefuted testimony demonstrated that persons suffering from borderline personality disorder are characterized by their inability to cope with normal stresses of life (R. 111, 829). Individuals carrying this diagnosis are hyper-sensitive to perceived rejection (R. 111, 843) and consistently display extremely low levels of self-esteem (R. 111, 842). Of particular significance in explaining, or attempting

to explain, the seemingly mindless execution of two (2) sleeping strangers, Dr. Krop noted that persons diagnosed as Appellant typically build up resentment and explode in so-called "rage reactions" (R. 111, 841). Dr. Krop, while finding Appellant to have been sane at the time of the offense and competent to stand trial for same, clearly noted that Appellant's perception of reality was distorted by his mental condition at the time of the offense (R. 111, 846). Thus, the sleeping strangers were simply part of "the world that was rejecting him" (R. 111, 904).

The trial court's refusal to instruct the jury upon the statutory mitigating circumstance of **"substantial"** impairment requires reversal for resentencing once it has been established, as the record herein does, that a reasonable quantum of evidence was presented demonstrating impaired capacity. Stewart at 420.

XII. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY TO CONSIDER THE EXISTENCE OF MULTIPLE NON-STATUTORY MITIGATING CIRCUMSTANCES WHICH WERE ESTABLISHED THROUGH THE UNREFUTED TESTIMONY OF APPELLANT'S EXPERT WITNESS.

In its instruction to the jury concerning the existence of statutory mitigating circumstances, the trial court asked the jury to weigh the Appellant's age at the time of the offense (19) as well as **"any** other aspect" of the Appellant's character (R. IV, 969). The trial court thereafter did not offer any instruction as to the jury's consideration of numerous non-statutory mitigating circumstances which were established through the unrefuted testimony of Dr. Krop.

Dr. Krop clearly identified at least five (5) non-statutory

mitigating circumstances which the court had a duty to advise the jury to consider in the weighing process which preceded its advisory vote, Krop identified non-statutory mitigating circumstances including: (1) Appellant's emotional deprivation and neglectful early environment; (2) Appellant's ongoing emotional disturbance at the time of the offense as supported by his eight (8) year diagnosis of borderline personality disorder; (3) Appellant's acute depression at the time of the offense precipitated by a disastrous series of stressful personal crises occurring within a year of the offense; (4) Appellant's ability to be rehabilitated as evidenced by his admission to the crime (R. 111, 848), intelligence level (R. 111, 848), youth (R. 111, 848) and lack of significant history of drug or alcohol abuse (R. 111, 848), as well as (5) Appellant's documented history of good institutional adjustment. This Court has consistently indicated that positive character traits, including potential for rehabilitation and productivity in prison constitute proper mitigating circumstances for the jury and court to consider in a capital case. Holsworth v. State, 522 So.2d 348 (Fla. 1988); Fead v. State, 512 So.2d 176 (Fla. 1987).

The Court's failure to instruct the jury on these proven non-statutory mitigating circumstances, as well as the court's own refusal to properly weigh them prior to imposing its sentence, constitutes reversible error requiring a new sentencing hearing.

CONCLUSION

The trial court's failure to conduct a full evidentiary hearing into Appellant's accusations of ineffective assistance of counsel, and conflict of interest of counsel, have rendered the sentences of death imposed herein fundamentally unfair as violative of Appellant's due process rights. The remaining violations of this Court's pronoucements with respect to the application of aggravating and mitigating circumstances likewise render the sentences of death imposed herein a legal nullity.

It is respectfully requested that this Court vacate both sentences of death imposed upon the Appellant by the trial court, and remand this cause back to the trial court with instructions concerning the holding of a proper evidentiary hearing upon Appellant's **pro se** motions. It is further requested that this Court remand this matter to the trial court for the additional purpose of holding a new evidentiary resentencing hearing before a different jury.

Respectfully submitted,

LAW OFFICES OF GILBERT A. SCHAFFNIT

Gilbert A. Schaffnit, Esquire
Attorney for JONES
719 Northeast 1st Street
Post Office Box 1252
Gainesville, Florida 32602
(904) 378-6593/(904) 374-4998 (FAX)
Florida Bar No.: 249769

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and by U.S. Mail to **BARBARA DAVIS, ESQUIRE, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114; and to RANDALL S. JONES, Inmate #111508, Florida State Prison, Post Office Box 747, Starke, Florida 32091; on this** 5th **day of December, 1991.**

GILBERT A. SCHAFFNIT, ESQUIRE
COUNSEL FOR RANDALL SCOTT JONES