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IN THE SUPREME COURT OF FLORIDA

RANDALL SCOTT JONES,

**Appellant/Cross-Appellee,**

**vs.** CASE NUMBER: 78,160

STATE OF FLORIDA,

**Appellee/Cross-Appellant.**

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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

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# REPLY BRIEF OF APPELLANT/CROSS-APPELLEE

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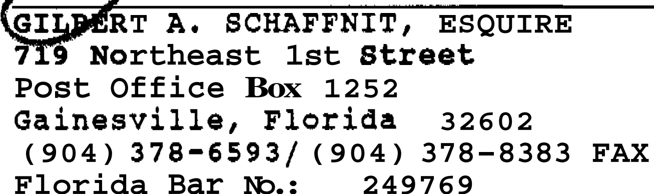
Respectfully submitted,

LAW OFFICES OF GILBERT A. SCHAFFNIT



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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

Appellant reavers the Statement of Facts and Case which appears in his Initial Brief (pages 1-8), which has been accepted by Appellee herein (Answer Brief, p. 1).

## SUMMARY OF ARGUMENT

**REPLY - POINT 1.** The trial court clearly failed to conduct a proper Hardwick inquiry into timely, written allegations of Appellant that his trial counsel was presently ineffective and suffered from a conflict of interest. The Court never addressed the factual allegations constituting "reasonable cause" and never advised the Appellant of the consequences of discharging court-appointed counsel; necessitating reversal and remand for resentencing.

**REPLY - POINT 2.** The failure of the trial court to ensure that a record was made documenting the hearing held upon Appellant's Second Motion to Suppress, coupled with the failure of the record to contain critical documentary evidence introduced at the unreported hearing, deprived the Appellant, an indigent, of due process of law and equal protection of the laws.

**REPLY - POINT 5.** The trial court improperly submitted the aggravating circumstance "cold, calculated and premeditated" to the jury based on an inadequate factual record and in contravention of the unrefuted testimony of Appellant's expert that Appellant's mental condition constituted a pretense of moral justification. The trial court further erred in basing its own sentences of death,

in part, upon this aggravating circumstance.

**REPLY - POINT 6.** The **trial** court erred in instructing the jury upon the aggravating circumstance of pecuniary gain as to the murder victim Brock, and basing its sentence of death in part thereon, in that the evidence did not demonstrate beyond a reasonable doubt that the capital felony was committed for this purpose.

**REPLY - POINT 8.** The trial court reversibly erred in allowing the State to present irrelevant and highly prejudicial testimony concerning an alleged "defensive wound" to victim Perry in contravention of this Court's earlier ruling in this case that the aggravating circumstance "especially heinous, atrocious and cruel" was legally inapplicable. The evidence did not pertain to any statutory aggravating circumstance and could have only been introduced for the purpose of inflamming the passions of the jury.

**REPLY - POINT 9.** The **trial** court further erred in denying Appellant's Motion for Mistrial based upon the State's irrelevant and improper reference, in closing argument, to the impact Appellant's crime had upon one of the victims as well as the co-defendant who had provided emotional testimony earlier that day.

**REPLY - POINT 11.** The trial court committed reversible error by failing to instruct the trial jury, or finding in its own judgment, that the statutory mitigating circumstance of "substantially impaired capacity" was present given the testimony of Dr. Krop. Stewart v. State, 558 So.2d 416 **(Fla. 1990).**

**REPLY - POINT 12.** The trial court erred reversibly by

failing, at the conclusion of the penalty phase, to find and weigh all valid mitigating evidence available from the record, instructing the jury thereon, **and** considering the same in its own judgment and sentence. The court further erred by imposing stringent, extra-legal requirements in its weighing of mitigating evidence.

**ANSWER *TO* STATE'S CROSS-APPEAL - POINT 1.** Neither this Court, nor the Legislature, has created any support for the State's theory that it is entitled to its own expert, and to have said expert conduct a compulsory mental **status** examination of the accused for the purpose of aiding the State in a capital sentencing proceeding. Accordingly, the trial court did not abuse its discretion in denying the State's request.

**ANSWER TO STATE'S CROSS-APPEAL - POINT 2.** Victim Perry, an occupant of the truck at the time the capital felony was committed upon her and co-victim Brock, was not related to the owner of the vehicle by blood or marriage. The record is devoid of evidence demonstrating ownership, co-ownership or any other pecuniary interest. The trial court's refusal to find, as to victim Perry, that the capital felony was committed during a robbery or for pecuniary gain is completely supported by the record.

## ARGUMENT

## REPLY - POINT 1

**THE TRIAL COURT FAILED TO CONDUCT A PROPER HEARING INTO ALLEGATIONS OF INEFFECTIVENESS OF COUNSEL, CONDUCT A PROPER INQUIRY OR MAKE REQUIRED FINDINGS.**

Appellee's response to allegations by Appellant that the trial court erred by failing to conduct an appropriate Hardwick inquiry focuses on the issue of trial counsel's alleged conflict of interest (Answer Brief, p. 4) and does not address the more serious concerns of effectiveness of counsel which were raised by Appellant below (Initial Brief, p. 13). Hardwick v. State, 521 So.2d 1071, 1073, cert. denied, 488 U.S. 871 (1988).

Appellant's pro se Motion to Dismiss (sic) Counsel (R.I., 11-23), filed a full month prior to the resentencing hearing, does, as the State maintains, allege a conflict of interest based on trial counsel's honorary deputy sheriff status in Marion County. (R.I. 11-23; Answer Brief, p.4). However, more importantly, the Motion directly challenged trial counsel's effectiveness by specifically alleging that trial counsel "refused to call to the stand or even contact any of numerous character witnesses for the Defendant." (R.I., 13).

The only "hearing" on this issue was that which was presumably conducted on February 15, 1991 on counsel's Motion to Withdraw in that the record is devoid of notice to Appellant concerning a hearing on **his pro se** motion. The responses of Appellant demonstrate his inability to proceed based upon lack of notice (R.I., 148-149). The State's suggestion that any notice to counsel

setting Appellant's **pro se** motion for hearing is adequate is **as** unavailing as their suggestion that Rule **4-4.2** of the Rules of Professional Conduct somehow prohibits the Clerk of Court from "contacting" Appellant by forwarding a Notice of Hearing on his **pro se** motion to his county jail cell via the **U.S.** Mail. (Answer Brief, **p.6).** Indeed, the Record is devoid of notice to either counsel or Appellant on either motion.

The State suggests that Appellant initially raised allegations of ineffective representation in his "second motion" and maintains that the allegations related to his **"original** trial." (Answer Brief, p.5). Appellant clearly alleged ineffectiveness of counsel in his **"first"** motion filed February **11, 1991** (R.I., **13).**

Appellant made more expansive claims of both conflict of interest and ineffectiveness of counsel in his "second" **pro se** Motion to Dismiss (sic) Counsel filed March 11, 1991 (R.I. **165-174). The** question **of** whether the allegations in either motion pertained to present, or prior, representation by trial counsel cannot be answered conclusively in that the trial court never addressed any of the allegations of ineffectiveness on a substantive, factual level. The trial court never inquired of Appellant as to the names of character witnesses allegedly supplied to counsel, nor did the trial court inquire of counsel as to whether any such names had been supplied. The trial court did not seek a proffer from Appellant a5 to the availability of **any** such witnesses, nor the content of their proposed testimony. This, despite the fact that the trial court was fully aware of the fact

that no **such** witnesses were called in either phase of Appellant's original proceeding. Jones v. State, **569 So.2d 1234** (Fla. **1990).** In the end, no witnesses other than Dr. Krop would be called by the Defendant at his resentencing. **The** sum total of the trial court's written **"findings"** rejecting Appellant's allegations of ineffectiveness contained in **his** "first" motion were as follows:

> **"Furthermore,** the Defendant's allegation that Mr. Pearl **is** ineffective is without merit. This Court has witnessed counsel's effective advocacy **in** this **and** other cases and finds that counsel is indeed effective."
>
> (Order dated February **19, 1991;** R.I., **29)** (Emphasis supplied).

**As** noted from the language of the Order itself, the trial court did not view the allegations as relating to Appellant's "original trial." (Answer Brief, p.5).

Thus, it is clear that Appellant invoked the requirements of Hardwick by twice alleging in writing the present ineffectiveness of trial counsel. Appellee's assertion that Appellant's complaints **were** confined to allegations of conflict of interest is not supported by the Record (Answer Brief, **p.7;** R.I., **11-13, 165-174),** including the facially inadequate Order of the trial court rejecting the assertion (R.I., 29).

Bowden v. State, **16** FLW S614 **(Fla.** Sept. **12, 1991),** cited by Appellee as an example of an adequately conducted hearing "strikingly similar to Jones' hearing" (Answer Brief, **p. 11),** is factually inapposite on a number of points. First, unlike the instant case where neither Appellant nor the Court discussed the option of self-representation, Bowden allegedly made three **(3)**

separate such **requests** which this Court found equivocal under Faretta v. California, 422 **U.S. 806, 835-36 (1975).** **Id.** at **S615.** Second, unlike the instant case, Bowden and his trial counsel agreed that Bowden had refused to discuss the case facts with counsel and Bowden had a history of non-cooperation with other, former counsel. **Id.** at 616. Indeed, this Court specifically found that the problems between Bowden and his counsel "were caused by Bowden's refusal to cooperate with counsel." Id. Such is clearly not the case herein.

Appellee's citations to Ventura v. State, 560 **So.2d 217 (Fla. 1990)** and Capehart v. State, 583 So.2d 1009 (Fla. 1989) are equally unavailing. In Ventura, unlike the instant case, the Defendant's allegations were of conflict of interest and were made once and not voiced **thereafter** throughout trial. Ventura, **p.** 220. In Capehart, the initial request for discharge of court-appointed counsel occurred after the rendition of the jury's guilty verdict, and prior to **the** commencement **of** the penalty phase. The allegations were vague and general in nature. Casehart, p. 1014. About the only common factor between Capehart and the instant case is that in each case the trial judge violated **the "better** course" by not advising the Defendants of their right to self-representation.

In sum, Appellant herein had consistently maintained his position that trial counsel was both ineffective and burdened by conflict of **interest.** Jones, at **1234.** Nevertheless, on remand for resentencing the same attorney was assigned to represent Appellant over his multiple protests (R.I., 11-13; 165-174). Appellant never

expressed satisfaction with trial counsel at any stage of the resentencing proceedings See, e.g., Scull v. State, 533 So.2d 1137, 1140 (Fla. 1988).

When presented with allegations of ineffectiveness of counsel coupled with a request for discharge of court-appointed counsel, the trial court has a two-fold duty under Hardwick: (1) to make a sufficient inquiry to determine whether there is reasonable cause to believe that court-appointed counsel is rendering ineffective assistance of counsel; and if no reasonable basis for that claim exists, then (2) so state "on the record" and advise the Defendant that if he discharges counsel the State may not thereafter be required to appoint a substitute. Id. at 258. In the instant case, the trial court did neither. Reversal and remand has been ordered even where the inquiry was sufficient, but the advisement concerning the appointment of substitute counsel was never given. Taylor v. State, 557 So.2d 138, 143-144 (Fla. 1st DCA 1990). Reversal and remand with instructions is clearly warranted where, as here, both requisites of Hardwick are absent.

## REPLY - POINT 2

**THE RECORD HEREIN IS INSUFFICIENT TO SUSTAIN THE TRIAL COURT'S DENIAL OF APPELLANT'S SECOND MOTION TO SUPPRESS.**

Although this Court originally upheld the denial, by the trial court, of Appellant's Motion to Suppress statements in the original proceeding, Jones v. State, 569 So.2d 1234 (Fla. 1990), Appellant on remand filed a subsequent or Second Motion to Suppress alleging new grounds. (R.I., 36). The Second Motion to Suppress originally

was to be heard on February 28, **1991** (R.I., **58)** but was continued by **the** Court (R.I., **83**) when counsel for the State claimed insufficient notice and opportunity to prepare as follows:

> "MR. PEARL: 1 need only to file this document as a condition precedent to my argument upon the motion to suppress. I have exhibited it to Counsel but Counsel has very candidly told me he knew nothing of this, is not prepared and does not feel that it would be fair to burden him with the argument in this case.
>
> MR. DAMORE: It is no question of burdening, Your Honor, it's just that I don't know anything about this. I can see, from counsel's arm, it looks like a docket sheet from the Clerk, as best I can gather, that indicates the Defendant was arrested for possession of alcohol by a minor. However, if Counsel is about to try to argue that he was appointed a Public Defender, we don't know without having a transcript of any proceedings in that case as to whether or not the Public Defender may or may not have been appointed; whether Defendant in that case got his own attorney; whether they were appointed for the purpose, solely, of appearing with him at first appearance, all those things. **And,** whether he then, effectively, sought to institute his Sixth Amendment right to counsel, whether that would have any effect in this case. Also, Your Honor, candidly, not being familiar with all the appellate proceedings in this case, I cannot advise this Court **as** to whether or not this issue has already **been** heard by the Supreme Court of Florida and is, in fact, the law of the case and should not even be heard by Your Honor in a secondary hearing.
>
> THE COURT: I will set it for another time, Gentlemen, but it will have to take place lat because we are trying cases next week and I will hear it one day next week **after** I release the Jury for the day." (R.I., 82-83).

The **Second** Motion to Suppress was subsequently litigated at an <u>unreported</u> hearing, and denied thereafter by written Order (R.I.,

137-138). The Clerk's progress docket in Putnam County Case No. 87-2134-MMPA which allegedly demonstrates appointment of the Public Defender on the unrelated offense prior to law enforcement interrogation upon the instant case is likewise not in the Record.

The State claims that the issue is nevertheless controlled by McNeil v. Wisconsin, _____ U.S. _____, 111 S.Ct. 2204 (1991), a case decided after the resentencing hearing was conducted herein.

The State may well be correct in this assertion. However, unfortunately, the absence of any transcript or stenographic record of the proceedings held upon Appellant's Second Motion to Suppress deprive Appellant of any opportunity for meaningful review of the trial court's decision. Thus, through intentional omission or mere negligence, no transcript exists of trial court proceedings upon the admissibility of a confession in a capital case where some of the most compelling evidence of guilt came from the admissions themselves. Appellant, an indigent, was denied due process of law and equal protection guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 2 and 9 of the Florida Constitution by virtue of state action which operated to deprive him of a sufficient transcript of the record so as to perfect meaningful appellate review as a matter or right. Griffin v. Illinois, 351 U.S. 12 (1955); Draper v. Washinston, 372 U.S. 487 (1963); Bell v. Wainwright, 299 F. Supp. 521 (N.D. Fla. 1969). Denial of the creation of a free transcript of the proceedings upon Appellant's Second Motion to Suppress, which alleged new factual and legal arguments, is fundamental,

constitutional error where (1) a transcript would have been valuable to the defense and (2) no functional alternatives exist. Britt v. North Carolina, **404 U.S. 226 (1971);** Jeffries v. Wainwright, 794 F.2d 1516, 1518 (11th Cir. 1986).

In the absence of defense counsel's exhibit documenting the appointment of counsel in the unrelated case, the transcript is not only valuable but essential to a just determination by this Court of any error of the trial court in denying Appellant's Second Motion to Suppress. Moreover, given the long-standing adversary nature of Appellant's relationship with trial counsel, consultation with trial counsel to **"create"** a record is an unavailing alternative. Jeffries, **p. 1518.** Reversal and remand is therefore necessary.

**REPLY - POINT 5**

**THE TRIAL COURT ERRED IN PERMITTING THE JURY TO CONSIDER THE AGGRAVATING CIRCUMSTANCE, "COLD, CALCULATED AND PREMEDITATED", AND IN FINDING THIS CIRCUMSTANCE IN ITS FINAL ORDER IN THAT THE FACTUAL BASIS FOR SAME WAS ABSENT AND THE UNREFUTED TESTIMONY PRESENTED BY THE DEFENSE OFFERED A PRETENSE OF MORAL JUSTIFICATION.**

Appellee suggests that the presence of mental disturbance, while "relevant to **mitigation,"** is not relevant to the determination of whether the murder was committed in a "cold, calculated and premeditated" manner without "pretense of moral or legal justification," **§921.141(5)**(i) **(1989),** Fla.Stat., unless the accused "was so disturbed he could not premeditate." (Answer Brief, **p.** 18).

First, this Court has consistently required proof of a heightened state of premeditation by the accused for the aggravating circumstance to be properly applied. Maxwell v. State, **443**, So.2d 967 (Fla. 1983). Second, as the Court in Banda v. State, 536 So.2d 221, ***225*** (Fla. 1988), cert. denied, **489** U.S. **1087 (1989)** noted:

> "...under the capital sentencing law of Florida, a "pretense of justification@@ is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the **homicide."** (Emphasis supplied).

Banda **speaks** of a "colorable claim" in reference to the establishment of a **"pretense"** which is defined by Webster's Third New International Dictionary 1797 **(1981)** as "something alleged or believed **on** slight grounds; an unwarranted assumption." (emphasis supplied); Banda, at 225 **(N.2).**

In this case, Appellee's citation to Cruse v. State, 16 **FLW S701 (Fla.** Oct. **24,** 1991) provides no assistance. In Cruse, "five out of the six experts" who testified at trial opined that Cruse's paranoid delusions related to a fear of his own sexuality, not of any fear of physical harm from others. Thus, this Court upheld the trial court's decision to find the aggravating circumstance as supported by the "overwhelming weight of the **evidence."** Id. at **S704.** In Klokoc v. State, 16 FLW ***5756*** (Fla. Nov. 27, **1991),** this Court merely found that there was sufficient record evidence to support the judge's conclusion to apply the aggravating circumstance, but then imposed life imprisonment based, in part, upon mitigating circumstances of

mental and emotional distress. **Id.** at ***S757-758.***

**However,** in the instant case, the unrefuted testimony of Dr. Krop established the presence of a pretense of moral justification as noted by the following record excerpt:

> "Q. You are familiar, of course, with the statutory **scheme set** forth **in** Florida Statute, Sec. 921.141 of aggravating and mitigating circumstances?
>
> A. *Yes*, I am.
>
> Q. There is an aggravating circumstance set forth in that statute which reads as follows -- and, I'll ask you whether you are familiar with it: The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner, without any pretense or moral or legal justification.
>
> Are you familiar, sir, with that statutory aggravating circumstance?
>
> A. I'm familiar with it, yes.
>
> Q. Have you dealt with it before in patients or in testimony **as** a forensic psychologist?
>
> **A.** Yes, at times.
>
> **Q. To what** extent, **if** at all, **would** real **or** imagined rejection, experienced by Randy Jones at that time and place, based upon his personality as you have diagnosed it, and his subsequent, otherwise inappropriate behavior, or killing two people in order to take away their truck, to what extent, if at all, would Randy's acts constitute a pretense of a moral justification for having done that act?
>
> MR. WHITSON: Judge, I've got to object. I think that invades the province of the jury. That's the ultimate issue in this case, the pretense issue, and I don't believe it is an appropriate subject to ask --
>
> THE COURT: No, sir. I'll allow the witness to testify. overruled.

THE WITNESS: Although, certainly, ultimately, that's a decision that has to be made by others I can only say that, from a psychological standpoint, this individual perceived his life to be full of rejections. He perceived these individuals, who were totally innocent, to be a part of that world that had rejected him. In that sense he, again, from a distorted perceptual point of view, somehow was able to justify, in his own mind, engaging in a violent crime.

After the fact, in talking to him, he certainly does not see that justification and cannot comment on any kind of a justification for killing people. But, at that time, it's my opinion that his perception was somewhat distorted and he would have had to justify it.

Q. Of course, I am speaking to you now, of a pretense of a moral justification and not the actual existence of one.

A. That's correct.

Q. And, what I was asking, essentially was, could or could not his mind have persuaded him that he was morally justified in killing two people in order to take a truck to extricate his stuck car out of the sand?

MR. WHITSON: Objection, goes to speculation. He's asking the doctor to speculate about what the mind process of this particular man, at the particular time, concerning the homicides of two people in cold blood.

MR. PEARL: That, Your Honor, is what the appellate courts call a "talking motion."

THE COURT: Speaking objection, I think, is the word. Overruled.

A. I can only indicate that, in my opinion, based on my evaluation, that his mind certainly could have, as a coping mechanism, as a way to deal with his rejections, could have distorted reality to such an extent that he could have morally justified engaging in that behavior.

Q. Does his mind work like that all the time

or jus under particular stress?

> A. I would say it was working that way at the time. His mind has not been working that way since the time that I have been evaluating him He understands the reality of what happened at that time.

In sum, the trial court could not lawfully have found the existence of the aggravating factor of "cold, calculated and premeditated" due to the facts of the case as well as the unrefuted testimony of the defense's forensic psychological expert.

## REPLY - POINT 6

**THE TRIAL COURT ERRED IN INSTRUCTING THE JURY UPON THE AGGRAVATING FACTOR OF PECUNIARY GAIN, AND BASING ITS SENTENCE OF DEATH IN PART THEREON, IN THAT THE EVIDENCE DID NOT DEMONSTRATE BEYOND A REASONABLE DOUBT THAT THE MURDER OF VICTIM BROCK WAS COMMITTED FOR SAID PURPOSE.**

As it did below, the State on appeal attempts to justify the finding that the capital felony was committed for pecuniary gain, §921.141(5)(f) (1987), Fla.Stat., by improper reference to post-incident events such as Appellant's subsequent activity in trying to sell victim Brock's vehicle (R. 11, 201) (Answer Brief, p. 23). However, the record clearly supports the "reasonable hypothesis" that the truck was initially needed solely to extricate the vehicle Appellant and co-defendant Reesh got stuck in the sand. Simmons v. State, 419 So.2d 316 (Fla. 1982). Had Appellant desired the victim's vehicle solely to convert it to his own use, he would have presumably shot and killed the fisherman whom he initially approached in an effort to use his vehicle to pull Reesh's car out of the sand.

This aggravating circumstance clearly was not established beyond reasonable doubt, and should not have been applied by the trial court.

**REPLY - POINT 8**

**THE TRIAL COURT ERRED IN ALLOWING IRRELEVANT AND HIGHLY PREJUDICIAL TESTIMONY CONCERNING AN ALLEGED "DEFENSIVE WOUND" TO VICTIM PERRY IN CONTRAVENTION OF THIS COURT'S PREVIOUS RULING THAT THE MURDER OF VICTIM PERRY WAS NOT "ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL."**

Appellee asserts that trial counsel for Appellant failed to object to opinion testimony of the State's medical examiner as to the nick on victim Perry's finger being a defensive wound, and therefore the issue is waived (Answer Brief, **p. 27).** Moreover, it is argued that the references were minimal. Id.

Dr. Floro first mentioned the nick injury to victim Perry's finger in the context of describing his overall autopsy findings, and the comments were not objectionable at that time (R. 111, 779). However, the instant the State asked Dr. Floro to render an opinion concerning the defensive nature of the wound, counsel objected based upon speculation (R. 111, 782). After the objection was overruled (R. 111, **782),** the collogy between the State and Dr. Floro concerning Perry's alleged "defensive wound" and went on for pages (R. 111, ***782-785)*** well exceeding "two sentences." (Answer Brief, **p. 27).**

The State began another line of inquiry with Dr. Floro only after the trial court made it clear on the record that defense counsel's objection to the prior inquiry was **not** waived (R. 111,

**784-785).** Defense counsel's questioning of Dr. Floro concerning the issue of Perry's alleged "defensive wound" (R. 111, **787-795)** occurred well after his objections were overruled by the trial court. Defense counsel's failure to explore this area upon cross-examination would have prejudiced Appellant, particularly in view of Dr. Floro's alleged prior inconsistent statement on the issue (R. 111, **787-791).**

However, most importantly, the State had no business exploring this highly prejudicial area of "defensive wounds" in that it inflamed the passions of the jury by offering the suggestion that victim Perry was aware, albeit briefly, of her impending death; this Court having previously ruled that the murder of victim Perry was **not** especially heinous, atrocious or cruel. Jones, at 1238; §921.141(5) (h) (1987), Fla.Stat.

**REPLY - POINT 9**

**THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED UPON IRRELEVANT AND IMPROPER REFERENCE TO VICTIM IMPACT AND THIRD PARTY IMPACT.**

The State of Florida's final remarks to the jury included the following reference to the impact of Appellant's crimes upon others, including one of the victims and the co-defendant:

> "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)

Counsel lodged an immediate objection to the improper remarks and moved for mistrial, which was denied (R. IV, 950). The State concedes the fact that a contemporaneous objection was lodged but suggests that the issue is nonetheless waived by virtue of the fact that the objection and motion for mistrial were upon the grounds of the State appealing for jury sympathy and an appeal for the jury to consider the impact on "a third person who had no connection to the case."

The above-referenced quotation from the State's closing clearly demonstrates that the State was making reference to the impact "on Paul Brock's life..." (R. IV, 949). Paul Brock was one of the victims herein, not an unconnected third party. Chris Reesh likewise was the co-defendant herein, not an unconnected third party. The references to the impact of the crime on Reesh were highly prejudicial in that Reesh had tearfully testified from the witness stand hours before the comments were made. The references to Brock were clearly "victim impact" argument.

The State contends that any error pursuant to Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) was waived and cites this Court's opinion in Reichmann v. State, 581 So.2d 133 (Fla. 1991). Reichmann, however, does not discuss waiver of the victim impact issue stated in Booth, supra.; rather, Reichmann deals with a variety of instances of alleged prosecutorial misconduct where no contemporaneous objections were made by Reichrnann or, once the objection was sustained, Reichmann did not move to strike, request a special instruction or move for

mistrial. Reichmann, p. 139 (n. 12). In the instant case, a contemporaneous objection was made followed immediately thereafter by a motion for mistrial (R. IV, 950).

The State does not suggest that improper reference to victim impact is not prejudicial, but rather offers that reversal is not automatic unless the errors are so basic to a fair trial that they can never be treated as harmless. State v. Murray, 443 So.2d 955, 956 (Fla. 1984). The standard restated in Murray is the old "harmless error" rule set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Murray did not involve the presentation of improper victim impact evidence and, indeed, was not a case wherein death was a possible penalty. By contrast, in Patterson v. State, 513 So.2d 1257, 1263 (Fla. 1987), this Court, dealt squarely with the issue of victim impact evidence in a phase two sentencing proceeding and held that:

> "Allowing this type of evidence in aggravation appears to be reversible error in view of the United States Supreme Court decision in Booth v. Maryland, _____ U.S. _____, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987)." (emhasis supplied)

An examination of the record in this cause should lead this Court to the conclusion that the issue has not been waived, nor is the remark harmless error.

**REPLY - POINT 11**

**THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE TRIAL JURY, AND FAILING TO FIND IN ITS OWN JUDGMENT, THAT THE BTATUTORY MITIGATING CIRCUMSTANCE OF "SUBSTANTIALLY IMPAIRED CAPACITY" WAS PRESENT.**

The State argues that since Jones' own expert, Dr. Krop,

testified that Jones was not **"substantially"** impaired at the time of the crime, the inquiry must end (Answer Brief, p. 35). The State also suggests that despite specific discussion of Dr Krop's testimony as it related to statutory mitigating circumstances, and a specific request by counsel for an instruction as to same, Jones has nevertheless waived the issue (Answer Brief, p. 35).

**A** close examination of the record reveals that the trial court interrupted the State during the discussion pertaining to statutory mitigating circumstances relating to mental impairment by noting that the instructions had been requested by the defense. (R. IV, 926). The trial court's reference clearly applied to each statutory mitigating circumstance and the context of the discussion thereafter indicated that the court was of the opinion that Jones' counsel was seeking both instructions. **§921.141(6)**(b); (6)**(f) (1987),** Fla.Stat. The issue is not waived.

On a substantive level, the State attempts to distinguish this Court's holding in Stewart v. State, 558 So.2d **416** (Fla. **1990),** to no avail. In Stewart, as in the instant case, the Defendant presented uncontroverted evidence demonstrating mental instability at the time of the offense. **Id.** at **420. As** this Court noted:

> **"The** trial court determined that the instruction on impaired capacity was inappropriate on the basis of Dr. Merin's additional testimony that he believed that Stewart was impaired but not substantially so. The qualified nature of Dr. Merin's testimony does not furnish a basis for denying the requested instruction. **As** noted above, an instruction is required on all mitigating circumstances **"f**or which evidence has been presented" and a request is made. Once a reasonable quantum of **evidence is presented**

> showing impaired capacity, it is for the jury to decide whether it shows **"substantial"** impairment. Cf. Cooper v. State, 492 So.2d 1059 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S.Ct. 1330, 94 L.Ed.2d 181 (1987) (no instruction required upon bare presentation of controverted evidence of alcohol and marijuana consumption, without more). To allow an expert to decide what constitutes **"substantial"** is to invade the province of the jury. Nor may a trial judge inject into the jury's deliberations his views relative to the degree of impairment by wrongfully denying a requested **instruction."** Id.

The above-cited language of Stewart describes precisely what the trial court did below by refusing to instruct the jury as to either statutory mitigating circumstance, and by ultimately failing to find the existence of either statutory mitigating circumstance in his own Final Order. The error, as in Stewart, cannot be said beyond a reasonable doubt to have had no effect on the jury's recommendation of the death sentence; hence, this Court is required to follow its holding in Stewart and remand for a new sentencing proceeding. Id. 421.

## REPLY - POINT 12

**THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO INSTRUCT THE JURY AS TO THE EXISTENCE OF UNREFUTED, NON-STATUTORY MITIGATING CIRCUMSTANCES AND IN FAILING TO PROPERLY FIND AND WEIGH SAID CIRCUMSTANCES IN ITS FINAL JUDGMENT.**

The State suggests that the Court has no duty to instruct the jury on individual non-statutory mitigating circumstances which have been presented to the jury through the unrefuted testimony of the defense expert herein, Dr. Krop (Answer Brief, p. 39-41). It further quotes extensively from the trial court's Final Judgment

and Sentence as to each victim to support its conclusion that the trial court properly weighed both statutory and non-statutory mitigating factors (Answer Brief, p. 39-41); (R. IV, 257-258, 264-266).

As this Court recently noted in Wickham v. State, 16 FLW 5777, S778 (Fla. Dec. 12, 1991), the trial court has an obligation, at the conclusion of the penalty phase, to both find and weigh all valid mitigating evidence which is available anywhere in the record. See, also, Cheshire v. State, 568 So.2d 908, 911 (Fla. 1990); Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The trial court clearly failed to perform its duty in this regard. Moreover, when it did find the existence of mitigating testimony, the trial court imposed its own stringent, extra-legal conclusions concerning the weight to be given to the evidence as noted by the following excerpt:

> "Absent a showing of significant deprivation and/or abuse to the Defendant or extreme emotional disturbvance, the Court finds little mitigation value given the circumstances of these offenses." (R. IV, 257-258, 264-266).

Dr. Krop's unrefuted testimony clearly demonstrated that Appellant was capable of rehabilitation and Dr. Krop set forth all of the numerous factors he took into consideration in forming this opinion. Dr. Krop is a respected forensic clinical psychologist with years of experience whose credentials were never questioned by the State. Dr. Krop based his finding that the Defendant was capable of rehabilitation upon observations made on at least four (4) separate occasions (R. 111, 801 through R. IV, 921).

Nevertheless, the Court found that the Defendant was "not capable of rehabilitation." This conclusion is completely unsupported by the record, and indeed, contrary to the record.

**ANSWER TO STATE'S CROSS-APPEAL - POINT 1**

**THE TRIAL COURT PROPERLY DENIED THE STATE'S MOTION TO APPOINT A MENTAL HEALTH EXPERT TO CONDUCT A MENTAL STATUS EVALUATION OF THE DEFENDANT AND FURTHER RULED PROPERLY IN DENYING THE STATE'S MOTION TO STRIKE DR. KROP'S TESTIMONY.**

The trial court never restricted the State of Florida at any time from presenting any evidence it desired to present, including **the** testimony of its expert medical examiner, Dr. Floro (R. **111, 488-510).** The trial court held a hearing on the State's motion to appoint a mental health expert and motion to **order** mental health examination of the Defendant (R. I, 58, **118-119). As the** State concedes, the trial judge permitted the State the opportunity to hire whomever it wanted to and to present whatever rebuttal evidence it wished to present, but the Court could not order that the Defendant submit to an examination by the State's expert (R. I, 77), and hence, denied that part of the Motion (**R**. I, 112-113). The State below presented no statute, rule or case authority for the proposition that a trial court may order a Defendant to be examined by an expert employed on behalf of the State of Florida in a capital sentencing phase.

As Appellee **has noted by** reference to this Court's decision in Burns v. State, 16 FLW S389 (Fla. May 16 1991), there exists no authority for a trial court to require **a** Defendant to submit to

such an examination. Id. at S391, S392. In footnote seven (7) of the Burns decision, this Court noted that:

> "We do not pass on whether the court erred in denying the state's request (to appoint an expert to examine the defendant). However, because there is no rule of criminal procedure that specifically authorizes a state's expert to examine a defendant facing the death penalty when the defendant intends to establish either statutory or nonstatutory mental mitigating factors during the penalty phase of the trial, the matter has been brought to the attention of the Florida Criminal Rules Committee for consideration."

Id. at S392.

Thus, unless and until the Legislature passes a law, or this Court **creates** a rule **of** procedure authorizing **or** directing the trial court to appoint an expert on behalf of the State of Florida to examine the Defendant in a capital sentencing proceeding, the trial court clearly cannot have been said to have abused its discretion. As a result, the State's Motion to Strike Dr. Krop's testimony was properly denied.

## ANSWER TO STATE'S CROSS-APPEAL - POINT 2

**THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY THAT IT COULD CONSIDER THE AGGRAVATING CIRCUMSTANCE OF PECUNIARY GAIN/COMMISION DURING A ROBBERY AS TO VICTIM PERRY.**

The trial court correctly found from the evidence that victims Brock and Perry were not husband and wife or otherwise related and that victim Perry had no financial interest in the truck which Jones allegedly desired to convert to his own use (R. IV, 941). The State's argument fails to mention that both victims Brock and

Perry were asleep at the time the shots were intially fired and each was clearly deceased at the time the truck was **"taken".**

In Henry **v.** State, 586 So.2d 1033 (Fla. 1991) store employees were killed during the course of a robbery at the place of their employment. This Court upheld the application of aggravating factors of commission during a robbery and commission for pecuniary gain. Id. at 1035, 1038. This Court's decision in Henry is clearly based upon the fact that the employees had a direct employer/employee relationship with the business establishment which was the **"victim"** of the robbery for pecuniary gain. By contrast, there is no evidence in this record to support the proposition that victim Perry was a co-owner of the vehicle, had any financial interest therein, or was in any way connected with the vehicle other than by merely being present inside the vehicle at the time of her death. Given the above circumstances, the trial court reasonably concluded that the jury should not have been instructed as to the aggravating circumstance of pecuniary gain/commission during a robbery as to victim Perry.

## CONCLUSION

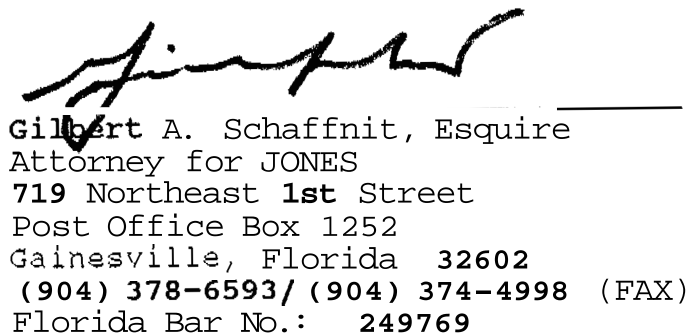
WHEREFORE, for the reasons, and upon the authorities cited herein, it is respectfully submitted that this Court should enter **its** Order reversing and remanding the above-referenced proceeding for resentencing before a different jury. This Court should further decline to issue an advisory opinion concerning issue #1 of the State's Cross-Appeal and should further decline to require the trial court, on remand, to instruct the trial jury that it should consider the additional aggravating circumstances suggested by the State in issue #2 of the State's Cross-Appeal as to victim Perry.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to BARBARA DAVIS, ESQUIRE, Assistant Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114; and to RANDALL 8. JONES, Inmate #111508, Florida State Prison, Post Office Box 747, Starke, Florida 32091; on this 20th day of January, 1992

Respectfully submitted,

LAW OFFICES OF GILBERT A. SCHAFFNIT



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