IN THE SUPREME COURT OF FLORIDA

HARRY JONES,

Appellant,

v. Case No.: 80,827

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee, the State of Florida, the prosecuting authority in the trial court, will be referred to in this brief as the state. Appellant, HARRY JONES, the defendant in the trial court, will be referred to in this brief as Jones. References to the record on appeal (pleadings, pretrial hearings, and sentencing hearings) will be noted by the symbol "R"; references to the trial transcripts will be noted by the symbol "T." All references will be followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS

As to Issue I:

At the pretrial suppression hearing, Lt. Livings testified that, as the result of an automobile accident on Meridian Road, Jones, the driver, was hospitalized (R 949). Livings related that the truck was registered to a George Young, and contact with Young's family members revealed that Young's whereabouts were unknown (R 949). Jones told other detectives that he had obtained the vehicle from Frenchtown and did not know anything about Young (R 950). After meeting with Detective Jones and interviewing witnesses at a liquor store where both Jones and Young had been seen, Livings learned that Jones was acquainted with Young through an interaction at the liquor store the previous afternoon, and that Jones had "driven away" with Young (R 950). The witnesses at the liquor store told Livings that Young had had "quite a bit of cash" in his possession to pay for alcohol that afternoon, and that Jones had had no money (R 951-52). Witnesses at a residence where Young had deposited another passenger revealed the fact that Young was last seen leaving this residence with Jones in Young's vehicle (R 951).

Based on this information, Livings contacted Jones at the hospital for additional information, hoping to discern

whether Young might be injured in the woods somewhere or whether foul play was involved with Young's disappearance (R 952).[1] Jones related with a headshake that he did not know the whereabouts of the owner of the vehicle (R 953). When Livings informed Jones of the substance of his interviews with various witnesses, Jones became uncooperative (R 953).

Livings noticed Jones's clothing in an unsealed bag in the corner of the hospital room, and decided to take it "[b]ased on everything that Detective Wood had uncovered during his investigation and during the time that [Livings] was with him and heard certain interviews and participated in them, suspicion was very high that there may have been foul play involved in this situation." (R 954). Livings also explained that seizure was necessary because, in his experience, evidence taken from clothing "generally will narrow down a location as to where an individual may or may not have been," and because hospitals tend to misplace such items (R 955).

Livings later instructed Detective Coughlin to check with the hospital to ascertain whether other items were removed from Mr. Jones's person when he was admitted (R 956). Coughlin discovered that Jones had had lottery

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[1] Livings spoke with Jones about 24 hours after the accident, during which time police personnel continued to search for Young (R 953).

tickets[2] and "a considerable amount of cash" in his pockets (R 956). The tickets and money were seized because Jones's family members would have had access to them and might have taken them (R 957).

The state argued that Jones had no standing to raise the issue because he had no reasonable expectation of privacy:

> [T]his is Mr. Jones in the hospital, through his own actions, not the actions of any state agent. Mr. Jones wrecked the dead man's car and consequently injured himself, was taken to the hospital under emergency conditions. The clothing was taken off of him, his belongings were taken from him, and they were in the hands of totally separate custodians. This was not anything the State did or required or compelled of Mr. Jones.

(R 963-64). The state alternatively argued that, even if Jones had standing, the detectives effected a seizure based on probable cause (R 965). The trial court orally held:

> It's obvious that this case does not come within the laws and constitution relative to searches and seizures of a person's residence, which is his castle. This is a case where certain materials w[ere] released or turned over to or came into custody of others by an act of the Defendant, although it is accidental -- that is, the automobile

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[2] Lottery tickets bought from the same location also had been found in Young's vehicle (R 957).

> wreck and hi[s] being incompetent or unconscious to the extent that they had to take these clothing matters and other personal effects and hold them in the hands of the public authorities there or employees there. So, although he might have had some slight reasonable expectation of privacy, it was not with the strength it would be in his private home.
>
> The Court looks upon this situation more or less as the officer taking the property into protective custody, much as they would a witness that they feel might need to remain through an ongoing investigation. So, the Court finds that his constitutional rights were not violated and the seizure was properly executed and the motion will be denied.

(R 971-72). When the state introduced the clothing, lottery tickets, and currency at trial, defense counsel objected (R 488).

As to Issue II:

Defense counsel objected to composite state exhibit 5, which consisted of photographs depicting the victim's body floating in the water (T 469-71). After hearing argument, the trial court admitted only 5A and 5G, and excluded 5E (T 471).

Defense counsel also objected to composite state exhibit 7, which consisted of the autopsy photographs (T 481). After hearing argument, the trial court excluded 7G, 7H, and 7I (T 482).

As to Issue IV:

At the penalty phase charge conference, defense counsel objected to the heinous, atrocious, and cruel instruction:

> [T]he United States Supreme Court has clearly questioned the adequacy of Florida's instruction for aggravating circumstances of heinous, atrocious and cruel. And that's in Espinosa v. Florida, 1992 case, 120 L. Ed. 2d 854.
>
> We contend that the newest instruction remains so vague it will result in arbitrary and capricious application of the death penalty, contrary to the Eighth Amendment of the United States [and] Article I, Section 16 of the Florida Constitution. The instruction, in defining heinous, atrocious includes language that has already been rejected by the United States Supreme Court.
>
> Furthermore, the instruction does not describe the conscienceless or pitiless crimes which are unnecessarily tortuous to the victims as a limit on what may be considered heinous, atrocious and cruel but merely is a kind of crime included under that category. We contend that adding this example of heinous, atrocious and cruel after a definition which allows the jury to impose death in what amounts to almost any first degree murder does nothing to bring this within the requisite instruction requirement. Even if the last sentence is read to limit the jury's discretion in terms of conscienceless or pitiless or inadequate to channel the jury's discretion.

(T 971-72).

The sentencing court instructed the jury:

> 4. The crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked or vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional facts that show that the crime was conscienceless or pitiless and was unnecessarily tortuous to the victim.

(T 997-98).

As to Issue V:

In its sentencing memorandum, the state argued the application of the heinous, atrocious, or cruel aggravating factor:

> 4. The Capital Felony was especially heinous, atrocious, or cruel.
>
> The State would respectfully submit that this aggravating circumstance, which was contested by the defense, was established beyond a reasonable doubt.
>
> The defense contends that because it cannot be asserted whether the defendant was conscious while being drowned, . . . this is not an aggravating factor. Jackson v. State, 451 So. 2d 458 (Fla. 1984).
>
> Setting aside the physiological and emotional trauma inflicted on a conscious victim of a deliberate drowning, the remaining evidence is still sufficient to classify this killing [a]s heinous, atrocious and cruel.

> The medical examiner testified at length regarding the seriousness of the wounds to the victim which were consistent with defensive, premortem injuries. That testimony disclosed a savage blow to the chest resulting in separation of the rib cartilage at three different locations, and three separate blows to the head. Clearly the victim was in excruciating pain and filled with terror and fear as the attack continued. Preston v. State, 444 So. 2d 939, 946 (Fla. 1984).
>
> Even assuming the victim was rendered unconscious prior to the drowning itself, the number and severity of the blows inflicted on the victim as he struggled to avoid his death demonstrate the defendant's consci[ence]less and pitiless utter indifference to the suffering of the victim. See: Hitchcock v. State, 578 So. 2d 685 (Fla. 1990); and contrast with Scull v. State, 553 So. 2d 1137 (Fla. 1988), involving a single blow to the victim's head.

(R 812-13).

The sentencing court found:[3]

> Evidence was presented on this aggravating circumstance and the Jury was instructed on it. While the evidence presented indicated that the victim, George Young, Jr., was alive when he drowned, there was no conclusive evidence as to whether the victim was

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[3] The sentencing court found two other aggravating circumstances applicable: (1) Jones was previously convicted of another capital felony or of a felony involving the use or threat of violence to a person; and (2) the capital felony was committed while Jones was engaged in a robbery (R 829-30).

> conscious or unconscious when drowned. However, the evidence presented by the medical examiner regarding the seriousness of the wounds to the victim indicated that the wounds were consistent with defensive, premortem injuries. The wounds consisted of an acute fracture of the long bone in the forearm, fractured ribs, numerous tears in the skin of the left arm and numerous blows to the head. The evidence presented clearly reveals that the victim, George Young, Jr., experienced a great deal of pain and terror as he attempted to avoid being killed. The actions of the Defendant clearly demonstrate that the crime was conscienceless and pitiless and unnecessarily tortuous to the victim.
>
> The Court finds that this aggravating circumstance was proved beyond a reasonable doubt.

(R 831-32).

As to Issue VI:

In its written sentencing order, the sentencing court spoke to mitigation:

> 2. MITIGATING CIRCUMSTANCES: Florida Statutes 921.141(6)
>
> (a) The Defendant has no significant history of prior criminal history.
>
> (b) The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.
>
> (c) The victim was a participant in the Defendant's conduct or consented to the act.

(d) The victim was an accomplice in the capital felony committed by another person and his participation was relatively minor; and

(e) The Defendant acted under extreme duress or under the substantial domination of another person.

Defense counsel made no request for instructions to the Jury on the above statutory mitigating circumstances, (a, b, c, d, e), the Jury was not instructed on them, and the Court finds that they do not apply.

(f) The capacity of the Defendant to appreciate the criminality of his conduct or to conform to the requirements of law was substantially impaired. Evidence was presented with regard to this statutory mitigating circumstance, the Jury was instructed on it it, and there was sufficient evidence upon which the Jury could have been reasonably convinced that this mitigating circumstance was established.

The evidence established that Defendant had been drinking beer and gin on the day of the murder and the evening prior to the murder. Defendant testified that his medical records indicate that his blood alcohol level was 0.269. Defendant further testified that when he was drinking he got in trouble.

While this mitigating circumstance, whether viewed as a statutory or non-statutory mitigating circumstance, is entitled to some weight, it is not entitled to great weight in light of the facts established in this case.

(g) The age of the Defendant at the time of the crime. The Defendant is 33 years of age. Defense counsel made no request for an instruction to the Jury on this mitigating circumstance,

the Jury was not instructed on it, and the Court finds that it does not apply.

3. NON-STATUTORY MITIGATING CIRCUMSTANCES

(a) The Defendant suffered from childhood trauma and a difficult childhood. Evidence was presented during the penalty phase of the trial and there was sufficient evidence upon which the Jury could have reasonably believed that this non-statutory mitigating circumstance was established.

Defendant and his sister both testified that when Defendant was five or six years old his father dropped Defendant off, gave him some money, left with his girlfriend, and Defendant has not seen him since. Both Defendant and his sister testified that Defendant was close to his father.

Further, both Defendant and his sister testified that Defendant's mother stabbed and killed Defendant's step-father and spent three years in prison. While Defendant's two sisters and his aunt attempted to raise the Defendant, he never adjusted and started getting into trouble.

While this non-statutory mitigating circumstance is entitled to some weight, when one considers its remoteness in time and the fact that his similarly situated sisters have become productive citizens, this mitigating circumstance i not entitled to great weight.

(b) The Defendant has the love and support of his family. Evidence was presented during the penalty phase of the trial and there was sufficient evidence upon which a jury could have reasonably believed that this non-statutory mitigating circumstance was established. While this non-statutory mitigating circumstance is entitled to some weight, the Court finds that it is not entitled to great weight.

> 4. The Court finds sufficient aggravating circumstances exist for imposition of the death sentence, and that the aggravating circumstances far outweigh the mitigating circumstances.

(R 833-35) (emphasis in original).

SUMMARY OF THE ARGUMENT

As to Issue I:

The trial court correctly denied Jones's motion to suppress physical evidence under three different theories. First, Jones did not have "standing" to claim a fourth amendment violation where, although Jones may had have a subjective expectation of privacy in the money, lottery tickets, and clothing, Jones's expectation of privacy was not one that society is prepared to recognize as reasonable. Second, even if Jones had a reasonable expectation of privacy, the items seized were in "open view" or "plain view." Third, again assuming Jones had a reasonable expectation of privacy, the evidentiary items were properly seized due to exigent circumstances.

As to Issue II:

The trial court did not abuse its discretion in admitting the photographs into evidence. These photographs were relevant not only to identify the victim, but to illustrate the nature of his wounds, the cause of death, and the condition and location of the body when first discovered.

As to Issue III:

Because Jones did not argue this point below, he failed to preserve it for appellate review. In any event, Jones's claim that the aggravating factor of murder committed during the course of a felony violates the proscription against cruel or unusual punishment is wholly devoid of merit.

As to Issue IV:

The instruction read to the jury concerning the heinous, atrocious, or cruel aggravating factor is constitutional. The sentencing court read the 1990 version of this instruction to the jury, which this Court has approved in both Hall and Preston, because it sufficiently defines and limits the terms heinous, atrocious, and cruel. Were this Court to determine otherwise, any error was clearly harmless because, under any definition of the terms, the instant murder was committed in a heinous, atrocious, or cruel manner.

As to Issue V:

The sentencing court correctly found that Jones committed the instant murder in a heinous, atrocious, or cruel manner. The record unequivocally shows that the victim was not only alive when Jones drowned him, but conscious. Jones first beat the victim severely, causing an

acute break in the victim's left arm, and leaving defensive wounds on the victim's torso and head. Jones then dragged the victim into the lake, and held his head under water until the victim stopped moving.

As to Issue VI:

The sentencing court properly considered all mitigation presented by Jones, finding that one statutory and two nonstatutory mitigating circumstances had been established. In weighing the aggravating factors against the mitigation, which the court considered weak, the sentencing court permissibly found that the aggravating factors substantially outweighed the mitigation.

ARGUMENT

Issue I

WHETHER THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE.

The trial court's ruling on Jones's motion to suppress comes to this Court with a presumption of correctness, and this Court should interpret the evidence and all reasonable inferences and deductions derived therefrom in a manner most favorable to sustain the trial court's ruling. Johnson v. State, 438 So. 2d 774 (Fla. 1983); McNamara v. State, 357 So. 2d 410 (Fla. 1978). Although the trial court did not specifically rule on the state's "standing" argument, the court's order can be sustained under a standing theory as well as under exigent circumstances and open view theories. See Caso v. State, 524 So. 2d 422 (Fla. 1988) ("A conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it.").

"Standing"

In Dean v. State, 478 So. 2d 38 (Fla. 1985), this Court adopted the Rakas v. Illinois, 439 U.S. 128 (1978), analysis concerning "standing" to contest a search or seizure, holding that

> the determination of whether the proponent of a motion to suppress is entitled to contest the legality of a search and seizure must take into consideration the substantive fourth amendment issues as well as the concept of standing. In so holding, we recede from that portion of [State v.] Tsavaris[, 394 So. 2d 418 (Fla. 1981)] treating standing as a separate inquiry to be determined before the substantive fourth amendment issues. This conformity with the United States Supreme Court on this issue is particularly appropriate in light of the amendment to Article I, section 12, Florida Constitution, adopted after the Tsavaris decision in 1982, which mandates that the right against unreasonable searches and seizures "shall be construed in conformity with the fourth amendment to the United States Constitution, as interpreted by the United States Supreme Court."

Id. at 41. See Rakas, 439 U.S. at 140 (the standing "aspect of the analysis belongs more properly under the heading of substantive Fourth Amendment doctrine than [under] the heading of standing . . . ."). See also State v. Suco, 521 So. 2d 1100 (Fla. 1988).

The "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas, 439 U.S. at 143.[4] Jones

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[4] Determining whether an individual has a legitimate expectation of privacy in the object of a search or seizure requires a two part inquiry. United States v. McKennon, 814

understandably has not claimed that he had a legitimate expectation of privacy in his hospital room, but contends that he had such an expectation in his clothes, lottery tickets, and money. Although Jones may have had a thoroughly justified subjective expectation of privacy in these items, see id. at 143 n.12, his expectation was not "one that society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. 347, 361 (1967).

The instant record shows that, as a result of Jones's accident with Young's truck, Jones was seriously injured and transported to the hospital, and his clothing was removed at some point for treatment purposes. There is no evidence that law enforcement personnel had anything to do with the removal of Jones's clothes or with the subsequent removal of money and lottery tickets from the pockets of Jones's clothes. When Livings visited Jones in the hospital, he observed Jones's clothes in an unsealed bag in a corner of the room. Although Jones had been in this hospital room for approximately 24 hours, there was no evidence that Jones had sought to exclude persons from his room, had attempted to deny access to this bag of clothes, or had requested the

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F.2d 1539, 1542-43 (11th Cir. 1987). The first question asks whether the individual has manifested a subjective expectation of privacy in the object of the search or seizure. Id. The second inquiry is whether society is willing to recognize the individual's expectation of privacy as legitimate. Id.

return of the lottery tickets and money to him. In other words, there can be no "reasonable inference that [Jones] took normal precautions to maintain his privacy," like sealing the bag, placing the bag in the closet, asking for the return of the lottery tickets and money, etc. Rawlings v. Kentucky, 448 U.S. 98, 105 (1980). Even if Jones's injuries prevented such actions, the record shows that Jones was able to communicate, and thus could have relayed such requests to hospital personnel. Accordingly, because he had no legitimate expectation of privacy in the unsealed bag of clothing and the loose currency and lottery tickets, Jones cannot claim a fourth amendment violation.

Seizure

"Plain View"

Assuming without conceding that Jones had a legitimate expectation of privacy in these items, it is clear that the seizure did not violate Fourth Amendment protections because the items were in open view. The elements of the plain view exception to the warrant requirement are set forth in Coolidge v. New Hampshire, 403 U.S. 443 (1971): The seizing officer must be in a position where he has a legitimate right to be;[5] the officer must come across the evidence

[5] According to the Supreme Court in Texas v. Brown, 460 U.S. 730 (1983), the Coolidge plurality's requirement of probable cause was not an additional limitation placed on

inadvertently;[6] and the incriminating nature of the evidence must be immediately apparent on its face.[7]

In Ensor v. State, 403 So. 2d 349 (Fla. 1981), this Court clarified the difference between "plain view" and "open view," concluding that the Supreme Court intended the Coolidge "plain view" doctrine to cover only the scenario where an officer is legally inside a constitutionally protected area and inadvertently observes contraband also in the protected area. The instant factual situation is identical to the scenario described as "open view" by the Ensor Court because it did not involve an intrusion: "[B]oth the officer and the [evidence were] in a non-constitutionally protected area." Id. at 352. Thus, the Ensor Court concluded: "Because no protected area [was] involved, the resulting seizure has no fourth amendment

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the plain view doctrine; instead, the phrase simply recast the plurality's holding that a police officer must be engaged in a lawful intrusion or must otherwise legitimately occupy the position affording him a "plain view." Id. at 737 n.3. See also Arizona v. Hicks, 480 U.S. 321 (1987); Horton v. California, 496 U.S. 128 (1990).

[6] This is to say that the officer may not "know in advance the location of [certain] evidence and intend to seize it." Coolidge, 403 U.S. at 470.

[7] In Texas v. Brown, 460 U.S. 730 (1983), the United States Supreme Court interpreted the "immediately apparent" language of Coolidge as meaning only that an officer must have probable cause to believe that the items he sees in plain view are evidence of a crime, not that the officer must "know" that the items are incriminating. Id. at 741-42.

ramifications . . . ." Id. (emphasis supplied). Similarly, because Jones does not claim that his hospital room was a constitutionally protected area, Livings made no intrusion and the seizure of the clothing, money and lottery tickets in open view has no fourth amendment consequences.

If this Court determines otherwise, the instant record nevertheless supports a "plain view" seizure. Livings had a legitimate right to be in Jones's hospital room to conduct an investigation into the accident and Young's whereabouts; while Livings was in the room, he inadvertently observed the unsealed bag of clothing, and later discovered the money and lottery tickets; and the evidentiary character of these items was immediately apparent to Livings due to the missing status of Young. Further, probable cause justified Livings's belief that the items were associated with criminal activity.[8] Livings testified that, at the time of his interview with Jones, he knew that Jones was the last person to be seen with Young in Young's vehicle, and that Young had had a substantial amount of cash in his possession; that Young was the owner of the wrecked vehicle

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[8] It is the probability of criminal activity, not a *prima facie* showing of such activity, that is the standard of probable cause. State v. Smith, 233 So. 2d 396 (Fla. 1970). The probability of criminal activity must be viewed in light of the factual and practical considerations of everyday life upon which reasonable and prudent men act. Paula v. State, 188 So. 2d 388 (Fla. 3d DCA 1966). See also Texas v. Brown, 460 U.S. 730 (1983).

and had been missing for over 24 hours; and that lottery tickets had been found in the wrecked vehicle. Livings was also aware that Jones had told Detective Wood that he had obtained the vehicle from someone in Frenchtown. See Exhibit 14. Finally, Livings witnessed Jones change from cooperative to uncooperative when confronted with statements from witnesses that rebutted Jones's assertion that he knew nothing about the owner of the vehicle. Based on all of this information, Livings had a reasonable belief that the clothing, money, and lottery tickets were likely evidence of criminal activity. Compare Craig v. State, 585 So. 2d 278 (Fla. 1991).

Exigent Circumstances

Again assuming without conceding that Jones had a legitimate expectation of privacy in these items, the seizure did not violate Fourth Amendment protections because exigent circumstances existed. The combination of probable cause and exigent circumstances usually justifies a warrantless seizure. Vale v. Louisiana, 399 U.S. 30 (1970). The need to preserve evidence that may be lost or destroyed if a seizure is delayed has long been recognized as an exigent circumstance. Schmerber v. California, 384 U.S. 757 (1966). The test for exigent circumstances is whether the police had an urgent need in the performance of duty which afforded neither time nor opportunity to apply to a

magistrate for a warrant. Hornblower v. State, 351 So. 2d 716, 718 (Fla. 1977).

> To determine if exigent circumstances exist, some factors a court examines include: (1) the degree of urgency involved and amount of time necessary to obtain a warrant; (2) a reasonable belief that [evidence] is about to be removed; (3) the possibility of danger to police officers guarding the site of [evidence] while a search warrant is sought; (4) information indicating the [evidence]'s possessors know police are on their trail; and (5) the ready destructibility of the [evidence].

United States v. Vasquez, 953 F.2d 176, 180 (5th Cir. 1992). See also Wike v. State, 596 So. 2d 1020, 1024 (Fla. 1992).

Four of these factors existed in the present case. As Livings testified, police personnel had been searching for Young for over 24 hours with no success. They had no leads on his whereabouts, other than the facts that Young had been seen last with Jones, Jones left the liquor store with Young in Young's vehicle, and Jones was alone when he wrecked Young's car. Although Livings stated that he could have obtained a warrant within three to six hours, Livings was faced with the reality that Jones's clothing already had been left unattended and unsealed in Jones's hospital room for about 24 hours.[9] Hospital personnel could have moved or

[9] At the time police officers secured the money and lottery tickets from hospital security, these items had been in the custody of the hospital for over 48 hours.

disposed of the clothing at any time; Livings recounted his experience with hospitals misplacing items. Because Jones could communicate, he could have directed that the clothing be removed or discarded. Additionally, Jones's family would have had access to the clothing, money, and lottery tickets and could have removed these items at any time.

The possibility that these items could have been removed became great after Livings spoke with Jones, who became uncooperative after having been advised of witnesses' statements that connected him with Young. After Livings's interview with Jones, Jones realized that he could be a suspect, and might have been interested in disposing of any evidence that would have strengthened his connection with Young. Jones makes much of the fact that Livings could have gotten another police officer to guard the evidence, just as Livings later posted a police officer outside Jones's room. However, Livings himself stated that it was not until later that a guard was posted outside Jones's room. Thus, there still could have remained a substantial period of time, after the 24 hours that had passed already, during which the evidence would have been susceptible to removal or destruction.

The prosecutor in this case aptly noted:

> This is a hospital facility with nurses and custodial personnel and technicians

> and doctors going in and out all the time. It is not at all difficult to conceive of someone trying to keep this environment clean and sterile by disposing of that material that is right then and there in their plain sight.
>
> Not only could it have been inadvertently disposed of, the Defendant had the ability to communicate and request the disposition or destruction of these items. He had the ability to advise the hospital to release the lottery tickets and the cash to some person of his choosing and thereby take them out of availability to law enforcement.
>
> Finally, as Lieutenant Livings pointed out, there was at that point a 24-hour old, ongoing search for the missing owner of the vehicle, last seen in this man's company, no idea where he is. There was clearly an emergency to seize the clothing, if nothing else, to see what could be gleaned from it to assist in locating a man who might at that point be still alive. They had no way of knowing whether the man was alive or dead.

(R 967-68). Because Livings had probable cause to believe that the items seized were evidence of a crime and exigent circumstances concerning the possible destruction of this evidence existed, the instant seizure did not violate fourth amendment protections.

Subsequent Seizure

After Livings seized Jones's clothing, money, and lottery tickets, police personnel delivered the clothing to a soil specialist for the purpose of narrowing the possible

locations where Young might have been found, and delivered the lottery tickets to lottery personnel for the purpose of discovering whether the tickets found in Jones's pockets were purchased in the same location as the tickets found in Young's truck. Because it appears that emergency medical personnel removed Jones's clothes, and hospital personnel removed the lottery tickets and money from the pockets of Jones's clothing, the initial "seizure" of these items was effected by private individuals. Thus, any "additional invasions of [Jones's] privacy by the [state] must be tested by the degree to which they exceeded the scope of the private [seizure]." United States v. Jacobsen, 466 U.S. 109, 115 (1984). After all, the "Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." Id. at 117.

There can be no dispute in the instant appeal that the scope of the seizure by law enforcement personnel of the currency found in Jones's pockets was identical to the scope of the seizure effected by hospital personnel. Further, the subsequent tests which were performed on the lottery tickets and clothing did not exceed the scope of the initial seizure

> because any further legitimate expectation of privacy was only remotely compromised. Although the test[s] exceeded the private investigation of the non-governmental employee[s], any

> "seizure" of [evidence] which [was] lost in the course of testing it [was] reasonable, balancing the nature and quality of an individual's fourth amendment rights against the importance of the governmental interest alleged to justify the intrusion. See Jacobsen, 104 S. Ct. at 1662-63.

State v. Gans, 454 So. 2d 655, 657 (Fla. 5th DCA 1984). Accordingly, the subsequent seizure of soil from Jones's clothing and information from the lottery tickets was reasonable for fourth amendment purposes.

In any event, any error in admitting these items into evidence was harmless. As Ruth and Solomon Mills's testimony showed, Young's body was found independent of the seizure of these items (T 427, 433-34). Further, Jones's connection with Young was sufficiently established without the lottery tickets and money, through the testimony of various witnesses who saw Jones converse with Young at the liquor store; Young help Jones with his drunk friend; Young drive off in his truck with Jones and his drunk friend; Young and Jones drop off Jones's drunk friend at his residence; and Young and Jones together in a convenience store (T 279-84, 299-302, 317-19, 337-39, 346-49). Thus, because it is clear beyond a reasonable doubt that any error in admitting these evidentiary items would not have affected the jury's verdict, any error was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Issue II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING VARIOUS PHOTOGRAPHS INTO EVIDENCE.

It is well settled that the admission of photographic evidence is a matter within the broad discretion of the trial court, and that a trial court's ruling will not be disturbed on appeal unless a clear showing of abuse is made. Duest v. State, 462 So. 2d 446 (Fla. 1985). Here, the trial court did not abuse its discretion in admitting the photographs because they were relevant. See Henry v. State, 613 So. 2d 429 (Fla. 1992); Burns v. State, 609 So. 2d 600 (Fla. 1992); Nixon v. State, 572 So. 2d 1336, 1342 (Fla. 1990), cert. denied, 112 S. Ct. 164 (1991); Haliburton v. State, 561 So. 2d 248, 250 (Fla. 1990), cert. denied, 111 S. Ct. 2910 (1991); Gore v. State, 475 So. 2d 1205, 1208 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986).

Jones's argument concerning state exhibit 5E is enigmatic, as the trial court excluded this exhibit (T 471). As for exhibits 5A and 5G, their relevance is immediately apparent. Exhibit 5A shows the location of the victim's body from a distance; precisely, it places the Ruth and Solomon Mills's testimony in perspective, showing how the victim's body was floating among the grasses in the water (T 472). Exhibit 5G shows the victim floating in the water from a full side view; specifically, it shows that the

victim was found floating face down, with his shirt bunched up around the arms and upper torso because the buttons were missing (T 472-73, 662).

The relevance of exhibits 7A - 7F and 7J - 7P is also clear. The medical examiner's testimony was critical in helping the state to establish that Jones had beaten Young before drowning him. During this struggle, Jones apparently struck Young in the head and torso, ripped and tore Young's shirt causing the buttons down the front to disengage, and broke Young's left arm (T 649-51, 653-55). Further, the medical examiner testified that Young was alive when Jones drowned him, based on the items aspirated into Young's lungs during the drowning (T 656-59).

Exhibit 7A shows that victim lying on his back, and the medical examiners removing his unbuttoned shirt (T 662). Exhibit 7B shows a close up of the victim's shirt which had several tears (T 663). Exhibit 7C showed a close up of the tears in the left arm of the victim's shirt (T 663). Exhibit 7D shows the tears in the victim's shirt, which was resting on the victim's torso, and the missing buttons down the front of the shirt (T 663). Exhibit 7E shows a close up of the lower left portion of the victim's shirt where there were many tears (T 663). Exhibit 7F was a full shot of the victim's shirt, showing all the tears on the left side, with white paper underneath to highlight the tears, and showing

the absence of tears in the right side (T 663). Exhibits 7J, 7K, and 7L showed the acute break of the victim's left arm from different angles (T 663-64). Exhibit 7M was a close up of the broken arm, palm side up (T 664). Exhibit 7N shows the pronounced break of the victim's arm, palm side down (T 664). Exhibit 7O depicts the victim's unbroken right arm, palm side down (T 664). And Exhibit 7P depicts the victim's unbroken right arm, palm side up (T 664).

Predictably, Jones cites to Young v. State, 234 So. 2d 341 (Fla. 1970), receded from on other grounds, State v. Retherford, 270 So. 2d 363 (Fla. 1972), cert. denied, 412 U.S. 953 (1973). This reliance is misplaced, however, because "Young involved the admission of 45 highly prejudicial photographs of marginal relevance." Haliburton, 561 So. 2d at 250-51 (emphasis added). See also Straight v. State, 397 So. 2d 903, 907 (Fla. 1981) ("[T]he pictures in the present case were not repetitive as in Young and were of greater relevance. . . They were few in number and included only a very few gruesome ones which were relevant to corroborate testimony as to how death was inflicted."). As in Haliburton, the photographs here were used to identify the victim and to illustrate the nature of the victim's wounds and the cause of death. See also Burns, 609 So. 2d at 600; Nixon, 572 So. 2d at 1342; Jackson v. State, 545 So. 2d 260 (Fla. 1989); Grossman v. State, 525 So. 2d 833 (Fla.

1988), cert. denied, 489 U.S. 1071 (1989); Bush v. State, 461 So. 2d 936, 939 (Fla. 1984), cert. denied, 475 U.S. 1031 (1985). Further, these pictures were used to explain the condition of the body when first discovered. See Nixon, 572 So. 2d at 1342; Gore, 475 So. 2d at 1208.

Like the defendant in Nixon, Jones is correct that some of the photographs were arguably gruesome. However, "[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." Henderson v. State, 463 So. 2d 196 (Fla. 1985). See also (T 481). This Court cannot presume that such photographs "will so inflame the jury that they will find the accused guilty in the absence of evidence of guilt. Rather, [this court should] presume that jurors are guided by logic and thus are aware that pictures of the murdered victims do not alone prove the guilt of the accused." Id. at 196. Here, where the prosecution offered the photographs for a legitimate purpose, and these evidentiary items clearly were relevant in proving the case against Jones, it cannot be said that the photographs were so shocking in nature as to outweigh their relevance. Thus, the trial court did not abuse its discretion in admitting them.

If this Court determines otherwise, any error by the trial court on this point was harmless beyond a reasonable doubt. There simply is no possibility that the admission of

these photographs affected the jury's verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The state presented the jury with much more telling evidence of Jones's guilt, namely, Jones's confession to Kevin Prim (T 681-83) and the statements of witnesses who had seen Jones with Young (T 279-84, 299-302, 317-19, 337-39, 346-49).

Issue III

WHETHER JONES'S DEATH SENTENCE, AN AGGRAVATING FACTOR OF WHICH WAS MURDER COMMITTED DURING THE COURSE OF A FELONY, VIOLATES THE EIGHT AMENDMENT PROSCRIPTION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Jones contends that "[t]he automatic application of the murder while committing a specified felony aggravating circumstance to a defendant whose first degree murder conviction rests on a felony murder theory fails to genuinely narrow the class of felony murderers eligible for the death penalty under the Eighth Amendment." Initial Brief at 41. In so arguing, Jones has failed to note that he made no such argument below. Because Jones did not present this claim to the trial court, he failed to preserve it for appellate review, and this Court should deem it procedurally barred. Ventura v. State, 560 So. 2d 217 (Fla. 1990), cert. denied, 498 U.S. 951 (1991); Swafford v. State, 533 So. 2d 270 (Fla. 1988), cert. denied, 103 L. Ed. 2d 944 (1989); Eutzy v. State, 458 So. 2d 755 (Fla. 1984), cert. denied, 471 U.S. 1045 (1985); Trushin v. State, 425 So. 2d 1126 (Fla. 1982).

In any event, assuming preservation, the "during the course of a felony" aggravating factor does not violate the proscription against cruel or unusual punishment. The United States Supreme Court implicitly has approved of the

felony element of the offense of felony murder as a valid aggravating circumstance in Proffitt v. Florida, 428 U.S. 242 (1976). There, the Court held that Florida's capital sentencing scheme satisfied the deficiencies identified in Furman v. Georgia, 428 U.S. 153 (1976). Cf. Gregg v. Georgia, 428 U.S. 153 (1976) (death penalty upheld under Georgia statute which allowed similar duplication). The United States Supreme Court also has found no Eighth Amendment violation in using an element necessary to the conviction of first degree murder as an aggravating factor to support a death sentence. Lowenfeld v. Phelps, 484 U.S. 231 (1988).

As noted in Proffitt, the "narrowing" process involves more than consideration of aggravating factors.

> The system must be examined as a whole because it works as a whole. In addition to aggravating factors, our statute further guides and channels the sentencer's discretion by providing a bifurcated proceeding, requiring consideration of mitigating circumstances, explicitly directing the manner in which the jury must weigh the various sentencing factors, and mandating meaningful appellate review. The cumulative effect of these procedural safeguards assures that our statute's use of the underlying felony as an aggravating circumstance does not violate the principles of Furman.

State v. Middlebrooks, 840 S.W.2d 317, 348-49 (Tenn. 1992) (Drowota, J., concurring & dissenting) (citations

omitted).[10] Thus, a felony aggravating factor could be mitigated by a defendant's conduct, intent at the time of the murder, or mental state. See Tison v. Arizona, 481 U.S. 137 (1987); Cabana v. Bullock, 474 U.S. 376 (1986); Enmund v. Florida, 458 U.S. 782 (1982).

Regardless of the eventual outcome of Middlebrooks, its holding affords Jones no relief for two reasons. First, the indictment charged Jones with premeditated murder (R 1), and the jury found Jones guilty as charged (R 786). Because the Middlebrooks court made clear its holding applied only "when the defendant is convicted of first-degree murder solely on the basis of felony murder," 840 S.W.2d at 346 (emphasis supplied), Middlebrooks is inapposite here. Second, the Middlebrooks court concluded that death was a valid sentence for felony murder when other aggravating factors were present. Here, the sentencing court's written order lists two other valid aggravating circumstances -- the murder was committed in an especially heinous, atrocious and cruel manner, and the murder was committed by one who had previous convictions for violent felonies (R 828-36).

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[10] The United States Supreme Court has granted certiorari in Middlebrooks. See Tennessee v. Middlebrooks, 123 L. Ed. 2d 466 (1993).

Issue IV

WHETHER THE INSTRUCTION ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR IS CONSTITUTIONAL.

In Espinosa v. Florida, 120 L. Ed. 2d 854 (1992), the United States Supreme Court held that the heinous, atrocious or cruel instruction given in that case was unconstitutionally vague. Based on Espinosa, Jones asks this Court "to find section 921.141(4)(h) Fla. Stat. [sic], as well as the [instant] instruction interpreting same . . . unconstitutionally vague and in violation of the Eighth Amendment to the United States Constitution prohibition against cruel and unusual punishment." Initial Brief at 58. In so arguing, Jones has overlooked this Court's disposition of this issue in post-Espinosa cases in which the sentencing courts gave the identical instruction read to the jury in this case.

In Preston v. State, 607 So. 2d 404 (Fla. 1992), cert. denied, 113 S. Ct. 1619 (1993), this Court rejected Preston's challenge that the heinous, atrocious or cruel factor was unconstitutionally vague:

> Because of this Court's narrowing construction, the United States Supreme Court upheld the aggravating circumstance of heinous, atrocious, or cruel against a vagueness challenge in Proffitt v. Florida, 428 U.S. 242 . . . (1976). Unlike the jury instruction in Espinosa v. Florida, . . . 120 L. Ed. 2d

854 (1992), the full instruction on heinous, atrocious or cruel now contained in Florida Standard Jury Instructions in Criminal Cases, which is consistent with Proffitt, was given in Preston's case.

Id. at 410.

Similarly, in Hall v. State, 614 So. 2d 473 (Fla. 1993), this Court again rejected such a claim:

> We also find no merit to Hall's contention that the heinous, atrocious, or cruel aggravator is unconstitutionally vague.[4] In Espinosa v. Florida, . . . 120 L. Ed. 2d 854 (1992), the United States Supreme Court declared our former instruction[5] on this aggravator invalid. Hall's trial judge, however, gave his jury the new instruction as follows:
>
> > Six, the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means that designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering to others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily tortuous to the victim.
>
> This instruction defines the terms sufficiently to save both the

> instruction and the aggravator from vagueness challenges.
>
> ---
>
> [4] We have previously rejected Hall's constitutional claims or claims very similar to them. E.g., Ragsdale v. State, 609 So. 2d 10 (Fla. 1992); Sireci v. State, 587 So. 2d 450 (Fla. 1991), cert. denied, . . . 117 L. Ed. 2d 639 (1992); Jones v. State, 569 So. 2d 1234 (Fla. 1990); Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), vacated on other grounds, . . . 120 L. Ed. 2d 892 (1992); Eutzy v. State, 541 So. 2d 1143 (Fla. 1989).
>
> [5] Formerly, the instructions listed this aggravator as "especially wicked, evil, atrocious or cruel" without defining any of those terms.

Id. at 478.

Under both Hall and Preston, the instruction given in this case passes constitutional muster, because it sufficiently defined the terms "heinous," "atrocious," and "cruel" and tracks the language of the June 1990 amendments to the standard jury instructions. See **Fla. Std. Jury Instr. (Crim.)** Penalty Proceedings -- Capital Cases 79-79a (1990). Jones's assertion that the United States Supreme Court rejected the "essentially identical" Mississippi instruction in Shell v. Mississippi, 498 U.S. 1 (1990), is bunk. There, the sentencing court offered the following limiting instruction to the jury: "'[T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of [,] the suffering of others.'" Id. at 2

(Marshall, J., concurring). As this Court will recognize immediately, the Shell instruction is not identical to the 1990 version of Florida's heinous, atrocious, or cruel jury instruction given in this case. Although the Shell limiting instruction purported to define the terms "heinous," "atrocious," and "cruel," it was constitutionally insufficient because its definitions were "'too vague to provide any guidance to the sentencer.'" Id. at 3 (citation omitted; emphasis in original). Compare Atwater v. State, 18 Fla. L. Weekly S496 (Fla. Sept. 16, 1993); Foster v. State, 614 So. 2d 455 (Fla. 1992). The same thing cannot be said about the last sentence of Florida's instruction, which clearly limits the application of this aggravating factor to those crimes which are "conscienceless or pitiless and . . . unnecessarily tortuous to the victim." (T 998).

Nevertheless, if this Court were to determine otherwise, it is clear that any error committed by the sentencing court on this point was harmless. There is no reasonable possibility that the giving of the challenged instructions contributed to the jury's recommendation of death. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Under any definition of the terms, this aggravating factor was established beyond a reasonable doubt. Slawson v. State, 619 So. 2d 255 (Fla. 1993); Thompson v. State, 619 So. 2d 261 (Fla. 1993). The evidence in this case shows

that a struggle between Jones and Young ensued because Jones robbed Young of his money. The struggle was quite serious in that Young sustained many wounds, the most severe of which was a broken left arm. Jones dragged Young into the water (T 671, 673-74), and then held Young's head under water until Young's head stopped "popp[ing] back up" (T 682). Compare Pope v. State, 441 So. 2d 1073, 1077 (Fla. 1983), aff'd, 569 So. 2d 1241 (Fla. 1990); Waterhouse v. State, 429 So. 2d 301, 307 (Fla. 1983), cert. denied, 488 U.S. 846 (1984).

Moreover, given that the other two aggravators were weighty -- Jones had convictions for prior violent felonies and committed the murder during the course of a robbery -- and the mitigation weak -- one statutory mitigator (capacity to appreciate criminality of behavior) and two nonstatutory mitigators (difficult childhood/childhood trauma and family support) (R 828-36), no reasonable possibility exists that the challenged instructions affected the jury's ten-to-two recommendation of death (R 785). Compare Espinosa v. State, 18 Fla. L. Weekly S470 (Fla. Sept. 2, 1993); Henderson v. Singletary, 617 So. 2d 313 (Fla. 1993).

Finally, even if this Court were to invalidate this factor, two strong, valid aggravating circumstances remain to be weighed against mitigation the sentencing court found was not entitled to much weight. Beyond a reasonable doubt,

it is clear that elimination of the heinous, atrocious or cruel factor would have made no difference in Jones's sentence. Sochor v. State, 619 So. 2d 285 (Fla. 1993); Maqueira v. State, 588 So. 2d 221 (Fla. 1991), cert. denied, 112 S. Ct. 1961 (1992); Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied 112 S. Ct. 955 (1992); Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988).

Issue V

WHETHER THE SENTENCING COURT CORRECTLY FOUND THAT JONES COMMITTED THE INSTANT MURDER IN AN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL MANNER.

Jones apparently concedes that the instant murder is heinous, atrocious, or cruel, but argues that it is not as heinous, atrocious, or cruel as other cases this Court has decided. Initial Brief at 65. Jones's initial contention is correct: The instant murder was committed in an especially heinous, atrocious, or cruel manner. Accordingly, the trial court correctly determined that this aggravating factor applied.

Jones would have this court focus only upon what the medical examiner could not testify to with 100% accuracy. Specifically, Jones finds significant the facts that Dr. Mahoney could not establish definitively whether various wounds occurred premortem or postmortem or whether the victim was conscious when drowned. Initial Brief at 63. In Gilliam v. State, 582 So. 2d 610 (Fla. 1991), this Court observed that, in arriving at a determination of whether an aggravating circumstance has been proven, a sentencing court may use a "'common-sense inference from the circumstances.'" Id. at 612 (quoting Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988), cert. denied, 489 U.S. 1100 (1989)). A common sense inference from the instant facts is that the victim

was conscious when Jones drowned him. After severely beating the victim about the head and torso, and breaking the victim's left arm, Jones dragged the victim into the lake and drowned him. Understandably, Jones makes no argument that the victim was not conscious after the beating and while being dragged into the lake. It is clear that the victim suffered both psychologically and physically; he was conscious of the pain Jones had inflicted on his throughout the beating, and aware that he was being dragged into the water to his ultimate demise.

Dr. Mahoney testified that the pattern of injuries on the victim's body was "much more consistent" with defensive injuries, particularly the acutely broken left arm (T 653). Dr. Mahoney commented on the injuries to the victim's head, noting that, if one were to look at each injury separately, there could be no real determination of whether each occurred premortem or postmortem; however, looking at all the pattern of the left extremity and the fractures, Dr. Mahoney "consider[ed] them to be premortem in origin" (T 654). Dr. Mahoney also found the chest fractures to be consistent with trauma impact injuries, i.e., premortem defensive injuries (T 654-55).

Mahoney also testified that the plant twig and material found in the victim's esophagus "signified . . . that this man was alive when he was in the lake." (T 656). Because

this matter was found only in the esophagus and bronchus, it "signified that this man had gulped and he had gulped a large amount of water." (T 656). Further, because the twig found in the victim's throat was so large, it was inconceivable to Mahoney

> that [the victim] could have [gotten] a structure this large [to] float into [his] mouth, get past [his] tongue and go into [his] larynx and trachea and then to the distal portion of [his] lung after the death. It has to be premortem, before death, because it takes an incredible amount of inspiration of water to suck a piece of material that large into [one's] lungs.

(T 656). Dr. Mahoney opined that, if the victim were an "average person," he could have been conscious for at least two or three minutes during the drowning (T 659).

Finally, Dr. Mahoney concluded that, at the time of the drowning, the victim was alive (T 665). Although Mahoney could not state absolutely that the victim was conscious during the entire drowning episode, "the very fact that [the injuries were] defensive [indicated that] he [was] conscious. . . . "[C]ertainly sometime during this assault he was conscious." (T 674).

This Court has consistently upheld the finding of this aggravating factor under similar circumstances. In Arbelaez v. State, 18 Fla. L. Weekly S500 (Fla. Sept. 23, 1993),

Arbelaez beat and strangled the child victim before throwing him off a bridge. The medical examiner's testimony indicated that the injuries to the child's neck and body occurred while the child was alive, but shortly before death. Further, the record indicated consciousness because, when Arbelaez called the child's name before throwing him from the bridge, the child lifted his arms to be picked up by Arbelaez. See also Pope v. State, 441 So. 2d 1073, 1077 (Fla. 1983) (after shooting the victim several times and clubbing her over the head with the gun barrel, Pope dragged the still-living victim to the canal where he threw her to drown; "[t]he evidence of conscious psychological and physical suffering is clear from the medical examiner's testimony and supports a finding that this murder was heinous, atrocious, or cruel to an extent greater then that inherent in all murders."), aff'd, 569 So. 2d 1241 (Fla. 1990); Waterhouse v. State, 429 So. 2d 301, 307 (Fla. 1983) ("The victim suffered numerous bruises and lacerations inflicted with a hard, sharp weapon. There were defensive wounds showing that she was alive and conscious when she was attacked. The victim was left in the water where she drowned. The capital felony was especially heinous, atrocious, or cruel."), cert. denied, 488 U.S. 846 (1984).

Issue VI

WHETHER THE SENTENCING COURT PROPERLY CONSIDERED THE MITIGATING EVIDENCE.

Jones claims that, because he introduced a reasonable quantum of competent, uncontroverted mitigating evidence concerning the amount of alcohol he had to drink on the night of the murder, the trial court "was required to find that this mitigating circumstance was proven." Initial Brief at 68. Jones's contention that the trial court no longer has discretion in finding mitigating is both disingenuous and refuted by case law from this Court.

This Court has

> previously held that a trial court need not expressly address each nonstatutory mitigating factor in rejecting them, Mason v. State, 438 So. 2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051 . . . (1984), and "[t]hat the court's findings of fact did not specifically address appellant's evidence and arguments does not mean they were not considered." Brown v. State, 473 So. 2d 1260, 1268 (Fla.), cert. denied, 474 U.S. 1038 . . . (1985). More recently, however, to assist trial courts in setting out their findings, [this Court has] formulated guidelines for findings in regard to mitigating evidence in Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 . . . (1988), and Campbell v. State, no. 72,622 (Fla. June 14, 1990). We have even noted broad categories of nonstatutory mitigating evidence which may be valid. Campbell, slip op. at 9 n.6. However, "[m]itigating circumstances must, in some way, ameliorate the enormity of the

> defendant's guilt." Eutzy v. State, 458 So. 2d 755, 759 (Fla. 1984), cert. denied, 471 U.S. 1045 . . . (1985). *[This Court], as a reviewing court, not a fact-finding court, cannot make hard-and-fast rules about what must be found in mitigation in any particular case.* Hudson v. State, 538 So. 2d 829 (Fla.), cert. denied . . . 107 L. Ed. 2d 165 (1989); Brown v. Wainwright, 392 So. 2d 1327 (Fla.), cert. denied, 454 U.S. 1000 . . . (1981). *Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain within the trial court's discretion.* King v. Dugger, 555 So. 2d 355 (Fla. 1990); Scull v. State, 533 So. 2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037 . . . (1989); Stano v. State, 473 So. 2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093 . . . (1986).

Lucas v. State, 568 So. 2d 18, 23 (Fla. 1990) (emphasis supplied).

Jones cannot legitimately claim that the sentencing court abused its discretion in this case. Defense counsel advised the sentencing court of mitigation in a memorandum (R 791-809), and called witnesses during the penalty phase to establish these mitigating factors (T 952-68). Thereafter, the sentencing court found that Jones had established one statutory mitigating factor -- lack of capacity to appreciate the criminality of his conduct -- and two nonstatutory mitigating factors -- Jones suffered from childhood trauma/difficult childhood and had the love and support of his family (R 833-35); although the court considered all the mitigating factors, it found that they

were not entitled to great weight (R 834-35). Compare Tompkins v. State, 502 So. 2d 415, 421 (Fla. 1986), cert. denied, 483 U.S. 1033 (1987).

If this Court were to determine otherwise, any error on this point was unquestionably harmless beyond a reasonable doubt, as the mitigation presented by Jones was at best weak, particularly in light of the strong evidence which supported the three aggravating circumstances. See Stewart v. State, 18 Fla. L. Weekly S294 (Fla. May 13, 1993); Pace v. State, 596 So. 2d 1034 (Fla. 1992); Wickham v. State, 593 So. 2d 193 (Fla. 1992), cert. denied, 112 S. Ct. 3003 (1992); Cook v. State, 581 So. 2d 141 (Fla. 1991), cert. denied, 112 S. Ct. 252 (1992); Echols v. State, 484 So. 2d 568 (Fla. 1985), cert. denied, 479 U.S. 871 (1986).

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to affirm Jones's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JAMES C. BANKS, ESQ., 217 North Franklin Boulevard, Tallahassee, Florida 32301, this 10th day of November, 1993.

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