Case No: 80-827

Lower Court Case No: 91-1932-AF

IN THE SUPREME COURT

FOR THE STATE OF FLORIDA

HARRY JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT

FOR THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Appellant was the Defendant in the trial court and will hereafter be referred to as "Appellant." Appellee will hereinafter be referred to as "State". The Record on Appeal is contained in 7 volumes. Volumes 1-6 will be referred to by use of the symbol "R" and volume 7, the trial transcript, will be referred to by the use of the symbol "RT". All references will include appropriate page number designations.

III.

STATEMENT OF THE CASE AND FACTS

Mr. Harry Jones was charged, by grand jury indictment, with First Degree Murder, Robbery and Grand Theft of a Motor Vehicle. (R. 1-3).

Prior to trial the defense filed a motion to suppress evidence seized as a result of an unlawful search and seizure. (R. 87-90). On May 11, 1992 the Honorable John A. Rudd, Circuit Judge heard the suppression arguments. (R.941). At the suppression hearing, John Livings, a Lieutenant with the Leon County Sheriff's Department, testified he was the unit supervisor at the time of investigation of this case. (R.948). Early in the investigation of the case, Mr. Jones told detectives he had obtained the vehicle in which he had an accident from the Frenchtown area of Tallahassee. (R.949-950). Mr. Jones further stated he did not know the victim, Mr. Young. (R.950). Law enforcement later discovered both Appellant and the victim drove away from a liquor store in the victim's truck together prior to the accident. (R.950).

In a subsequent interview, Mr. Jones claimed he did not know the whereabouts of the owner of the vehicle and further refused to cooperate with law enforcement. (R.953). It was later determined the clothes Appellant was wearing at the time of the accident had been removed by hospital personnel, placed in a plastic bag, and put into the corner of the Mr. Jones' room. (R.954). Lieutenant Livings unilateraly made the decision to seize the clothes and directed Detective Wood to do so. (R.954). He then instructed

another detective to check with the hospital and see if the hospital personel had taken any cash or lottery tickets from the Mr. Jones. Invesitgator Livings later had those same items seized from the hospital. (R.956-957,960). Immediately after seizing the clothes, he posted a uniformed officer in the intensive care unit of the hospital where he could visually observe the Mr. Jones. (R.958). The parties stipulated that Detective Caughlin was the one who seized the lottery tickets and the money from security at the hospital. (R.962).

Mr. Jones moved to suppress any evidence obtained from the seizure of the clothes. Mr. Jones argued the seizure of his clothes, money, and lottery tickets was warrantless and void of exigent circumtances, and was a blatant violation of his Fourth Amendment rights. In denying the motion to suppress the trial court stated:

> "The court looks upon this situation more or less as the officer taking it into protective custody, much as they would a witness that they might feel needs to remain through an on-going 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.972).

This case proceeded to a trial before the Honorable John A. Rudd, Circuit Judge, retired on May 13-15, 1992. (R. 91-736). Following extensive deliberations by the jury, the trial resulted in a hung jury and a mistrial was declared. (Not contained in record). As a result, the case proceeded to a second trial on November 9, 1992 before the Honorable William L. Gary, Circuit Judge. (RT. 1).

The first witness called by the State in this second trial was Paul Fontaine. Mr. Fontaine testified he employed the Appellant, Harry Jones, at the Catfish Pad from late April through May of 1991 and paid him $773.00 during that six week period. (RT.246-248). During the week prior to the homicide at issue, Mr. Fontaine revealed he loaned the Appellant $50.00. (RT.248-249).

Christine Robbins testified she is a bank teller at the Second National Bank, Tallahassee, Florida. Further, Mrs. Robbins explained on May 31, 1991 at 5:54 p.m. the alleged victim, George Wilson Young, Jr. withdrew $300.00 in cash from the bank. (RT.256-261).

Jessie O'Connor was called upon next. Mrs. O'Conner testified she and Mr. Young were romantically involved during the month of May 1991. (RT. 263-264). On May 31, 1991 she and Mr. Young went to dinner at the Golden East Restaurant and Mr. Young paid for the meal in cash. Mrs. O'Conner also explained Mr. Young later paid to fill her car up with gas. (RT.268-270).

The State then summoned Archie Hamilton. (RT. 274-275) Mr. Hamilton, an employee of the Market Street Liquors at the corner of the Truck Route and Highway 20 West, Tallahassee, Florida was a good friend of Mr. Young. (RT. 274-275). On June 1, 1991, Mr. Young came into his store and shortly thereafter, two black males also entered the store. (RT.275-276). One of the black males acted as if he was sick and Mr. Hamilton asked Mr. Jones to take the sick male to the bathroom. Mr. Jones male did so and then returned to the store. While Mr. Jones was in the store, Mr. Young purchased

a half pint of Gilbeys Gin and paid for it with money he pulled out of his pocket. (RT.276-278). As Mr. Young paid for his purchase, Mr. Jones was standing in a position where he could see all of the money Mr. Young had in his pocket. (RT. 279). A short while later, Mr. Jones and Mr. Young helped the first black male from the bathroom to the curb outside the store. At that time, Mr. Young agreed to give the two men a ride home. (RT. 279-281). Mr. Hamilton never saw Mr. Young again. (RT. 283).

Fain Searcy, the assistant manager of Market Square Liquors, also testified to Appellant's presence in the store. According to Searcy, on June 1, 1991, Mr. Jones came into the store and purchased a half pint of Seagrams Gin. (RT. 294-296). Mr. Jones later came back with Timothy Hollis, who was apparently drunk, and wanted to use the bathroom. At that point, Mr. Jones purchased another half pint of gin. (RT. 296-297). On the second occasion George Wilson Young, Jr., came into the store and also purchased a half pint of Gilbeys Gin which he paid for it out of a roll of money in his pocket. (RT. 297-299). Thereafter, Mr. Young helped Timothy Hollis out of the bathroom and agreed to give both Hollis and Mr. Jones a ride home. (RT. 299-301). Mrs. Searcy explained the three customers left the store between 6:45 and 7:00 p.m. (RT. 302).

Lum Wiggins, the manager of the Inland Service Store at the intersection of Pensacola Street and Capital Circle, testified as well to Mr. Jones visit to the Liquor store. Mr. Wiggins testified on June 1, 1991 he noticed Mr. Jones and Timothy Hollis crossing

the street from Burger King and heading toward the liquor store. (RT. 312-316). Mr. Wiggins further revealed he later noticed Mr. Jones, Mr. Young, and Timothy Hollis getting into Mr. Young's truck and leaving the liquor store around 7:00 p.m. (RT. 317-320).

Timothy Holis testified in May and June of 1991 he lived on Jackson Bluff Road with his mother, two brothers, and Harry Jones. (RT. 327-328). On June 1, 1991 he and Mr. Jones started drinking about noon. Mr. Hollis' last recollection was walking with Mr. Jones toward the store to buy some liquor. (RT. 329-330). He did not remember how he got home that day. (RT. 330).

Johnnie Mae Hollis testified next. Mrs. Hollis testified Mr. Jones stayed in her house and paid her $25.00 a week in rent. (RT. 336-337). On the morning of June 1, 1991 Mr. Jones borrowed $10.00 from her. (RT. 338). Mrs. Hollis also explained, later on that day Mr. Jones and a white man brought Timothy Hollis home in a red and white truck. After dropping off Timothy Hollis, Mr. Jones left. She was unaware whether he left with the white man or not. (RT. 338). Prior to leaving, however, Mr. Jones gave her back the $10.00 he had borrowed. (RT. 339-340).

John Colson, a sales clerk with the Suwannee Swifty Convenience Store, testified between 7:30 and 8:00 on June 1, 1991 a white male and Mr. Jones came into his store and bought a six pack of beer and some chips. (RT. 344-353).

The State then called Florida Highway Patrol Officer Donald Ross to the stand. Mr. Ross testified on June 1, 1991, he responded to an accident on Meridian Road, 2/10 of a mile south of

Ox Bottom Road after receiving a call at 8:10 p.m. (RT. 353-354). He discovered a red and silver Ford Bronco with heavy crush damage to the right side and a black male lying on the pavement on the south side of the vehicle being attended by some other individuals. (RT. 354). The vehicle appeared to be traveling south. (RT. 354). He recovered two half pint bottles of gin from the truck. (RT. 355). He was later advised by hospital personnel the black male driving the vehicle was Harry Jones. (RT. 357-358). He also found blood inside the vehicle and blood on the driver. (RT. 358).

Leon County Deputy Sheriff David Frimmel testified on June 1, 1991, he was northbound on Meridian Road south of the Bannerman Road intersection when he observed a red and silver Ford Bronco II which was in front of him turn around and head in the opposite direction. (RT. 373-380). This occurred approximately 7:45 p.m. (RT. 380).

Robert L. Collins, Sr. testified he called 911 to report an accident on North Meridian Road about 1/2 mile past Bannerman Road. (RT. 384-392).

James Hudson, a communications officer with the Leon County Sheriff's Department, testified he received such a call on the 911 system reporting an accident on North Meridian Road just past Bannerman Road on the first day of June, 1991 at 8:08 p.m. (RT. 392-396).

Veronica Branton was one of several accident witnesses called to the stand. Ms. Branton testified she and several others came across the accident on North Meridian. According to Ms. Branton,

she observed several people take a black male out of a truck and lay him on the roadway. (RT. 396-400). The injured man removed from the truck was wearing a pair of dark blue jeans which looked wet to Ms. Branton. (RT. 402-403). On cross-examination, she revealed she never touched the person or the pants to determine whether or not they were in fact wet. (RT. 404-405).

William Hill, Jr. also drove up on the accident with Ms. Branton. Mr. Hill testified he helped take the man out of the wrecked Bronco and put him on the highway until an ambulance arrived. (RT. 406-407). In helping the person out of the vehicle he grabbed the man by the waist and his pants and, with the exception of the subject's blood, the pants appeared to be dry. (RT. 410-412).

In addition, Tony L. Williams helped remove the man from the vehicle. Mr. Willaims also recalled the injured man's pants were dry. (RT. 413-421).

The State next called Ruth Mills of the Horseshoe Plantation. Mrs. Mills stated on June 6, 1991, she, her son, and her grandson went fishing at Boat Pond. (RT. 426). While the three were fishing, they discovered a body in the pond and reported it to the property supervisor. (RT. 427-428). She further testified she had seen Mr. Jones fishing in the past at Huckabee Pond. Huckabee Pond is also located on the Horseshoe Plantation. (RT. 428-430).

Solomon Mills, the son of Ruth Mills, also testified he and his mother discovered a body in Boat Pond on June 6, 1991. (RT. 430-433). Further, Mr. Mills had seen Mr. Jones on the Plantation

fishing in different lakes in the past. (RT. 435).

Robert King was the property manager of Horseshoe Plantation. According to Mr. King, on June 6, 1991 he received a report of a body being found in Boat Pond. Mr. King later helped direct the deputy sheriff to the site. (RT. 440-442).

Sergeant William P. Gunter of the Leon County Sheriff's Department Crime Scene Identification Section, took the stand next. Sergeant Gunter introduced a number of pictures of the red Ford Bronco registered to the victim, George Wilson Young, Jr. In addition, Seregeant Gunter introduced several lotto tickets which were recovered from the same vehicle. (RT. 459-463). He further introduced two half-pint gin bottles and several other objects recovered from the same vehicle. (RT. 465-467). Sergeant Gunter explained he went to Boat Pond to visit the location where the body was discovered on June 6, 1991. Over the objections of Appellant, several photographs presenting the condition of the body as it was discovered on June 6, 1991 were introduced. (RT. 468-473). Mr. Jones' objection was adopted from the previous trial in this case and was argued on the grounds that the pictures were extremely inflammatory. (RT. 469-472, R. 298-343).

This witness also introduced photographs, again over the Appellant's objection, taken during the autopsy of George Wilson Young, Jr. on June 7, 1991. (RT. 480-482). Again Mr. Jones adopted the arguments made in the previous trial in this cause on the grounds the pictures were so gruesome and shocking their probative value and relevance was clearly outweighed by the prejudicial

effect to the Appellant. (RT. 481, R.298-343). Sergeant Gunter also introduced debris collected from the throat and lungs of the deceased. (RT. 484-488). Finally, over the Appellant's objections, Sergeant Gunter introduced $168.00 in United States currency, three (3) lottery tickets, and Appellant's clothing all of which was collected at the Tallahassee Memorial Regional Medical Center. (RT. 486-489). Sergeant Gunter explained he turned over Mr. Jones pants and shoes to Dr. Anderson, a botanist at Florida State University and Joe Scheuster, also known as Dr. Dirt, so they could study the soil samples contained thereon. (RT. 490).

The State next summoned the Leon County Deputy Sheriff case investigator, Michael Wood. (RT. 508-509). Over objections by Appellant, (RT. 496), Investigator Wood testified about a conversation he had with Appellant at the hospital. Appellant told Investigator Wood he did not obtain the Bronco from a white man, but instead obtained it from a black man in French Town. (RT. 512-515). Investigator Wood later went back to the hospital and seized Appellant's clothing which was located at the foot of the Appellant's bed in a bag. (RT. 518-519).

Investigator Woods also detailed the distances between several points in Leon County and the driving time between each of those several points. (RT. 522-533). According to Investigator Wood, the total driving time to drive the route described by the prosecutor was 52 minutes and 30 seconds. (RT. 529-531). Investigator Wood, however, did not allow for any additional time for Mr. Young and Mr. Jones to take Timmy Hollis out of the truck when they brought

him home or for other stops during his drive time calculations. (RT. 555-556).

Michael Halligan of the Leon County Sheriff's Department was then called to the stand. Officer Halligan testified on June 17, 1991, he was assigned to guard the Mr. Jones at the hospital. Officer Halligan testified when he went into the hospital to change the handcuffs on the Mr. Jones, Mr. Jones stated he did not kill that white man. Mr. Jones then stated that he got the truck from the Frenchtown area. (RT. 569-570). At the time Mr. Jones made these statements, the witness claimed he was unaware of their significance (RT. 571-572). Upon cross-examination, it was pointed out this witness in fact took a missing persons report on June 2, 1991 from the victim's son wherein he learned that the victim's truck was involved in an accident on Meridian Road. (RT. 572-573).

George Wayne Young, the son of the victim George Wilson Young, Jr., testified his father liked to play Lotto and other Florida lottery games. (RT. 581-583). He further testified it was not his father's habit to give his vehicle to strangers to drive. (RT. 586).

Eugene McCarthy, a special agent with the Florida Lottery Division of Security, also took the stand for the State. Mr. McCarthy testified State's exhibit #8 was a lottery ticket purchased at the Publix Store in Westwood Shopping Center in Tallahassee on May 4, 1991 at 8:35 p.m. In addition, State's exhibit #12, which consisted of the lottery tickets seized at the hospital, were purchased at the same time. (RT. 591-593).

Joe Scheuster was called as the first of three (3) experts by the state. Mr. Scheuster, a soil scientist employed by the Soil Conservation Service of the United States Department of Agriculture, testified as an expert witness in soil classification. (RT. 595-596). He was contacted by the Leon County Sheriff's Department to help locate a body based upon soil discovered on the pants or clothing of the suspect. (RT. 596). After examining soils removed from the defendant's shoes and pants, he was able to narrow the search area. (RT. 597). Mr. Scheuster subsequently went to the pond where the body was in fact recovered and compared the soil with material removed from Appellant's shoes and clothes. He found that the two samples were similar. (RT. 598-602).

The State then called upon the second expert witness, Dr. Loran C. Anderson. (RT. 612-614). Over a continuing objection from the defense, Dr. Anderson, a professor of biology at Florida State University and curator of the Herbarian, testified regarding several State's exhibits. According to Dr. Anderson, State's exhibit #16, which appeared to be a small twig removed from the left lung of the deceased, was a type of aquatic grass identical to a grass called Maiden Cane Hemitonon Panicum. This type of grass was found in Boat Pond in the northern part of Leon County. (RT. 615-617). He further stated State's exhibit #17, which was removed from the larynx of the deceased, was some sort of root material with soil and some dried multi-cellular filamentous algae attached to it. It too matched the sediment or mud found in the bottom of Boat Pond. (RT. 614-618). Accordingly, he deduced the victim had

drowned probably in shallow water where his face might have been up close to where the bottom-sediment could be drawn into the esophagus. (RT. 619).

Dr. Anderson also explained several other State's exhibits. These exhibits included the gray pants, black socks, and sneakers of Dr. Jones, as well as a shirt recovered from the vehicle of the deceased following the wreck. He discovered mud impacted around one of the eyelets of the shoe, on his socks, and the pants. (RT. 619-622). Microscopic examination of this mud revealed pine and oak pollen, common to the trees in North Florida which was also found in abundance around the pond. (RT. 621-622). Dr. Anderson concluded the person wearing those clothes made more than a casual entry into the water. (RT. 624).

Dr. John Mahoney took the stand as the last of the three experts for the State. Dr. Mahoney, a pathologist in private practice in Leon County and an associate medical examiner, testified he did an autopsy on George Wilson Young, Jr. on June 6, 1991. (R. 645-647). Dr. Mahoney found an acute fracture of the distal radial head, which is the long bone in the forearm closest to the thumb. (RT. 650). In his opinion these results were compatible with what he would opine as defensive injuries. (RT. 653). Dr. Mahoney further found fractures to several ribs which is more consistent with trauma than animal molestation. (RT. 654). Upon his internal examination he found a dead plant twig in the lungs and a very gritty fibrillar black material in the esophagus. (RT. 655). This discovery signified to him the victim was alive

when he was in the lake. (RT. 656). The doctor opined that the cause of death was freshwater drowning. (RT. 665).

On cross-examination, the Doctor testified he was not able to say if the victim was conscious at the time he drowned. In fact, it was very possible the victim was unconscious. (RT. 668). Finally, he explained if the person was unconscious and placed underwater he would not be aware of the fact that he was drowning. (RT. 669).

Inmate Kevin Prim was then called to the stand. Mr. Prim testified he previously resided with Harry Jones in the medical cell at the Leon County Jail along with Jay Watson. (RT. 675-676). While in the county jail, Mr. Jones told Mr. Prim he met some guy at a liquor store and observed this guy pull out some money to pay for a purchase. Mr. Prim stated, Mr. Jones convinced the guy into giving both Mr. Jones and a cousin a ride because his cousin was intoxicated at the time. After taking the cousin home, Mr.Jones and this guy went to Orchard Pond where a struggle ensued over Mr. Jones' attempt to take the guy's money. Mr. Prim explained Appellant even stated he broke the guy's arm and the struggle then proceeded into the water where Mr. Jones held him down until he stopped popping up. (Rt. 681-682). Mr. Prim also claimed Mr. Jones asked him his opinion on how several other stories sounded. (RT. 680).

A second inmate, Jay Watson, also testified. Mr. Watson stated he was housed in the same medical cell with the Mr. Jones and Mr. Prim. Mr. Watson testified he overheard Mr. Jones and

Kevin Prim discussing Mr. Jones' case. He told Mr. Jones not to discuss his case, but the Mr. Jones told him that he and Kevin Prim were good friends from way back. Mr. Jones further stated he was in jail because he had killed a man. (RT. 698-701). Upon cross-examination he revealed he had seen Kevin Prim going through Mr. Jones' paperwork while the he was out at a Bible study. (RT. 715).

Thereafter the State rested its case. (RT. 721). Mr. Jones moved for a judgement of acquittal arguing the State's case was purely circumstantial. This motion was denied. (RT. 721-722).

The defense began its case with Romane Alphonso Roberts. Mr. Roberts testified in the summer of 1991 he was in the same cell with the Mr. Jones, Kevin Prim, and Jay Watson. (RT. 723-725). While in that cell, he recalled Kevin Prim asking several people for information about their cases. (RT. 726). He also saw Kevin Prim reading the Mr. Jones' papers and when confronted with same, Kevin Prim told him not to mention it. (RT. 726-727).

Paul Williams, an investigator retained on behalf of Harry Jones, testified in 1974 he recalled the victim, Mr. Young, loaning his car out to several people. (RT. 732-740).

The defense then called upon Charles Cox, a paramedic with Tallahassee Memorial Regional Medical Center. Mr. Cox testified he was called to the scene of an accident on Meridan Road on June 1, 1991. Mr. Cox explained upon his arrival at the accident, a black male was found laying in the middle of the road who appeared to be severely injured. (RT. 746-747). While working on the Mr. Jones he touched his clothing and testified his pants appeared to be dry.

(RT. 747-748).

The defense also called Lucille Murray to the stand. Ms. Murray testified two or three days before Mr. Jones was involved in the accident, he was talking to her about buying her car for $200.00. (RT. 767-768). At that time Mr. Jones had some money, but she did not know how much. (RT. 769).

Gene Taylor of the Public Defender's Office took the stand next. Mr. Taylor testified he was initially appointed to represent Mr. Jones in June of 1991. (R. 806-807). As part of his discussions with Mr. Jones he told him not to discuss his case with anyone except his attorney or a representative of the Public Defender's Office. (RT. 808). Mr. Jones appeared to be quite aware of the need to keep his mouth shut. (RT. 809). He further stated he gave Mr. Jones copies of all witness statements, police reports, and anything else related to his case. (RT. 810-811).

Finally, Randy Murrell of the Public Defender's Office took the stand for the defense. Mr. Murrel testified during 1991 he was appointed to represent Jay Watson. (RT. 817). Mr. Watson's recommended guidelines sentence was nine to twelve years and the State was seeking to treat him as a habitual offender which would get him up to a life sentence for his charges. (RT. 821). He further stated he discussed the possibility of Mr. Watson's testimony being used to receive a more lenient recommendation from the state. The parties in Mr. Watson's case postponed his sentencing several times in order that the judge might show him some leniency because he assisted or testified in a case. (RT.

823-824). At Mr. Watson's sentencing the prosecutor in this case, Mr. Wade, appeared on behalf of Mr. Watson. (RT. 825). Mr. Watson was ultimately sentenced to ten years as a habitual offender with a three year minimum mandatory. (RT. 826).

Thereafter the defense rested its case. (RT. 838). Defense renewed all previously made motions including a motion for judgment of acquittal. (RT. 839).

At the jury instruction charge conference Mr. Jones moved to exclude all lesser included offenses and the trial court denied same. (RT. 832).

During the reading of the jury instructions the trial court stated,

> "In order to convict of first degree murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill". (RT. 918).

The jury returned with verdicts of guilty as charged of first degree murder, robbery, and grand theft of a motor vehicle. (RT. 942).

The trial continued into the penalty phase wherein the State relied upon the evidence previously introduced during the guilt phase of the trial and, in addition, entered into the record certified judgment and sentence reports of a 1977 conviction for attempted robbery, a 1982 conviction for robbery, a 1982 conviction for two counts of armed robbery with a pistol, and a 1984 conviction for armed robbery with a firearm and kidnapping. (RT. 949-952). The State rested its case. (RT. 952).

Defense began its penalty phase case by calling Betty Jones Stuart, Mr. Jones' sister. (RT. 952-953) Mrs. Stuart, who is a police officer with the Metro Dade Police Department, explained Mr. Jones' father was very abusive to his mother and beat her. Appellant, however, was very attached to his father and it was after his father abandoned the family when Mr. Jones was only five years old, that Mr. Jones became difficult to control. Mr. Jones had a extremely hard time coping without a father. (RT. 953-954). Several years later, Mr. Jones' mother married the Appellant's alcoholic step-father and she too became an alcoholic. (RT. 954). According to Mrs. Stuart, Mr. Jones never really accepted his step-father. (RT. 955). Mrs. Stuart recalled one evening when the step-father, who would talk crazy after he was drunk, became very abusive with Mr. Jones' mother. Finally, Mr. Jones' mother had enough, fought back and stabbed the step-father to death. She was subsequently sent away to prison for about three years. (RT. 955). After the stabbing, Mr. Jones seemed to become a changed person and was out of control. (RT. 955-956).

Finally, Harry Jones testified in his own behalf. Mr. Jones informed the court he is 33 years old and went through the tenth grade in high school. Mr. Jones did later obtain through his own endeavors a GED. (RT. 958). He recalled his father taking him to a store when he was five years old and buying him some things before he told him he wasn't going to see him anymore. (RT. 958). He has not seen his father since that day. (RT. 959).

Mr. Jones testified on May 31, 1991, he and Timothy Hollis drank most of the night until about 5:00 a.m. (RT. 961-962). He began drinking again that morning and drank continuously throughout the rest of the day. (RT. 964-965). Following the accident, Mr. Jones was taken to the hospital and a blood test revealed a .269 reading, two and one half times "the legal drunk level". (RT. 966). Thereafter the defense rested its case. (RT. 968).

The defense submitted three jury instructions for the court's consideration related to the weighing of the evidence and the heinous, atrocious, and cruel jury instruction. (RT. 969). The court denied all three. (RT. 973).

The trial court, in part, instructed the jury as follows:

> "2. The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of a robbery."
>
> * * *
>
> "4. 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 torturous to the victim." (RT. 997-998).

Thereafter the jury returned, by a vote of ten to two, to advise and recommend the court impose the death penalty upon Harry Jones. (RT. 1002).

On November 20, 1992 the Honorable William L. Gary, Circuit Judge held the following aggravating circumstances to exist beyond a reasonable doubt:

> "(B) The defendant was previously convicted of a another capital felony or of a felony involving the use or threat of violence to the person" [for the 1977 conviction of attempted robbery, the September 20, 1982 conviction for robbery, the September 20, 1982 conviction for robbery, the September 20, 1982 conviction for two counts of robbery with a firearm, and the February 24, 1984 conviction for robbery with a firearm and kidnapping.]

(R. 829, 998-999).

> "(D) The capital felony was committed while the defendant was engaged... in the commission of, ... any robbery...."

(R. 830, 1000).

> "(H) The capital felony was especially heinous, atrocious, and cruel... while the evidence presented in the case that the victim, George Young, Jr. was alive when he was drowned, there was no conclusive evidence as to whether the victim was 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 the

defensive premortem injuries. The wounds consisted of an acute fracture to the long bone of the forearm, fractured ribs, numerous tears of the skin on the left arm and numerous blows to the head. The evidence presented clearly revealed that the victim, George Young, Jr. experienced a great deal of pain and terror as he attempted to avoid being killed. The actions as the defendant clearly demonstrate that the crime is conscienceless and pitiless and unnecessarily torturous to the victim." (R. 831-832, 1001-1002).

The trial court found the following mitigating circumstances:

"(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Evidence was presented with regard to this statutory mitigating circumstance, the jury was instructed on it, and there was sufficient evidence upon which the jury could have been reasonably convinced that this mitigating circumstance was established.... while this mitigating circumstance, whether viewed as a statutory or nonstatutory mitigating circumstance, is entitled to some weight, it is not entitled to great weight in light of the facts established in this case."

(R. 833-834, 1004-1005).

Nonstatutory mitigating circumstances were found as follows:

"(a) Defendant has 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 nonstatutory mitigating circumstance was established. ...While this nonstatutory 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 is not entitled to great weight."

"(b) The defendant had the love and support of his family. The 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 nonstatutory mitigating circumstance was established. While this nonstatutory mitigating circumstance is entitled to some weight, the court finds that it is not entitled to great weight."

(R. 834-835, 1005-1006).

As a result, the court found that because the aggravating circumstances outweighed the mitigating circumstances and because of the jury's recommendation by a vote of ten to two to impose the death penalty, a sentence of death was appropriate. The court adjudged Appellant guilty of first degree murder and sentenced him

to be put to death. As to count II the court found Mr. Jones guilty of the charge of robbery and sentenced him to thirty years in the Department of Corrections as a habitual felony offender to run consecutive to sentence imposed for first degree murder. The court also adjudged Appellant guilty of count III, Grand Theft and sentenced him to ten years in the Department of Corrections as a habitual felony offender to run concurrent with count II. (R. 106-108, 835-865, 1006-1008, 996).

Notice of Appeal was timely filed on November 25, 1992. (R. 867-868).

IV.

POINTS OF ARGUMENTS ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS PERSONAL PROPERTY OF THE APPELLANT WHICH WERE SEIZED IN ORDER TO PUT THEM IN PROTECTIVE CUSTODY WITHOUT PROBABLE CAUSE AND WITHOUT A WARRANT.

II. WHETHER THE GRUESOME PICTURES OF THE VICTIM'S BODY WERE SO PREJUDICIAL SO AS TO RESULT IN A FUNDAMENTALLY UNFAIR PROCEEDING IN VIOLATION OF THE APPELLANT'S RIGHT TO A FAIR TRIAL.

III. FLORIDA FAILED TO "GENUINELY NARROW" THE CLASS OF MURDERERS ELIGIBLE FOR THE DEATH PENALTY THROUGH THE FELONY MURDER AGGRAVATING CIRCUMSTANCE.

IV. WHETHER THE FLORIDA 'HEINOUS, ATROCIOUS, OR CRUEL' AGGRAVATING FACTOR IS UNCONSTITUTIONAL UNDER ESPINOSA V. FLORIDA.

V. WHETHER THE TRIAL COURT ERRED IN DETERMINING THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL SO AS TO JUSTIFY IMPOSITION OF THE DEATH PENALTY.

VI. WHETHER THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY CONSIDER COMPETENT UNCONTROVERTED EVIDENCE OF TWO MITIGATING CIRCUMSTANCES.

V.

SUMMARY OF ARGUMENTS

The trial court erred in failing to suppress the introduction of evidence seized from the Appellant's hospital room, prior to his arrest, without his consent, without first securing a warrant and absent exigent circumstances. The seizure and subsequent search of the Appellant's effects was made based on a suspicion of foul play being involved, and according to the trial court, in order to place the effects in protective custody. The seizure violates the principals of the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution, United States v. Jacobson, 466 U.S. 109, 112 S. Ct. 1534, 80 L. Ed. 2d 85 (1984); Arizona v. Hicks, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987); Shepard v. State, 343 So. 2d 1349 (Fla. 1st DCA 1977), and a host of other cases as more fully set forth in the arguments which follow.

The trial court also erred in allowing the introductions of gruesome pictures of the victim's body after its recover from a lake where it was discovered after being missing for six days contrary to Section 90.403 Fla. Stat. and Reddish v. State, 167 So. 2d 858 (Fla. 1964).

During the death penalty phase the court erred in sentencing the Appellant to death based on the fact that the death occurred while the defendant was involved in the commission of a robbery. Section 921.141. The automatic application of the murder while committing a specified felony aggravating circumstance to a

defendant who's first degree murder conviction rests on a felony murder theory fails to genuinely narrow the class of felony murderers eligible for the death penalty as required by the Eighth Amendment. Arave v. Creech, 113 S. Ct. 1534 (1993), Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047 (1990) and State v. Middlebrooks, 840 S.W. 2d 317 (Tenn. 1992) cert granted; Tennessee v. Middlebrooks, 113 S. Ct. 1840 (1993).

The heinous, atrocious, and cruel aggravating cirucmstance of the Florida death penalty statute (Section 921.141(4)(h) is unconstitutionally vague and violation of the Eighth Amendment. Espinosa v. Florida, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992); Richmond v. Lewis, 113 S. Ct. 528 (1992); Johnson v. State, 612 So. 2d 575 (Fla. 1993); and Davis v. State, 18 Fla. L. Weekly S385 (Fla. June 24, 1993).

Even if the heinous, atrocious and cruel aggravating circumstance is declared to be constitutional, the trial court erred in imposing the death penalty based on this aggravating circumstance.

Finally, the trial court erred in failing to adequately consider competent, uncontroverted evidence of two mitigating circumstances contrary to Nibert v. State, 574 So. 2d 1059 (Fla. 1990).

For each of the foregoing reasons the Appellant was denied a fair trial and sentencing and this cause should be reversed and remanded for a new trial and/or sentencing.

VI.

ARGUMENT

I.

WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS PERSONAL PROPERTY OF THE APPELLANT WHICH WERE SEIZED IN ORDER TO PUT THEM IN PROTECTIVE CUSTODY WITHOUT PROBABLE CAUSE AND WITHOUT A WARRANT.

The Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution declare the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. The United States Supreme Court has repeatedly held the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, and in most cases, the failure to do so may be excused only by exigent circumstances. Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). All searches and seizures conducted without a warrant are per se unreasonable, and therefore unconstitutional, unless conducted within the framework of a few specifically established and well delineated exceptions. Katz v. United States, 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

Although the Fourth Amendment cases sometimes refer indiscriminately to searches and seizures, there are important differences between the two which are relevant here. A "search" occurs when an expectation of privacy which society is prepared to consider reasonable is infringed. As such, the interest of the citizen which is protected is the interest in personal privacy. A

"seizure", on the other hand, occurs whenever there is some meaningful interference with an individuals possessory interest in specific property. The constitutionally protected interest is therefore the interest in retaining possession of the property. United States v. Jacobson, 466 U.S. 109, 112 S. Ct. 1534, 80 L. Ed. 2d 85 (1984); Texas v. Brown, 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983).

In the instant cause deputies first seized the Appellant's clothing, lottery tickets and money without benefit of a warrant. Following this illegal seizure, the clothing was searched for evidence, again without benefit of a warrant. In order to withstand constitutional muster the State has the burden of showing (1) the deputies had probable cause to believe the seized, and later searched, objects were either evidence of a crime or contained evidence of a crime; and (2) since there was no warrant obtained for either the seizure or the subsequent search, there must have been exigent circumstances which would excuse the requirement for a warrant. The State has done neither.

Determining whether probable cause existed to justify the seizure and subsequent search of the clothing, lottery tickets and money, this Court must look at what information law enforcement had when the decision to seize the property was made. Lieutenant Livings testified the only information the police had was (a) Appellant had been in an accident while driving Mr. Young's truck; (b) Appellant and Mr. Young were seen together twenty-four hours earlier; (c) when last seen Mr. Young had a roll of money in his

possession; and (d) Mr. Young had not been seen in twenty-four hours. (R. 949-951). No mention was made of any crime being committed, however, Lt. Livings had a "suspicion" there may be some foul play involved. (R. 954). These minimal facts simply do not rise to the level of probable cause sufficient to justify a warrantless seizure of protected articles somehow associated with a yet unknown crime.

Lt. Livings did not have the probable cause necessary to secure a warrant or to justify the seizure of Appellant's clothing. In addition, there was no showing it was impractical for law enforcement to obtain a judicial review of their facts to determine if there was probable cause to seize the clothes. No exigent or emergency circumstances exist and there was no threat the clothes may have been destroyed. Indeed, Appellant's lottery tickets and money were not seized until after another twenty-four hours had passed. (R. 87-88). This gave law enforcement a total of forty-eight hours, more than ample opportunity to secure a warrant from a neutral magistrate and yet no attempt was made to do so.

The Supreme Court in Jacobson likens the seizure of effects to the seizure of people and its cases discussing same. For example, in order to justify a brief detention of an individual to investigate the circumstances which arouse the suspicion of law enforcement, the officer must have a reasonable belief the individual is involved in criminal activity. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Likewise, a brief detention of luggage in order to determine whether it contains

narcotics must be supported by a reasonable belief they do in fact contain narcotics. United States v. Place, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983) (Holding a ninety minute detention was not of short duration and was, therefore, unconsititutionally excessive). The seizure in this cause was by no means temporary or of short duration. In order to justify the complete seizure of someone's effects law enforcement must either obtain a warrant authorizing such a seizure or conduct the seizure within a few specifically established and well delineated exceptions. Vale v. Louisiana, 399 U.S. 30, 90 S. Ct. 1969, 26 L. Ed. 2d 409, (1970). Law enforcement certainly did not have probable cause necessary to arrest appellant for any crime. Likewise, probable cause did not exist for the seizure and subsequent search of his effects. Importantly, the trial court failed to make any finding that probable cause existed at the motion to suppress hearing. (R. 971-972).

The clothing, lottery tickets and money were subsequently turned over to Sgt. Bill Gunter of the Leon County Sheriff's Department Crime Scene Investigation Section. (RT. 459, 486-489, 518-519). Sergeant Gunter later turned the clothes over to Dr. Anderson, a botanist, and Joe Scheuster, so they could study soil samples taken from the clothing. Appellant's clothing, at this time, was subjected to a law enforcement initiated "search", again without the benefit of a warrant, and again in violation of the Fourth Amendment. No facts were uncovered by law enforcement, other than those previously mentioned, which would give law

enforcement probable cause to believe any crime was committed. Further, the police could in no way articulate any link between between Appellant's clothes and the unknown, unnamed crime. In addition, law enforcement failed to secure a warrant to authorize the search of Appellant's clothes once seized. This subsequent search also consituted a violation of Appellant's Fourth Amendment right to privacy and it matters not that "the search uncovered nothing of any great personal value to the [Appellant]". Arizona v. Hicks, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987).

No probable cause existed to justify the seizure and search of Appellant's effects and such a seizure was a blatant violation of Appellant's Fourth Amendment guarantee. Accordingly, this Court's inquiry need go no further. In an abundance of caution, however, the State made several arguments at the motion to suppress hearing which will be addressed.

First, law enforcement cannot justify the warrantless seizure of Appellant's effects by arguing they were responding to an emergency. There was no emergency situation for search and seizure purposes as defined by earlier court decisions. See Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978); Michigan v. Tyler, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978) (Holding threat of fire justified warrantless entry because of emergency situation). Appellant did not face life-threatening surgery. He was not in a coma. He was not in a room where there was an immediate danger. See United States v. Wilson, 865 F. 2d 215 (9th Cir. 1989) (Stating a warrantless entry was justified by an

emergency -- the smell of highly flammable chemicals emanating from defendants home). Indeed, law enforcemnet waited a full twenty-four (24) hours to seize Appellant's clothing and an entire forty-eight (48) hours to seize the money and lottery tickets. This was not a spur-of-the-moment decision forced upon law enforcement as a result of an emergency situation. Rather, there was ample opportunity to secure a warrant before a neutral magistrate. Failure to obtain this warrant is inexcusable.

Interestingly, the State's own case demonstrates the absence of any emergency or exigent circumstances. Immediately after the seizure of the clothing, a uniformed officer was posted in the intensive care unit at the hospital where he could observe the Appellant "in the best interest of the State". (R. 958). When asked if the guard could have also observe the clothing Lt. Livings responded "he could have possibly, yes sir". The State all but concedes there was no danger of the clothing being destroyed before law enforcement had an opportunity to secure a warrant. Further, Appellant's money and lottery tickets were in the safe and secure possession and control of hospital security and were not seized by law enforcement until the next day. Again, there was no danger of destruction and ample opportunity to secure a warrant.

Second, the State argued during the motion ot suppress hearing, Appellant had no reasonable expectation of privacy because third parties had custody of the property (lottery tickets and money) and the opportunity to examine the property relying upon State v. Palmer, 474 So. 2d 1250 (Fla. 1st DCA 1985). The State's

reliance upon Palmer is misplaced.

First, in Palmer the initial search was made by a private party not law enforcement and effectively avoided implicating the Fourth Amendment. In this cause, it was a state law enforcement agency who initiated the search and therefore the conduct is under the full panoply of Fourth Amendment protection. Second, in Palmer the government did not significantly exceed the scope of the private search. In this cause law enforcement officers seized the clothes and subjected them to two scientific experts for soil and microanalysis, neither of which was done prior to the initial seizure. Third, in Palmer the testing was done where the package was located. In the instant case the search was done much later in several different locations. Fourth, in Palmer the officers' visual inspection enabled him to learn nothing he had not already learned prior to the search and seizure. In this cause the officers knew nothing about the clothing, lotto tickets or money prior to their seizure and learned everything after their seizure. Finally, in Palmer the articles were not taken from the accused, in this cause they were. Contrary to the State's argument this cause does not hinge on Palmer, rather, it hinges on the protections of the Fourth Amendment and the prodigy of cases intrepretating the same. See Arizona v. Hicks, 480 U.S. 321 (1987); Shepard v. State, 343 So. 2d. 1349 (Fla. 1st DCA 1977) to the contrary.

The State also argues the officers did not "conduct a search at all. All they did was effect a seizure". (R. 964, 966). Apparently the State believes warrants are unnecessary when no

search is conducted contrary to the language of the Fourth Amendment. Admittingly, law enforcement normally conducts a search in order to discover the objects it eventually seizes. While the events in this case are unusual, this Court can look to the Arizona v. Hicks, 480 U.S. 321, (1987) for guidance. The Police in Hicks made a warrantless entry into defendant's apartment based on an emergency situation. After the entry, the police noticed stereo equipment which appeared out of place in the "squalid" apartment. Suspecting it was stolen, components were moved and the serial numbers recorded. The United States Supreme Court held the recording of the numbers was a seizure and the moving of the equipment a search, both of which were a violation of the defendant's Fourth Amendment rights. Likewise in this case law enforcement seized the Appellant's effects without the necessity of a search and later conducted a search of the clothing to find the evidence subsequently introduced at trial (soil, dirt, pollen). In either event there is still a constitutional prohibition against unreasonable searches and seizures without a warrant.

The State argues the seizure was predicated on probable cause to believe the clothing was evidence relevant to a crime. (R. 965). Assuming solely for the purpose of this argument that probable cause did exist, the seizure and search of Appellant's clothing were still impermissible. The Supreme Court of the United tates has long held the existence of probable cause alone does not authorize a seizure without obtaining a warrant or in the alternative, the existence of exigent circumstances. Vale v.

Louisiana, 399 U.S. 30, 34, 90 S. Ct. 1969 26, L. Ed. 2d 409 (1970). Neither was present in this cause.

The State relies upon State v. Clark, 384 So. 2d 687 (Fla. 4th DCA 1980) to support its probable cause argument. Clark, however, is distinguishable. In Clark the police had already discovered a dismembered body and the medical examiner had informed them that the dismembering was done with something like an axe. After the police were armed with this knowledge and knew what to look for they discovered an axe at the defendant's residence. In contrast, no body had been discovered in this case nor was there any indication from any reliable source Appellant's clothes would reveal criminal actions. Importantly, the police knew of no crime being committed. Although the police may have suspected a crime, there is nothing incriminating about some clothes, money and lottery tickets which would lead them to reasonably believe they would be the instrumentalities of a crime.

The facts of this case are more similar to those in State v. Tamer, 475 So. 2d 918 (Fla. 3d DCA 1985). In Tamer, the authorities procurred a search warrant which stated ample probable cause to link the defendant to a prior arson. The authorities executed the warrant and seized articles of the defendant's clothing. In concluding the seizure of such clothes was impermissible and a violation of the defendant's Fourth Amendment rights, the court stated, "There are no facts stated therein which indicate that the subject clothing constituted some evidence relevant to proving the aforesaid arson". Comparably, there are

no facts which indicate the clothes in this case constituted some evidence relevant to any crime, not to mention the crime for which he was eventually charged. As in Tamer, this Court should find the unlawful seizure of Appellant's clothes lacked probable cause and was therefore unconstitutional.

Finally the State argues law enforcement "would have been derelict in their duties if they had not taken the items into custody. These items were relevant evidence to a crime, whether or not this defendant was even the perpetrator". (R. 968). If the effects are relevant to a crime the imporatant question which must be asked when the clothes were seized is "what crime?". Secondly, if the defendant was not the perpetrator, how are his clothes and possessions relevant at all? Additionally, there is no protective custody provision in the Fourth Amendment. Even if the seizure of the effects was done to take them into protective custody, no warrant was ever sought after the effects were safely in the custody of law enforcement. Although the trial court ruled the warrantless seizure was justified because the items were taken into protective custody, Appellant is unaware of any case law which authorizes the seizure of a citizens effects for "protective custody" purposes without a warrant. The police should have obtained a warrant and failure to do so violated Appellant's Fourth Amendment protection. Law enforcement was indeed derelict in the execution of its duties. It was derelic in ignoring the Fourth Amendment to the United States Constitution.

As a result of the trial court denying Appellant's motion to suppress, the State was allowed to introduce the testimony of Dr. Loran Anderson who compared soil samples obtained from Appellant's clothing with soil found at the crime scene; Joe Scheuster who compared pollen found on the Appellant's clothing with pollen found at the crime scene; and the testimony of a lottery official who testified the lottery tickets were purchased from the same store as another ticket found in the victim's truck was purchased from. Without this evidence there was little or no evidence to connect the Appellant to the crime scene and relatively little evidence connecting him to Mr. Young. As such, it cannot be said the introduction of this evidence and the testimony related thereto was harmless. Therefore, this cause should be reversed and remanded with directions to grant the Appellant's motion to suppress.

VI.

ARGUMENT

II.

WHETHER THE GRUESOME PICTURES OF THE VICTIM'S BODY WERE SO PREJUDICIAL SO AS TO RESULT IN A FUNDAMENTALLY UNFAIR PROCEEDING IN VIOLATION OF THE APPELLANT'S RIGHT TO A FAIR TRIAL.

Sergeant William P. Gunter of the Leon County Sheriff's Department Crime Scene Identification Section introduced, over the objections of the Appellant, several photographs depicting the body of George Young as it was discovered in and recovered from Boat Pond. Several additional photographs taken during the autopsy of George Young were also introduced into evidence, over the objections of the Appellant.

Section 90.403, Fla. Stat. (1991), provides as follows:

> "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence...."

There is no dispute regarding the death of the victim. Indeed, the cause of the victim's death was well established by the numerous witnesses at trial. Accordingly, there is no justifiable relevancy for the admissibility of the pictures. It should be noted, moreover, Appellant did not contest the testimony that George Young suffered a broken wrist, fractured ribs and drowned. In Reddish v. State, 167 So. 2d 858 (Fla. 1964), the Florida Supreme Court stated as follows:

> "We have consistently held that photographs

> which have potential for unduly influencing a jury should be admitted only if they have some relevancy to the facts and issue. Ordinarily, photographs normally classed as gruesome should not be admitted if they were made after the bodies have been removed from the scene unless they have some particular relevance, as was the situation in Leach and Smith v. State, Fla. 132 So. 2d 329. While the photographs (in the instant case) were not unusually gruesome, when measured by standards of others which have been allowed into evidence, we nevertheless failed to find any justifiable relevancy for their admissibility in the instant case. The cause of death had been clearly established and there was no fact or circumstance in issue which necessitated or justified the introduction of the photographs of the dead."

Reddish, 167 So. 2d at 863. The pictures had no relevance in the instant case. Rather, the gruesome nature of the photographs inflamed and prejudiced the minds of the jury.

The facts in the instant case are similar to those in Straight v. State, 397 So. 2d 903 (Fla. 1981). In Straight, the trial court permitted the entry of twenty photographs of a decomposed body of a purported victim. His body had been recovered from a river after twenty days. The court concluded that the twenty pictures introduced in trial constituted an unnecessary large number of inflammatory photographs. In reversing the Florida Supreme Court relied upon the principle set forth in Leach v. State, 132 So. 2d 329, 331-332 (Fla. 1961).

> "Where there is an element of relevancy to support admissibility then the trial judge in the first instant and this court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and detract them from the fair and unimpassioned consideration of the evidence."

See also Young v. State, 234 So. 2d 341 (Fla. 1970).

A review of the exhibits introduced into evidence bears out the Appellant's arguments at trial. Exhibits 5A and 5E show Mr. Young's body floating in a weed and scum filled pond after apparently being there for several days. The deteriorating conditon of the body is particularly evident in photograph 5G. Exhibits 7A-F, J-P were taken at the autopsy. They too show the gruesome effect of mother nature on a decomposing body. Numerous pictures depict a blackened face with skin rotting away and being eaten by the maggots which are present in the picture. Several photographs are duplications of one another as they depict a broken wrist, cuts on the arms, or the condition of the victim's shirt. However, none of the pictures depict something which the jury had not had described to them by the medical examiner.

The photographs in this case where so gruesome and inflammatory as to create undue prejudice in the minds of the jury. Introduction of the gruesonme photographs resulted in a fundamentally unfair proceeding and clearly violated Appellant's constitutional right to a fair trial. This cause, therefore, should be reviewed and remanded for a new trial.

VI.

ARGUMENT

III.

FLORIDA FAILED TO "GENUINELY NARROW" THE CLASS OF MURDERERS ELIGIBLE FOR THE DEATH PENALTY THROUGH THE FELONY MURDER AGGRAVATING CIRCUMSTANCE.

The Appellant, Harry Jones, was charged by indictment with First Degree Murder in that

> "on the first day of June, 1991, in Leon County, Florida, did unlawfully kill a human being, George Wilson Young, Jr., by beating and/or drowning, and the killing was perpetrated from or with a premeditated design or intent to effect the death of George Wilson Young, Jr., contrary to Section 782.04(1), Florida Statutes." (R. 1-2).

At the conclusion of the guilt/innocence phase of the trial the jury was instructed, pursuant to the Florida Standard Jury Instructions in Criminal Cases on first degree premeditated- murder and first degree felony-murder. As part of the felony- murder instruction the jury was informed that the underlying felony was robbery. (RT. 916-918). Thereafter, the jury returned with a verdict of guilty of First Degree Murder, without distinguishing between premeditated murder and felony murder, and Robbery. (RT. 942).

In the penalty phase of the trial the State relied on the jury's verdict of guilty on count II, Robbery, to support the finding of the aggravating circumstance of committing a murder while engaged in the commission of a robbery. (RT. 976). Thereafter, the trial court instructed them that one of the aggravating circumstances they could consider was

> "The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery." (RT. 997).

With respect to weighing aggravating circumstances and mitigating circumstances the court instructed the jury as follows:

> "Should you find sufficient aggravating circumstances to exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances." (RT. 998).

The jury subsequently returned with an advisory sentence, by a vote of ten to two, of death. (RT. 1002).

At the defendant's sentencing hearing the sentencing court found

> "The existence of this aggravating circumstance was confirmed by the verdict of the jury in the guilt-innocence phase of the trial when the defendant was found guilty of robbery in addition to first degree murder. The evidence was clear to the applicability of this aggravating circumstance, the jury was instructed with regard to it, and the court finds that it was proved beyond a reasonable doubt." (R. 1000).

The 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. Applying Eighth Amendment principles, Appellant will demonstrate why his sentence of death violates the Eighth Amendment.

A. FLORIDA LAW OF FIRST-DEGREE MURDER AND THE OPERATION OF THE FLORIDA CAPITAL SENTENCING SCHEME.

In Florida the death penalty is an available punishment only for the crime of First Degree Murder. Section 782.04(1) and

775.082(1) Fla. Stat. The Florida Legislative has broadly defined First Degree Murder to include three separate classes of murder, to wit: (1) the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed; or (2) the unlawful killing of a human being when committed by a person engaged in the perpetration of, or in an attempt to perpetrate, any Trafficking offense (controlled substances), arson, sexual battery, robbery, burglary, kidnapping, escape, aggravated child abuse, aircraft piracy or the unlawful throwing, placing, or discharging or a destructive device or bomb; or (3) the unlawful killing of a human being which resulted from the unlawful distribution of certain specified controlled substances. Section 782.04 Fla. Stat.

Conviction of premeditated First-Degree Murder required proof of the element of "premeditation," Section 782.04(1)(a)1 Fla. Stat. However, no mens rea relating to the killing was required for a conviction of felony First-Degree Murder. Section 782.04(1)(a)2 Fla. Stat. To find Jones guilty of First-Degree Murder, the jury was required to find either the killing was premeditated or unlawfully committed during the course of a robbery. In fact, this jury was told by the court that "[i]n order to convict of first-degree murder, (sic) it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill." (RT. 918). However, the jury is not required to inform the court of whether the verdict on First-Degree Murder is based on premeditation or based on the existence of the underlying felony of

robbery.

A conviction of any of the aforementioned types of first-degree murder exposes the defendant to the penalty phase of the trial, the jury's discretion to recommend the death sentence, and the trial court's discretion to impose a sentence of death. During the penalty phase of the trial the State is required to prove at least one aggravating circumstance in order to justify a sentence of death. Section 921.141 Fla. Stat. In this cause the prosecutor met that burden merely be securing a verdict of guilty of First-Degree Murder during a robbery, i.e. felony murder. If the jury finds that the State has proven at least one statutory aggravating circumstance then it must consider mitigating circumstances. Section 921.141(2) Fla. Stat. (RT. 998). Thus, where the defendant has been convicted of First-Degree-Murder, based on an underlying felony, the State has an automatic aggravating circumstance by definition, and the burden immediately shifts to the defense to produce sufficient evidence of mitigating circumstances to overcome this automatic exposure to the death penalty.

Sections 941.121 and 941.142 Fla. Stat., the Florida death penalty statutes include an identical list of underlying felonies (with the exception of child abuse) as were enumerated in the First-Degree Murder statute. Section 782.04 Fla. Stat. No elements not already contained in the First-Degree Murder definition were added. In every "death eligible" First-Degree Felony Murder case where the State sought the death penalty, the

jury was compelled to find this statutory aggravating circumstance without proof of any additional fact or element by the State. This finding automatically required the defendant to establish mitigating circumstances sufficient to overcome the presumption of death as the appropriate penalty.

B. THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY WAS NOT "GENUINELY NARROWED".

Florida defined felony First-Degree Felony Murder and the felony-murder aggravating circumstance to have identical elements. Proof of the felony-murder necessitated proof of the felony-murder aggravating circumstance. All felony murderers were thus automatically subject to the death penalty while no premeditated murderers were ever subject to the death penalty absent proof of an additional aggravating element. Thus, the class of persons eligible for the death penalty was not "genuinely narrowed" in a rational, principled manner justifying the imposition of the sentence of death on Harry Jones.

1. THE EIGHTH AND FOURTEENTH AMENDMENTS REQUIRE "GENUINE NARROWING"

Under the Eighth Amendment, States must adopt procedural protections that "assure consistency, fairness, and rationality in the evenhanded operation of the state law...to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed..." Proffitt v. Florida, 428 U.S. 242, 260, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976)(Joint Opinion of Stewart, Powell and Stevens, JJ.)(citations omitted), and "promote the evenhanded,

rational, and consistent imposition of the death sentences under law." Jurek v. Texas, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2s 929 (1976)(Joint Opinion of Steward, Powell and Stevens JJ.)(Citation omitted).

Central to this jurisprudence is the "constitutionally necessary narrowing function" of any death penalty scheme. Pulley v. Harris, 465 U.S. 37, 50, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). As the Supreme Court stated this past term: "Our precedents make clear that a State's capital sentencing scheme must 'genuinely narrow the class of person eligible for the death penalty." Arave v. Creech, 113 S. Ct. 1534, 1542 (1993), quoting Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742, 77 L. Ed. 2d 235 (1983); Lowenfield v. Phelps, 484 U.S. 231, 244, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988)(discussing narrowing requirement); Barclay v. Florida, 463 U.S. 939, 960, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983)(Stevens, J., concurring)("[W]e have stressed the necessity of 'genuinely narrowing the class of persons eligible for the death penalty."); Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047, 3060-3061 (1990) (Scalia, J., concurring).

The Supreme Court has stressed the dual function of "genuine narrowing:"

> To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Lowenfield v. Phelps, 484 U.S. at 244, quoting Zant v. Stephens,

462 U.S. at 877. "When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so." Arave v. Creech, 113 S. Ct. at 1542, citing Lewis v. Jeffers, 497 U.S. 764, 776, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990) and Godfrey v. Georgia, 446 U.S. 420, 433, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).

"Genuine narrowing" serves its Eighth Amendment purpose by reducing the opportunities for the "freakish" and "wanton" imposition of the death penalty in two ways. First, "narrowing" limits the class of murderers for whom the death sentence can be considered. By restricting eligibility, it assures that the death penalty cannot be imposed indiscriminately. See, e.g. Walton v. Arizona, 110 S. Ct. at 3090 (Stevens, J., dissenting)("The risk of arbitrariness condemned in Furman is a function of the size of the class of convicted persons or eligible for the death penalty.") Second, "narrowing" limits the death penalty to those murderers whose culpability makes the death penalty particularly appropriate, insuring rationality by avoiding purely arbitrary sentencing. Not all murderers may be sentenced to death, and those who receive the death penalty must be rationally distinguishable from those who do not on grounds that reflect their respective degrees of culpability. As the Tennessee Supreme Court recognized in State v. Middlebrooks, 840 S. W. 2d 317 (Tenn 1992), qualitative narrowing and not simply numerical narrowing is required. A state "must not only genuinely narrow the class of death eligible defendants, but

must do so in a way that reasonably justifies the imposition of a more severe sentence on the defendants compared to others found guilty of murder." State v. Middlebrooks, 840 S.W. 2d at 343; See also, Zant v. Stephens, supra; Arave v. Creech, supra.

"Genuine narrowing" precludes the undifferentiated infliction of the death sentence upon the entire mass of murderers. Woodson v. North Carolina, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976). It restricts the death penalty in a manner that assures proportionality by requiring that only the most severe offenses, or the most deserving offenders, be considered for the most severe punishment. For, it would be the height of arbitrariness if less morally culpable murderers were always subject to the death penalty while more morally culpable murderers were systematically spared.

"Genuine narrowing" thus promotes the "rational and equitable administration of the death penalty" because it insures that the death penalty can be considered for only those offenders who demonstrate the most culpability or who cause the most harm. Boyde v. California, 494 U.S. 370, 377, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990) quoting Franklin v. Lynaugh, 487 U.S. 164, 181, 108 S. Ct. 2320, 2331, 101 L. Ed. 2d 155 (1988)(plurality opinion). By insisting that the States draw meaningful, rational distinctions between those persons who receive the death penalty and those who do not, the Eighth Amendment narrowing requirement stands at the heart of an "even-handed, rational, and consistent imposition of death sentences under law." Jurek v. Texas, 428 U.S. at 276.

The repeated holdings of the Supreme Court state that in "weighing" states such as Florida, every aggravating circumstance upon which the jury was authorized to rely exclusively in imposing a death sentence upon a particular defendant must meet the "fundamental constitutional requirement" of "channelling and limiting the sentencer's discretion" so as to minimize "the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). See, Id at 365; Stringer v. Black, 112 S. Ct. 1130, 1139-1140 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Espinosa v. Florida, 112 S. Ct. 2926, 2928, 120 L. Ed. 2d 854 (1992); Zant v. Stephens, 462 U.S. at 876 ("This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself.")(emphasis supplied). In Arave v. Creech, supra, the Supreme Court addressed the constitutional narrowing function of the "utter disregard for human life" aggravating circumstance, despite the presence of four other statutory aggravating circumstances that were not constitutionally challenged.

2. THE FLORIDA DEATH SENTENCING SCHEME DID NOT "GENUINELY NARROW"

The manner in which a State narrows its class of death-eligible offenders, as well as the role of aggravating circumstances in that scheme, is purely a matter of state law within Eighth Amendment requirements. See Stringer v. Black, 503 112 S. Ct. at 1136-1138 (comparing Mississippi, Louisiana, and Georgia narrowing schemes); Zant, 462 U.S. at 876-880 (discussing

narrowing function and role of aggravating circumstances in Georgia scheme).

As demonstrated below, Florida did not genuinely narrow at either stage, because: (1) Florida defined death eligible murder far too broadly and did not narrow its use in Section 921.141 Fla. Stat.; and (2) Florida permitted Jones' jury to base his death sentence recommendation and the sentencing judge to base his death sentence on the same broad felony-murder finding the jury had made at the guilt-innocence determination phase.

a. FLORIDA DID NOT NARROW AT THE DEFINITIONAL STAGE

It is clear that Florida has a broad definition of murder and has not narrowed at the definitional stage. As discussed previously, Florida has broadly defined the class of death-eligible murderers to include all first degree murderers. Sections 921.141, 921.142 Fla. Stat. Florida has also defined first-degree murder extremely broadly, having included in this definition all premeditated murders, as well as all killings which occurred in the course of a long list of underlying felonies regardless of the mens rea of the killer. Section 782.04 Fla. Stat.

Given the broad definition of death-eligible murder, it is clear that the Florida system is vastly different from the Louisiana system which had "define[d] first-degree murder to include a narrower class of homicides" thereby limiting death-eligibility to highly aggravated, highly culpable murders. Lowenfield, 484 U.S. at 241. Louisiana required proof of both (1) a specific intent to kill or inflict great bodily harm, and (2) one

of five specific situations characterizing the murder which distinguished it from other less culpable murders. Id at 242.

Florida's all-encompassing definition of First Degree Murder stands in marked contrast to the narrow Louisiana definitions. Florida specifically rejected both narrowly defining First Degree Murder and requiring proof of any mens rea for felony murder when it enacted its death sentencing scheme. Since Furman, Florida has, in fact, broadened its definition of First Degree Murder by adding several underlying felonies, including child abuse and drug trafficking.

The role of statutory aggravating circumstances in Florida is, therefore, far different from Louisiana where they serve no narrowing function. ("The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally-required narrowing process...") Lowenfield v. Phelps, 484 U.S. 231, 246, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988). The function of Florida's statutory aggravating circumstances should be to narrow the class of death-eligible first-degree murderers to those upon whom a death sentence may actually be imposed. Thus, Lowenfield's reasoning is inapplicable to the Florida statutory scheme where First Degree Murder is sweepingly defined. Florida did not provide any narrowing at the guilt stage of the proceedings.

b. FLORIDA'S FELONY MURDER AGGRAVATING CIRCUMSTANCE DID NOT "GENUINELY NARROW" IN A RATIONAL PRINCIPLED MANNER AT THE PENALTY PHASE

In the Florida capital sentencing scheme the class of murderers eligible for capital punishment is defined broadly and includes a sizable class of even those murderers who kill without specific intent. Aggravating circumstances are supposed to be employed to distinguish among members of that class. Arave v. Creech, 113 S. Ct. at 1542, 1543. In Florida, as in Idaho, "the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not." Id at 1542. Statutory aggravating circumstances in Florida therefore, must also satisfy the test recently reaffirmed by the Supreme Court:

> [A] State's capital sentencing scheme also must "genuinely narrow the class of persons eligible for the death penalty" ...[and w]hen the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so. (citations omitted.) (emphasis supplied)

Arave v. Creech, 113 S. Ct. at 1542. In Arave, the Supreme Court concluded that "[a]lthough the question is close, we believe the [utter disregard aggravating circumstance] satisfies this narrowing requirement." Arave, supra, at 1542. The Supreme Court concluded that the Idaho "utter disregard" aggravating circumstance, as defined by the Idaho Supreme Court, narrowed the class of death eligible murderers: "Given the statutory scheme, however we

believe that a sentencing judge reasonably could find that not all Idaho capital defendants are 'cold-blooded.' That is because some within the broad class of first-degree murderers do exhibit feeling." 113 S. Ct. at 1543. Not only did the "utter disregard" aggravating circumstance "genuinely narrow," it did so on a principled basis that reasonably distinguished those most culpable murderers: "Idaho similarly has identified the subclass of defendants who kill without feeling or sympathy as more deserving of death. By doing so, it has narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed." Id. Idaho had complied with the Eighth Amendment because it had a principled basis for treating such defendants "as more deserving of the death penalty" Id.

While the question was close in Idaho, Florida's felony murder aggravating circumstance plainly goes beyond the constitutional borderline. When it permitted Harry Jones to be sentenced to death on the basis of a felony murder aggravating circumstance which was co-extensive with the felony murder finding that underlies his first-degree murder conviction itself, Florida failed to identify a subclass of death-eligible defendants "as more deserving of death" because of their greater culpability.

Instead, the operation of the Florida scheme arbitrarily takes one of two broad classes of murderers, defined by the Legislature as being equally culpable first degree murderers, and automatically makes that class subject to the death penalty without requiring proof of any additional element reasonably justifying a sentencing

of death. Florida has determined that proof of the fact that the killing occurred during the course of a felony will substitute for proof of premeditation, so that the two crimes could be equally punished. Section 782.04(1)(a) Fla. Stat. But, once the Florida Legislature had made that determination, the trial court was obliged to treat these two classes of "death-eligible" first-degree murderers even-handedly absent a rational penological basis for exposing one to death without additional proof of aggravation and not the other.

The Florida Legislature has required proof of a statutory aggravating circumstance before the sentencer can consider imposition of the death penalty on a first-degree murderer. This is a genuine and meaningful requirement -- a requirement of proof of something more than the first-degree murder itself -- in the case of premeditated murderers. But it is an illusory and meaningless requirement in the case of the felony murderer when the felony murder aggravating circumstance is used to authorize a death sentence. See, Engberg v. Meyer, 820 P.2d 70, 90 (Wyo, 1991). Florida's statutory felony murder aggravating circumstance encompasses every single felony murderer except where the underlying felony is child abuse and -- by itself -- authorizes the death penalty without proof of any additional element or fact by the state for every felony murderer. In stark contrast, there must be proof of an additional element or fact to make any member of the class of premeditated, first degree murderers subject to the death penalty. No automatic aggravating circumstance that the murder was

committed with premeditation, parallels the one for felony murderers.

The question is not whether felony murder may be classed with premeditated murder as deserving capital punishment. There is little question under the Eighth Amendment that it can be. Whatever the wisdom of this determination, the Legislature can decide, constitutionally, that felony murderers and premeditated murderers are morally equivalent for purposes of punishment. See, Schad v. Arizona, 501 U.S. _____, 111 S. Ct. 2491, 2503 (1991). But because there is no rational penological basis for treating the class of all felony murderers more severely than the class of all premeditated murderers by making the former but not the latter automatically subject to the death penalty, the Eighth Amendment forbids this arbitrary result.

"[P]unishment should be directly related to the personal culpability of the criminal defendant." Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 2947 (1989). See also Id. at 2951. Consequently, an offender is not eligible for an enhanced punishment absent proof of an additional rational criterion which makes him or his offense more blameworthy or otherwise deserving of "a more severe sentence." Lowenfield, 484 U.S. at 244. In non-capital sentencing, therefore, a State may constitutionally enhance a punishment, so long as it establishes additional facts which demonstrate that the offense actually "inflict[ed] greater individual and societial harm" than the harm attaching to facts which constitute the elements of the offense. Wisconsin v.

Mitchell, 508 U.S. ____, 113 S. Ct. 2194, 2201 (1993).

Just as non-capital enhancement demands proof of additional harm by a defendant, application of an aggravating circumstance to permit a sentence of "death, surely the most severe 'enhancement' of all," Id., at 2200, demands proof of harm greater than that arising from mere proof of a death-eligible offense. Because there was no narrowing at the definitional stage, and because no additional rational criterion establishing greater culpability was proven by the felony-murder aggravating circumstance at the sentencing stage, no greater harm has been identified to reasonably justify enhancing the punishment of all felony murderers over all premeditated murders. Vague aggravating circumstances are constitutionally infirm for this exact reason. When an aggravating circumstance is vague, it applies to all death-eligible defendants, thereby failing to provide a basis to rationally distinguish from among the entire class of defendants any defendant as being more culpable, and thus "more deserving of death." Arave v. Creech, 113 S. Ct. at 1543. It is also for this reason that a State cannot make a defendant's gender, race or religion an aggravating factor, because neither race nor religion ipso facto enhances a defendant's blameworthiness for his offense. Cf. Zant v. Stephens, 462 U.S. at 885. This procedure, therefore, violated the Eighth Amendment.

Because of Florida's automatic aggravating circumstance for felony murderers, all felony murderers are treated as more culpable (morally worse) than all premeditated murderers for purposes of capital punishment. There is no reasonable basis upon which to

treat all felony murderers as more culpable than all premeditated murderers. Since there is no rational penological ground for distinguishing the class of felony murderers from the class of premeditated murderers, on the basis of the moral culpability of the offender, the felony murder statutory aggravating circumstance fails to reasonably justify subjecting one but not the other to capital punishment without proof of any further aggravation. The class of felony murderers thus made indiscriminately subject to the death penalty is itself larger than the class of death-eligible felony murderers at the time of Furman. It is not narrower. The sentencer is given no more guidance than the pre-Furman sentencer because the finding of the felony murder aggravating circumstance is compelled by the finding of first degree murder at the guilt-innocence phase of the trial. It is therefore present for consideration by every jury exercising its discretion to impose death for felony murderers. The opportunities for the arbitrary and capricious imposition of the death penalty are as rampant under this system as they were at the time of Furman.

Not only did Section 921.141(4)(d) Fla. Stat. fail to provide any "genuine narrowing" or "principled basis" upon which the jury could have distinguished among first degree murderers, it automatically and unconstitutionally placed "a thumb on death's side of the scale." Stringer v. Black, 112 S. Ct. at 1137. Florida is a weighing state. The finding of the felony murder aggravating circumstance merely repeated an element of the underlying offense of first degree murder that the jury had already

found. This same element was then placed on the scale to be weighed by the jury and later by the judge. In addition, because Florida law required a defendant to prove that mitigation outweighed any aggravating circumstances, the felony murder aggravating circumstance automatically made death the presumptive sentence, unless and until the defendant could prove that he should live. Thus, at sentencing, every felony-murderer was required to convince a jury and a judge that he should live by proving mitigating circumstances sufficient to outweigh the aggravating circumstance. Conversely, even a principal premeditated murderer was not saddled with such an awesome burden absent proof by the state of an additional aggravating circumstance not encompassed by the definition of the underlying crime of first degree murder.

This court should hold that as a matter of Eighth Amendment jurisprudence the felony-murder aggravating circumstance, as applied to Harry Jones, failed to provide a rational basis for treating all felony murderers more severely than all premeditated murderers for purposes of capital punishment. Therefore, this cause should be reversed and remanded for resentencing.

VI

ARGUMENT

IV.

WHETHER THE FLORIDA 'HEINOUS, ATROCIOUS, OR CRUEL' AGGRAVATING FACTOR IS UNCONSTITUTIONAL UNDER ESPANOSA V. FLORIDA.

Among the aggravating circumstances specified in Florida's death penalty statute is that the killing was "especially heinous, atrocious, or cruel". Section 921.141(4)(h) Fla. Stat. (1991). In the instant case, the trial court, over the objection of Appellant, instructed the jury one of the aggravating circumstances they may consider in the decision to recommend a death sentence over a life sentence is whether

> "[t]he 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 conscious-less or pitiless and was unnecessarily torturous to the victim."

(R. 998). Appellant would urge this Court to find section 921.141(4)(h) Fla. Stat., as well as the aforementioned jury instruction interpreting the same, are unconstitutionally vague and in violation of the Eighth Amendment to the United States Constitution prohibition against cruel and unusual punishment.

In Espinosa v. Florida, 505 U.S. __, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), the United States Supreme Court noted, "that a

Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give 'great weight' to the jury's recommendations, whether that recommendation be life... or death." Espinosa, 112 S. Ct. at 2928 citing Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) and Smith v. State, 515 So. 2d 182, 185 (Fla. 1987). If, as the Supreme Court implies in Espinosa, Florida considers the jury to be a vital element in the capital sentencing scheme, then it follows the court must clearly and adequately instruct the jury on the applicable death penalty law. Consequently, vague or incomplete instructions, as the ones given in the case at bar, are immediately suspect.

Capital sentencing juries for many years were given no guidance of what was especially heinous, atrocious, or cruel. Indeed, juries were simply informed the crime for which the defendant is to be sentenced was extremely wicked, shockingly evil, vile, or cruel". Florida Standard Jury Instructions in Criminal Cases (1976). The United States Supreme Court, faced with a similar instruction in Oklahoma, decided such a definition was unconstitutionally vague because it failed give due procees notice as defined by the Fourteenth Amendment. Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988).

In response to Maynard, the Florida Supreme Court discarded the old heinous, atrocious, and cruel definition and adopted a new jury instruction for heinous, atrocious, or cruel which tracked the language in State v. Dixon, 283 So. 2d 1 (Fla. 1973). Recently, the United State Supreme Court was presented with a Mississippi

jury instruction on its heinous, atrocious, or cruel factor which is essentially identical to the recently adopted Florida instruction. Shell v. Mississippi, 498 U.S. ___, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990). The Court rejected such a defintion stating, "[a]lthough the trial court in this case used a limiting instruction to define the 'especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient." Shell, 111 S. Ct. at 313.

Additionally, the Supreme Court declared the Florida heinous, atrocious, or cruel instruction unconstitutional and expressly stated:

> "We have held instructions more specific and elaborate than the one given in the instant case unconstitutionally vague."

Espinosa v. Florida, 112 S. Ct. at 2928; citing Shell, Maynard, and Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980). Additionally, in Richmond v. Lewis, ___U.S.___, 113 S. Ct. 528, 534 (1992), the Court held "[a]s we explained 'there is no serious argument that [this factor] is not facially vague'." citing Walton v. Arizona, 497 U.S. 699, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990). Importantly, this Court has already addressed and approved the aforementioned holdings of the Supreme Court in both Johnson v. State, 612 So. 2d 575 (Fla. 1993), and Davis v. State, 18 Fla. L. Weekly S385 (Fla. June 24, 1993). Thus, this Court is well aware of Florida's need for a constitutionally specific heinous, atrocious, or cruel instruction.

Following the standards established by the recent United States Supreme Court decisions, and subsequent adoption by the Florida Supreme Court, the current standard jury instructions are unconstitutionally vague. Unfortunately, the Florida standard jury instruction suffers from the same defect as those instructions given in Cartwright and Shell. The present instruction frankly fails to explain what the terms "heinous", "atrocious", and "cruel" mean. Indeed, the words 'wicked', 'evil', and 'vile' are no more than the phrases they purport to explain. Although the defining terms of 'cruel' have more meaning, the jury is instructed it can still find the aggravator by finding either the heinous or atrocious alternatives. As a result, the vagueness of these terms infects the meaning of the aggravator as a whole.

The standard instruction also contains additional vague sentences. For instance, one sentence states crimes accompanied by additional facts showing a conscienceless, pitiless, and unnecessarily torturous crime are intended to be included. Even though the intent of aggravating factors is to limit the number of cases in which the death penalty may apply, such vague sentences as the ones in the above instruction would likely expand the number of crimes which could potentially be reclassified as heinous and deserving the death penalty. Moreover, an ambiguous instruction, such as the one in the instant case, violates the Eighth Amendment because of the potential for reclassifying nonheinous crimes as heinous and applying the death penalty. See Boyde v. California, U.S. 370, 110 S. Ct. 1190, 1198, 108 L. Ed. 2d 316, 329 (1990).

This instruction as a whole simply misleads because, as it would be understood by a reasonable juror, it would make aggravating, as heinous, a variety of circumstances which the Florida Supreme Court has said are not proper considerations. For example, mutilation or disrespect for the corpse reasonably could be considered evidence of an evil, wicked, conscienceless person. Such a consideration violates settled law on the meaning of the aggravator. See Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984), after remand 522 So. 2d 802 (1988). A reasonable juror could interpret the instruction to find the aggravator because of the victim's character despite this Court's holding against considering such characteristics. See Jackson v. State, 498 So. 2d 906 (Fla. 1986). Jurors reasonably following the proposed instruction might believe that victim awareness of his impending death a very short time before it occurs establishes the aggravating circumstance although the Supreme Court says it does not. See Amoros v. State, 531 So. 2d 1256 (Fla. 1988); Parker v. State, 458 So. 2d 750, 754 (Fla. 1984), cert. denied 470 U.S. 1088 (1985).

The Florida 'heinous, atrocious, or cruel' jury instruction is unconstitutionally vague on its face and as used in the instant case. As such this case should be reversed and remanded for resentencing.

VI.

ARGUMENT

V.

WHETHER THE TRIAL COURT ERRED IN DETERMINING THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL SO AS TO JUSTIFY IMPOSITION OF THE DEATH PENALTY.

Dr. John Mahoney, an associate medical examiner, testified about his findings during the autopsy conducted on Kenneth Young. (RT. 645). His findings included an acute fracture of the distal radial head of the left arm which he characterized as consistent with a defensive wound.[1] (RT. 650-653). According to Dr. Mahoney, there were some tears in the skin of the left forearm including shallow wounds, which could have been made by sharp plant material, and some deeper lacerations around the fractured wrist end of the left arm. (RT. 650). Dr. Mahoney found cuts on both cheeks, the left neck, and the right eyebrow. Further, he could not say which, if any, of these cuts were premortem and which were postmortem injuries. (RT. 654). In addition, there were fractures of the seventh and eighth ribs on the left side, and the eighth anterior cartledge on the right side. (RT. 654). Although the cause of death was drowning, Dr. Mahoney could not say if the victim was conscious or unconscious at the time he drowned. (RT. 668-669).

Concluding this homicide was especially heinous, atrocious, or

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[1] This finding in laymen terms means a recent fracture of the left wrist.

cruel, the trial court held there was no conclusive evidence as to whether the victim was conscious or unconscious when he drowned. (R. 1002).

> "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 of 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 consciousless and pitiless and unnecessarily torturous to the victim." (R. 1002).

The record does not support the court's erroneous finding of numerous blows to the head. Rather, as the medical examiner stated, there were some cuts to both cheeks, the left neck, and right eyebrow. The medical examiner explicitly stated he could not determine whether these cuts were postmortem or premortem. (RT. 653-654). Further, there is abasolutely no testimony in the record to support the court's finding the victim "experienced a great deal of pain and terror" or even that the victim was aware he was going to be killed. Finally, the record is completely barren of any facts to support the finding that the homicide was consciousless or pitiless and unnecessarily torturous to the victim. Richardson v. State, 604 So. 2d 1107 (Fla. 1992).

At best the State proved the victim sustained a broken wrist (distal radial head), two fractured ribs, and several cuts. These types of injuries, either singularly or in combination, however, do not set this homicide above and apart from the ordinary or the norm

for premeditated murders. State v. Dixon, 283 So. 2d 1 (Fla. 1973). Certainly, when compared with other cases this Court has ruled upon, it is one of the least heinous, atrocious or cruel. See Revera v. State, 545 So. 2d 864 (Fla. 1989) (Stating murder of a law enforcement officer with two shots to the chest and one shot to the arm was not heinous, atrocious, or cruel); Hallman v. State, 560 So. 2d 223 (Fla. 1990) (Holding a single shot to the chest was not heinous, atrocious, or cruel); Cherry v. State, 544 So. 2d 184 (Fla. 1989) cert denied 110 S. Ct. 1835 (Declaring victim's death from a cardiac arrest suffered during a burglary was not heinous, atrocious, or cruel); Brown v. State, 526 So. 2d 903 (Fla. 1988) cert denied 190 S. Ct. 371 (Determining shooting a law enforcement officer to death after an initial shot to the arm was not heinous, atrocious, or cruel); Proffett v. Wainwright, 685 F. 2d 1227 (11th Cir. 1982) (Explaining a single stab wound to the chest was not heinous, atrocious, or cruel); and Demps v. State, 395 So. 2d 501 (Fla. 1981) cert. denied 102 S. Ct. 430 (Holding a defendant held victim while co-defendant stabbed victim was not heinous, atrocious, or cruel). As such, the trial court erred in finding this homicide was perpetrated in a heinous, atrocious, or cruel manner. Moreover, the trial court erred in using this aggravating factor to justify imposition of the death penalty. Therefore this cause should be reversed and remanded for a new sentencing hearing.

VI.

ARGUMENT

VI.

WHETHER THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY CONSIDER COMPETENT UNCONTROVERTED EVIDENCE OF TWO MITIGATING CIRCUMSTANCES.

In it's November 20, 1992 sentencing order the trial court made the following findings with respect to statutory and non-statutory mitigating circumstances:

> "(f)The capacity of the Defendant to appreciate the crimnality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Evidence was presented with regard to this statutory mitigating circumstances, the Jury was instructed on 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."
>
> * * *
>
> "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 of age his father dropped Defendant off, gave him some money, left with his

girlfriend, and Defendant has not seen his father 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 is 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 it is not entitled to great weight."

(R. 833-835, 1004-1006).

A mitigating circumstance must be "reasonably established by the greater weight of the evidence." Campbell v. State, 571 So. 2d 415 (Fla. 1990); Fla. Std. Jury Instr. (Crim) (1992). A trial court may reject a defendant's claim that a mitigating circumstance has been proven provided, however, the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances". Knight v. State, 512 So. 2d 922, 933 (Fla. 1987) cert denied 485 U.S. 929, 108 S. Ct. 1100, 99 L. Ed. 2d 262 (1988). Yet, "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." (emphasis ours) Nibert v. State, 574 So. 2d 1059, 1062

(Fla. 1990).

In the instant case Appellant testified on the night before he met Mr. Young, he and Timmy Hollis drank all night and began again early the next morning. In addition, he drank continuously throughout the course of that next day. (RT. 961-966). Indeed, while at the hospital a short time after the homicide took place, he was given a blood test which showed a blood alcohol level of .269, "two and one half times the legal drink level". (RT. 966). The State did not rebut this testimony. (RT. 967-968). As such, a reasonable quantum of competent, uncontroverted evidence was introduced by the Appellant. Thus according to this court the trial court was required to find that this mitigating circumstance was proven. Nibert v. State, 574 So. 2d at 1063. Contrary to the well established case law, the trial court held it was entitled to "some weight" in its considerations. See Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985); Cheshire v. State, 568 So. 2d 908, 911 (Fla. 1990).

The trial court also noted evidence that the Appellant suffered from a difficult and traumatic childhood was presented. The court erroneously all but rejected this evidence as a mitigating factor because "when one considers its remoteness in time and the fact that his similarly situated sisters have become productive citizens, this mitigating circumstance is not entitled to great weight." (R. 833-835, 1004-1006). The defense, however, presented competent, uncontroverted evidence which portrayed the childhood trauma and difficulties suffered by the Appellant as a

child.

> "The fact that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary. Nibert v. State, 574 So. 2d at 1062.

This court has repeatedly held the defendant's disadvantaged childhood, abusive parents, and lack of education and training, constitute valid mitigation and must be considered. Brown v. State, 526 So. 2d 902, 908 (Fla. 1988) cert. denied, 488 U.S. 944, 109 S. Ct. 371, 102 L. Ed. 2d 361 (1988). Furthermore, the trial court should have considered the effect of this childhood environment on the Appellant alone. The fact Appellant's sisters were similarly situated and turned out okay is simply irrelevant and outside the scope of the court's cosnsideration. Importantly, the lower courts erroneous consideration of the same deprives the Appellant of an individualized sentence contrary to both the Eighth and Fourteenth Amendments.

The trial court's refusal to seriously consider the aforementioned mitigating circumstances or at the very least, failure to cite any positive evidence from the record that would justify the courts rejection of same, constitutes reversible error. As such, this cause should be reversed and remanded for resentencing.

VII.

CONCLUSION

The trial court erred in failing to suppress the introduction of evidence seized from the Appellant's hospital room, prior to his arrest, without his consent, without first securing a warrant and absent exigent circumstances. The seizure and subsequent search of the Appellant's effects was made based on a suspicion of foul play being involved, and according to the trial court, in order to place the effects in protective custody. The seizure violates the principals of the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution, United States v. Jacobson, 466 U.S. 109, 112 S. Ct. 1534, 80 L. Ed. 2d 85 (1984); Arizona v. Hicks, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987); Shepard v. State, 343 So. 2d 1349 (Fla. 1st DCA 1977), and a host of other cases as more fully set forth in the arguments which follow.

The trial court also erred in allowing the introductions of gruesome pictures of the victim's body after its recover from a lake where it was discovered after being missing for six days contrary to Section 90.403 Fla. Stat. and Reddish v. State, 167 So. 2d 858 (Fla. 1964).

During the death penalty phase court erred in sentencing the Appellant to death based on the fact that the death occurred while the defendant was involved in the commission of a robbery. Section 921.141. The automatic application of the murder while committing a specified felony aggravating circumstance to a defendant who's

first degree murder conviction rests on a felony murder theory fails to genuinely narrow the class of felony murderers eligible for the death penalty as required by the Eighth Amendment. Arave v. Creech, 113 S. Ct. 1534 (1993), Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047 (1990) and State v. Middlebrooks, 840 S.W. 2d 317 (Tenn. 1992) cert granted; Tennessee v. Middlebrooks, 113 S. Ct. 1840 (1993).

The heinous, atrocious, and cruel aggravating cirucmstance of the Florida death penalty statute (Section 921.141(4)(h) is unconstitutionally vague and violation of the Eighth Amendment. Espinosa v. Florida, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992); Richmond v. Lewis, 113 S. Ct. 528 (1992); Johnson v. State, 612 So. 2d 575 (Fla. 1993); and Davis v. State, 18 Fla. L. Weekly S385 (Fla. June 24, 1993).

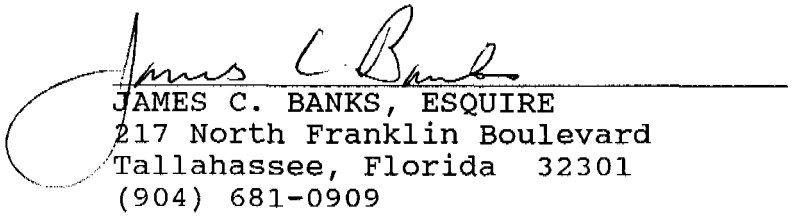
Even if the heinous, atrocious and cruel aggravating circumstance is declared to be constitutional, the trial court erred in imposing the death penalty based on this aggravating circumstance.

Finally, the trial court erred in failing to adequately consider competent, uncontroverted evidence of two mitigating circumstances contrary to Nibert v. State, 574 So. 2d 1059 (Fla. 1990).

For each of the foregoing reasons the Appellant was denied a fair trial and sentencing and this cause should be reversed and

remanded for a new trial and/or sentencing.

RESPECTFULLY SUBMITTED,



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VIII.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and three copies of the foregoing INITIAL BRIEF OF APPELLANT has been furnished by HAND DELIVERY to the FLORIDA SUPREME COURT, Tallahassee, Florida; and a true and correct copy of same has been furnished by UNITED STATES MAIL to: JAMES ROGERS, ESQUIRE, Assistant Attorney General, Department of Legal Affairs, Appeals Division, The Capitol Building, Tallahassee, Florida 32301; and a copy of same has been furnished by UNITED STATES MAIL to the Appellant/Defendant, HARRY JONES, Union C.I., P.O. Box 221, Raiford, Florida 32083 on this 25 day of August, 1993.

James C. Banks
JAMES C. BANKS, ESQUIRE