IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

HARRY JONES,

Appellant/Defendant,

vs.

CASE NO.
DOCKET # 80,827

STATE OF FLORIDA,

Appellee.
_____/

REPLY BRIEF OF APPELLANT

ON APPEAL FROM THE
CIRCUIT COURT, SECOND JUDICIAL CIRCUIT, LEON COUNTY

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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 2 volumes, and will be referred to by use of the symbol "R". All references will include appropriate page number designations.

III.

POINTS OF ARGUMENTS ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS PERSONAL PROPERTY OF THE APPELLANT WHICH WAS 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.

IV.

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 Appellant 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 an

Appellant 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 circumstance 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.

V.

ARGUMENT

I.

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

STANDING

The Appellee repeatedly refers to the Appellant's unclaimed right of privacy in his hospital room as the basis for Appellee's argument that Mr. Jones had no standing to challenge the unreasonable search and seizure of his clothing, lottery tickets and money. (Answer Brief, pages 16-19). In citing Rakas v. Illinois, 439 U.S. 128 (1978) to support the State's position the Appellee obviously overlooks the difference between "searches" and "seizures" and the cases which apply to each.

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 or effects. The constitutionally protected interest is therefore the interest in retaining possession of the property. United States v. Jacobson, 466 U.S. 109 (1984).

A review of Rakas clearly shows it to be distinguishable. In Rakas the prosecution offered into evidence a sawed off rifle and rifle shells which had been seized by police during a search of an automobile owned by a third party and in which the petitioners had been passengers. Before trial the petitioners moved to suppress the aforementioned evidence, however, they did not assert that they owned the evidence sought to be suppressed or the automobile to be searched. The Appellate Court of Illinois, Third Judicial District affirmed the trial court's denial of the petitioners' motion to suppress because the petitioners had failed to establish any proprietary interest in the automobile, any prejudice to their own constitutional rights, or that their own privacy had been invaded. Rakas, 439 U.S. at 129-132. The Supreme Court rejected the petitioners' request to relax or broaden the rule of standing to encompass any criminal defendant at whom a search was directed. In rejecting the petitioners' request the Court reaffirmed it's earlier position that "Fourth Amendment rights are personal rights which, ... may not be vicariously asserted." Rakas, 439 U.S. at 133-134, citing Alderman v. United States, 394 U.S. 165, 174 (1969). The Court also referred to it's earlier decisions in United States v. Jeffers, 342 U.S. 48 (1951) and Bumper v. North Carolina, 391 U.S. 543 (1968) and affirmed the petitioner's standing in each of those cases due to the petitioners possessory interest in the property seized. Rakas, 439 U.S. at 136. In the instant case the Appellant, unlike the petitioners in Rakas, has claimed ownership and a possessory interest in the property seized

by law enforcement. As such the Appellant is in fact claiming that his personal right to be free from unreasonable interference with his possessory interest in personal property was violated by law enforcement as opposed to Rakas' vicarious assertion of the violation of the Fourth Amendment rights of a third party. See Alderman v. United States, 394 U.S. 165 (1969). The United States v. Jeffers and Bumper v. North Carolina cases cited in the Rakas case are more in line with the instant case than Rakas is.

It should also be noted that in Rakas, the petitioners were arrested for armed robbery and the property seized consisted of a sawed off rifle and rifle shells; obvious instrumentalities of the petitioners' crime. In the instant cause, it is the Appellant's clothes which are seized, and they are seized with no knowledge by law enforcement of what crime(s), if any, the Appellant may have committed. The clothes were not contraband, the instrumentality of a crime, or the fruit of a crime. Furthermore, it really stretches the imagination to assert that they could be evidence of a crime given what law enforcement knew when the clothes were seized. Therefore, the Appellee's reliance on Rakas is misplaced and Appellee's selective quotes from Rakas misleading.

Appellee's reliance upon Rawlings v. Kentucky, 448 U.S. 98 (1980) is also misplaced. In Rawlings the petitioner was challenging the search of a third party's purse which contained narcotics belonging to the petitioner. The Court upheld the search in part due to the petitioner's "frank admission... that he had no subjective expectation that [the third party's] purse would remain

free from governmental intrusion..." Rawlings 448 U.S. at 105. In the instant cause the appellant had not transferred the clothes to a third party, as did Rawlings. The clothes were in a bag, in the corner of the Appellant's hospital room. While the Appellant may not have expressly sought to deny access to his bag of clothes, neither did he consent to their seizure by law enforcement. In fact, the hospital itself recognized the Appellant's propriety interest and privacy interest in the clothes by placing them into the plastic bag and placing the bag in the Appellant's hospital room to begin with. They further recognized the Appellant's rights with respect to the money and lottery tickets found in the clothes by securing same in the hospital vault and under the protection of hospital security.

Appellee argues the Appellant failed to manifest any objection to law enforcement's entry into the hospital room, or to the seizure of his property. However, in Arizona v. Hicks, 480 U.S. 321 (1987) the police were legally in the Appellant's apartment pursuant to an emergency situation. While in the apartment they moved a group of stereo components to record the serial numbers thereon. The Supreme Court held the actions of law enforcement in moving the stereo components to secure serial numbers was an unreasonable seizure. As such the petitioner in Hicks had standing to challenge the search even though, like the Appellant herein, he made no attempt to deny access to his property (the stereo). Appellee's argument seems to require a criminal defendant to take some action to inform law-enforcement that they are not free to

seize his property; that without some explicit manifestation of his desire to keep his personal property private he cannot he cannot later claim his rights were violated. This simply is not so, according to the Supreme Court in Hicks. In fact, it is the Fourth Amendment which explicitly forbids law enforcement from seizing an individuals property without a warrant.

Appellee cites Katz v. United States, 389 U.S. 347 (1967) to support its claimed lack of standing. However, Katz is also distinguishable. In Katz the Fourth Amendment protection sought is to be free from unreasonable searches by law enforcement who invaded the petitioner's privacy as he made a telephone call on a pay phone. Law enforcement in Katz did not interface with petitioner's possessory interest in any specific property or effects, as in the case before this court. As such, when Katz states the "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place" the court was discussing searches, not seizures. To hold otherwise would ignore the Court's later (1984) decision in Jacobson, supra.

Appellee argues that "although Jones had been in this hospital room for approximately 24 hours, there was no evidence that Jones had sought to exclude persons from the room, had attempted to deny access to this bag of clothes, had requested the return of the lottery tickets and money or that he took normal precautions to

maintain his privacy and therefore was not entitled to Fourth Amendment protection." (Answer Brief, page 8-19). If that were so then the United States Supreme Court made a big mistake in Arizona v. Hicks, supra. In Hicks, like the instant cause, law enforcement had a legitimate right to be in Mr. Hicks house. In Hicks, like the instant cause, the petitioner took no extra precautions to hide his property from the prying eyes of law enforcement. In Hicks, like the instant cause, law enforcement "seized" the personal property for Fourth Amendment purposes. And finally, in Hicks, like the instant cause, the petitioner had standing to challenge the seizure and the seizure was held unconstitutional.

The same arguments apply to the lottery tickets and money which were seized from the hospital. The hospital was entrusted with the possession and care of the lottery tickets and money which were found on the Appellant upon his admission to the hospital. While the Appellant did not have actual possession of these effects he did have constructive possession of them, much like the petitioner had constructive possession of his stereo in Arizona v. Hicks, supra. He had the ability to ask the hospital to return the lottery tickets and money at any time as Lt. Livings feared and as the Appellee appears to concede.

This cause does not involve an Appellant who was seeking to enforce a third parties Fourth Amendment right as was the case in Rakas, supra, as argued by the Appellee. The Appellant was seeking to invoke his own right to be free from the unreasonable and warrantless seizure of his own property, from his own hospital

room. As such, the Appellant had standing to contest the seizure of his personal property.

"PLAIN VIEW"

Appellee next argues, for the first time, that it now seeks to justify the warrantless seizure of the Appellant's property on the basis of the "plain view/open view doctrine" pursuant to Coolidge v. New Hampshire, 403 U.S. 443 (1971). The case law is clear that where the law enforcement officer is in a nonconstitutionally protected area and sees an object he recognizes as contraband, he is authorized to seize the contraband. Texas v. Brown, 460 U.S. 730 (1983). However, where the property seized is not recognized as contraband the seizure is only reasonable "assuming that there is probable cause to associate the property with criminal activity". Texas v. Brown, 460 U.S. at 741-742, citing Payton v. New York, 445 U.S. 573, 587 (1980). Through the use of creative and selective quotes Appellee again seeks to mislead the court. Appellee alleges that when "[B]oth the officer and the [evidence were] in a nonconstitutionally protected area" as outlined in example used by this court in Ensor v. State, 402 So. 2d 349, 352 (Fla. 1981) there are no fourth amendment ramifications. Appellee creatively substitutes "[evidence were]" in place of "contraband" as originally used by this court in order to support its argument. In this cause, for reasons outlined in the Initial Brief, there was no probable cause to believe the clothing in Appellant's room or the money and lottery tickets were associated with criminal activity and they certainly do not constitute "contraband". It

should also be noted that in Ensor the officer observed and seized a derringer pistol which was partially concealed by a floormat while charging the defendant with carrying a concealed weapon. The association of the pistol with the crime of carrying a concealed weapon was obvious and certainly amounted to more than probable cause. In this cause the Appellant's clothes, money, and lottery tickets could not be associated with any crime at the time they were seized. Indeed, at the motion to suppress hearing, no mention was made of any crime being committed and Lt. Livings only had a suspicion that some foul play may be involved. (R. 954). This "suspicion" certainly did not rise to the level of probable cause as required by the fourth amendment.

Appellee also cites Craig v. State, 585 So. 2d 278 (Fla. 1991) as authority for Lt. Livings seizure of Appellant's clothes. However, Craig is factually distinguishable. In Craig the officer was handed a shoe and noticed that their treads were similar to bloody prints found at a murder scene so he seized them as evidence. But note, that at the time of the seizure in Craig law enforcement had already found a dead body and had seen two shoeprints marked in blood at the scene. Thus they knew a homicide was committed and the bloody shoe tracts were clearly associated with the newly discovered shoes. In this cause law enforcement could not connect the clothes, money, and lottery tickets to any as yet undetermined crime.

As Appellee correctly points out, Coolidge v. New Hampshire, 403 U.S. 443 (1971) sets forth the three requirements the seizing

officer must meet under the plain view exception. The seizing officer must be in a position he has a legitimate right to be in; the officer must discover the evidence inadvertently; and the incriminating nature of the evidence must be immediately apparent on its face. In this cause the Appellant did not challenge the officer's right to be in the Appellant's room. With respect to the second requirement of inadvertent discovery, there was nothing inadvertent about the Lt. Livings discovery of the lottery tickets and money. In fact, he instructed a deputy to check with the hospital and see if hospital personnel had taken any money or lottery tickets from the Appellant. Those items were later seized. (R. 956-957, 960). Finally, there was nothing incriminating about the clothes, money or lottery tickets which were seized nor did Lt. Livings testify that they were incriminating. In fact, Lt. Livings had no idea what type of evidence, if any, the clothes, money, or lottery tickets would reveal, until much later. The incriminating nature of the seized evidence did not become apparent until much later, after the victim's body was found. As such two of the three prongs of the plain view doctrine were not met.

Detective Livings' broad conclusions and subjective views were insufficient reasons to substantiate the seizure of Mr. Jones' property without a warrant. "[I]f the items in question are innocent by themselves, they may only be seized if the officer has probable cause to believe that what he sees in plain view is incriminating evidence." State v. Reddish, 362 So. 2d 170, 172 (Fla. 2d DCA 1978) citing State v. O'Steen 238 So. 2d 434 (Fla. 1st

DCA 1970). "Probable cause means something more than suspicion." U.S. v. Benn, 441 F. Supp 1268, 1272 (E.D.N.Y. 1977) quoting Brinegar v. State, 338 U.S. 160 at 175 (1949). "The question must be decided not by the mere subjective views or unarticulated hunches of the police official but by an objective standard. Terry v. Ohio, 392 U.S. 1, 21-22 (1968). The warrantless seizure of the clothing by Detective Livings was nothing less than "a general exploratory search from one object to another until something incriminating at last emerges" Coolidge v. New Hampshire, 403 U.S. 443, 446 (1971). This condemned behavior occurred in Mr. Jones' case when a warrantless seizure of Mr. Jones' property was followed by a warrantless seizure of soil samples removed from Mr. Jones' clothing.

Furthermore, when law enforcement is able to articulate objective facts, those objective facts must lead to a conclusion that what is "in plain view" is at least more probable than not incriminating evidence.

EXIGENT CIRCUMSTANCES

Appellee next attempts to justify the seizure because exigent circumstances existed citing Schmerber v. California, 384 U.S. 757 (1966). In Schmerber the police were attempting to secure a blood sample from the petitioner before any evidence of intoxication was destroyed by the natural elimination processes of the body. If they had to wait the time required to secure a warrant the evidentiary value of the seized blood would have been lost. In the instant cause, Lt. Livings did not articulate what he hoped to gain

from the clothes, lottery tickets or money or why their value would be diminished by the passage of a few hours.

Appellee lists five (5) factors cited by this court in Hornblower v. State, 351 So. 2d 716, 718 (Fla. 1977) to determine if exigent circumstances exist. Appellant disagrees with Appellee's assertion that four of the five factors apply to the case. First, the degree of urgency involved and the amount of time necessary to obtain a warrant. It would only take three or so hours to obtain a warrant and at the time of the seizure, law enforcement wasn't even sure a crime had been committed. Second, "a reasonable belief that [evidence] is about to be removed." The articles seized had already been in the Appellant's room for 24 hours. In fact, it was the hospital personnel who put the clothes into the Appellant's room to begin with. There was no evidence to indicate that either the Appellant or hospital personnel were about to move, remove and/or destroy the Appellant's clothes. Furthermore, the lottery tickets and money was being kept safe and secure by hospital security so that no one, except the Appellant, could have unauthorized access to them. Finally, while it would have taken only three or so hours to secure a warrant, law enforcement waited twenty-four hours to seize the clothes and an additional 24 hours to secure the lottery tickets without a warrant. So much for the urgency alleged by the Appellee. The third factor to be considered is the possibility of danger to police officers guarding the site while a warrant was sought. There was no evidence whatsoever that any delay required to secure

a warrant posed a danger to law enforcement. In fact, a guard was posted immediately after the seizure to guard the Appellant, and no danger was articulated by the State. Fourth, the possessor of the seized evidence knew police were on his trail. In this cause, the Appellant's first brush with law enforcement was 24 hours prior to the seizure. In spite of knowing law enforcement was looking after him for 24-48 hours, the Appellant made no attempt to destroy or remove the seized objects. Finally, the ready destructibility of the evidence. Hospital security had the lottery tickets and money safely locked away where no one could get to them and clothes were not subject to a quick destruction by the bedridden Appellant. Additionally, the guard at the Appellant's door provided further security for the clothes.

Appellee thereafter cites the State Attorney's argument to the trial court as a possible basis for finding the evidence was susceptible to removal or destruction. However, the prosecutor, like Appellee did no more than speculate about what could possibly go wrong, with no factual basis to support their speculation.

SUBSEQUENT SEIZURE

Appellee next argues that because the subsequent searches of the clothing, lottery tickets and money was no greater than the initial seizure by the hospital they were constitutional citing United States v. Jacobson, 466 U.S. 109, 115 (1984). Under the facts of this cause the Appellee's argument must again fail. The "initial seizure", as it is termed by Appellee, consisted of hospital personnel removing Appellant's clothes so they could treat

his injuries. The clothes were subsequently returned to the Appellant's room. Therefore the hospital no longer had possession of the Appellant's clothing. Thus, law enforcement's subsequent seizure and search of the clothing did exceed the scope, degree, duration and extent of the hospital's initial "seizure". Furthermore, the hospital personnel conducted no tests, scientific or otherwise an Appellant's clothes.

With respect to the lottery tickets, the hospital merely took control over them in order that they would be held for safekeeping. Again, the hospital had no interest in the items and subjected them to no tests or inspection as law enforcement later did.

To imply that the subsequent soil testing on the clothing and delivery of the lottery tickets to yet another party, the Florida Lottery personnel, did not exceed the scope of the hospital's intrusion into the Appellant's rights is absurd and ignores the facts of this case.

Furthermore, it is interesting to note the argument the Appellee fails to make in support of denying the Appellant's motion to suppress. The trial court, in denying the motion to suppress "look[ed] upon this situation more or less as the officer taking it into protective custody... ." (R. 972). There is no basis for the trial court's conclusion that the property was taken into protective custody. There was no doubt as to Mr. Jones' identity so as to require law enforcement to search his belongings in order to ascertain this information. Mr. Jones' belongings had not been removed from a vehicle that was impounded by law enforcement at the

time of his auto accident. Caplan v. State, 531 So. 2d 88 (Fla. 1988) cert. denied 489, U.S. 1099 (1988); McClendon v. State, 476 So. 2d 1303 (Fla. 2nd DCA 1985); South Dakota v. Opperman, 428 U.S. 364 (1976). The seizure and search of Mr. Jones' clothing did not follow any law enforcement procedure or practice within the Sheriff's Department. The only justification for this "protective" seizure was to uncover incriminating evidence against Mr. Jones. Where an inventory search is used as a pretext to seize evidence illegally, that evidence will be suppressed. State v. Forbes, 419 So. 2d 782 (Fla. 2d DCA 1982). A warrantless investigatory search may not be conducted under the guise of inventory. U.S. v. Khoury, 901 F. 2d 948 (11th Cir. 1990). Furthermore, an inventory search cannot be used as a substitute for probable cause where none exists.

HARMLESS ERROR

Finally, Appellee argues that the admission of the clothes, lottery tickets, and money, and the results of tests run on same by law enforcement was harmless error. Appellee overlooked the fact that the only evidence which connects the Appellant to the pond in which the body is found came from soil samples taken from the seized clothes. Four of the first five witnesses called by the State testified about the amount of money the victim had when last seen and the State argued that the money seized by law enforcement belonged to the victim. Eugene McCarthy of the Florida Lottery testified that the tickets found in the victim's truck and those seized from the Appellant were purchased at the same time.

Sergeant Bill Gunter, Joe Scheuster and Dr. Loran Anderson all testified to the similarity of the soils and pollen at the pond the body was discovered in. In fact, Dr. Anderson concluded the person wearing these clothes made more than just a casual entry into the pond. (RT. 624). As such, the lottery tickets, money and soil seized from the Appellant provided critical connections between the Appellant and the victim, the location of the victim's body, provided a motive (robbery) for the victim's demise. As such, the denial of the Appellant's motion to suppress and the subsequent introduction of the aforementioned evidence and testimony was highly prejudicial to the Appellant's case and can, in no way, be characterized as harmless.

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.

Appellee admits that among the pictures admitted into evidence by the State there were "a few very gruesome ones" which are alleged to be relevant. (Answer Brief page 30). Predictably the State relies on Henderson v. State, 463 So. 2d 196 (Fla. 1985) for the proposition that those who commit murder should expect to be confronted with their handiwork. However, the gruesomeness of the photographs in this cause is caused not by the Appellant, but by the effects of mother nature upon the human body which was not recovered for several days. As such the photographs in this cause were so gruesome and inflammatory as to create undue prejudice in

the minds of the jury. The court's error in admitting the photographs into evidence, alone and in combination with the errors alleged in the motion to suppress argument heretofore presented, constitute harmful error. As such this cause should be reversed and remanded for a new trial.

III.

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

Appellee argues that the indictment, which charged Mr. Jones with premeditated murder, removed him from the felony-murder classification during penalty phase and denies him any relief based upon State v. Middlebrooks, 840 S.W. 2d 317, (Tenn. 1992). This argument is erroneous based upon the record. The record reflects that during the guilt-innocence phase, the jury was instructed on both premeditated murder and felony-murder, and the verdict form did not specify either theory of first-degree murder. Thus, it is impossible to tell whether the jury found the Appellant guilty of premeditated murder or felony-murder. Also, the State was permitted to utilize the guilty verdict arising from Count II, Robbery, to establish the felony-murder aggravator.

The above-mentioned facts demonstrates that Florida's statutory sentencing scheme regarding the felony-murder aggravator fails to "genuinely narrow" or provide a "principled basis upon which the jury could have distinguished among first-degree murder." Stringer v. Black, __U.S.__, 112 S. Ct. 1130, 1137 (1992).

Florida's felony-murder aggravator, on its face and as applied to Mr. Jones, makes death the presumptive sentence, unless and until the defendant can prove that death is inappropriate by presenting mitigating evidence:

> Aggravating circumstances serve to reduce the danger that the death penalty will be wantonly or arbitrarily imposed, a danger that was uppermost in the Court's mind when Furman v. Georgia... was decided... We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function.

Tennessee v. Middlebrooks, 840 S. W. 2d 317, 345-346 (1992) quoting Collins v. Lockhart, 754 F. 2d 258 (8th Cir. 1985).

Appellant has informed this Court in his initial brief of the differences between the statutory sentencing schemes of Louisiana and Florida. Based upon those differences, any reliance by the Appellee upon Lowenfield v. Phelps, 484 U.S. 231 (1988), for the proposition that there is no Eighth Amendment violation in utilizing an element necessary to the conviction of first-degree murder as an aggravating factor to support a death sentence is misplaced. Additionally, citations to Edmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987) in Appellee's answer brief regarding mitigation of the felony aggravator are also misplaced. Edmund and Tison are not narrowing cases. Instead they are proportionality cases that establish minimum levels of culpability, including accomplices to murder, that must be found before a death penalty will be found constitutional. This level of culpability may be found at any level of the process. Cabana v.

Bullock, 474 U.S. 376 (1986). Thus, Edmund and Tison define the floor of the class of persons who the State may determine to be death eligible, whereas, aggravating circumstances select from that class of death eligible murders the few worst offenders who may be sentenced to death.

Finally, a harmless error analysis does not apply to Mr. Jones' case. This Court has held that if the effect of a particular aggravator during the sentencing process cannot be determined, and that particular aggravator is eliminated, a resentencing is appropriate. See Bonifay v. State, 18 Fla. L. Weekly S464 (Fla. September 2, 1993); Rivera v. Dugger, 18 Fla L. Weekly S570 (October 28, 1993); Arbelaez v. State, 18 Fla. L. Weekly S500 (September 23, 1993). Since the jury did not distinguish between premeditated murder and felony-murder during the guilt-innocence stage and the trial court found the felony-murder aggravator to exist, the effect of this aggravator upon the jury's deliberations cannot be measured. Therefore, a resentencing is appropriate in Mr. Jones' case.

IV.

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

The United States Supreme Court, in Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. 2926, 2928, 120 L. Ed. 2d 854 (1992) 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 recommendation, whether that recommendation be life... or death." It then follows that the trial 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.

For many years capital sentencing jurors were given little or no guidance of what was especially heinous, atrocious, or cruel as they were simply informed that the crime for which the defendant was to be sentenced was "extremely wicked, shockingly evil, vile, or cruel." Florida Standard Jury Instructions in Criminal cases (1976). After the United States Supreme Court declared such a definition unconstitutionally vague, Florida adopted a new jury instruction for heinous, atrocious or cruel which tracked the language in State v. Dixon, 283 So. 2d 1 (Fla. 1973). See Maynard v. Cartwright, 486 U.S. 356 (1988). Again, the Supreme Court rejected the jury instruction as unconstitutionally vague. Shell v. Mississippi, 498 U.S. ___, 111 S. Ct. 313 (1990). Yet another heinous, atrocious, or cruel instruction was drafted. Appellant submits that this latest instruction, the one used in the instant cause, continues to suffer the same infirmities as its earlier counterparts. It too is unconstitutionally vague. The first four sentences are virtually identical to the earlier, unconstitutionally vague instructions. As such, at least the first four sentences of the instruction given to the jury in this case are not constitutionally sufficient. Shell v. Mississippi, 498

U.S. ___, 111 S. Ct. 313 (1990). As the court said in Richmond v. Lewis, __U.S.__, 113 S. Ct. 528, 534 (1992), "[a]s were explained 'there is no serious argument that [this factor] is not factually vague'." Also see Walton v. Arizona, 497 U.S. 699, 110 S. Ct. 3047 (1990); Johnson v. State, 612 So. 2d 575 (Fla. 1993); Davis v. State, 18 Fla. L. Weekly S385 (Fla. June 24, 1993).

The addition of the last sentence of the latest version of the heinous, atrocious or cruel instruction does not cure the problem, or make the instruction any less vague. As the Supreme Court said:

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

Espinosa v. Florida, 505 U.S.___, 112 S. Ct. 2926, 2928 (1992).

Appellee argues that if this court were to determine the trial court committed an error on this point, the error is harmless due to the severity of the victims injuries and the presence of other aggravating factors. However, with respect to the injuries it should be noted that the sentencing court found no conclusive evidence that the victim was conscious when he drowned (R.1002). Dr. Mahoney found some shallow wounds which could have been made by sharp plant material as well as some cuts to the cheeks, the neck and the right eyebrow. The most serious of the injuries consisted of two broken ribs and a fractured wrist. (RT. 650, 654). This certainly does not rise to the level of heinous, atrocious or cruel as this court has found in the past. Rivera v. State, 545 So. 2d 864 (Fla. 1989); Hallman v. State, 560 So. 2d 223 (Fla. 1990); Cherry v. State, 544 So. 2d 184 (Fla. 1989); Brown v. State, 526

So. 2d 903 (Fla. 1988); Demps v. State, 395 So. 2d 501 (Fla. 1981).

Finally, this court has held that if the effect of a particular aggravator during the sentencing process cannot be determined, and that particular aggravator is eliminated, as Appellant argues here, a new sentencing as appropriate. See Bonifay v. State, Fla. L. Weekly S464 (Fla. September 2, 1993); Rivera v. Dugger, 18 Fla. L. Weekly S570 (Fla. October 28, 1993); Arbelaez v. State, 18 Fla. L. Weekly S500 (Fla. September 23, 1993). As such, it cannot be said that the error committed by giving the jury, and by the sentencing court relying on an unconstitutionally vague instruction is harmless error.

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.

Contrary to Appellee's assertions the Appellant does not concede, but argues that this homicide is neither heinous, nor atrocious or cruel. In arguing that the heinous, atrocious, or cruel aggravating factor applies in this case the Appellee argues facts that are not part of the record or were rejected by the trial court at sentencing.

Appellee argues that "[A] common sense inference from the instant facts is that the victim was conscious when Jones drowned him". (Answer Brief page 42-43). Appellee further argues that Young was "aware that he was being dragged into the water to his ultimate demise." (Answer Brief page 43). To the contrary, the

medical examiner testified that he was not able to say the victim was conscious at the time he drowned and that it was very possible the victim was unconscious. (RT. 668). The doctor further testified that if the victim was indeed unconscious he would not be aware of the fact that he was drowning. (RT. 669). Furthermore, the sentencing court specifically found that there was no conclusive evidence as to whether the victim was conscious or unconscious when he drowned. (R. 1002). As such the court used its common sense, as Appellee says it should, and made findings contrary to what Appellee argues on appeal.

Appellee opines that the victim suffered physically as well as psychologically (Answer Brief page 43) however, the record is devoid of any facts upon which to base such an opinion. The record is likewise devoid of any evidence to support Appellee's assertion that the victim was aware of being dragged into the water to his ultimate demise.

Appellee further misquotes from the record in another attempt to make this court believe the victim was conscious for two to three minutes during the drowning (Answer Brief page 44). However, the record reads as follows:

> Q. How long before a person who is subjected to this kind of treatment, <u>assuming they're alive and conscious</u> when they're submerged, how long do they stay conscious and aware of what's going on and happening to them?
>
> A. If they are submerged, there is a lot of variability. I think a reasonable estimate would be approximately two to three minutes. Beyond that you're dealing with somebody that's been able to condition themselves and hold their breath for a very long time.

(RT. 659). Thus the prosecutor and doctor were discussing a hypothetical situation which assumed an alive and conscious victim. In this case the doctor could not say the victim was conscious when placed in the water and neither could the trial court.

Next, Appellee again argues the victim was conscious at some time during the assault as evidenced by the defensive wounds, in an attempt to lead this court into believing the victim was conscious during the drowning. (Answer Brief page 44). Again, Appellee is mixing up the facts to suit her purpose. Contrary to Appellee's arguments the evidence suggests a struggle took place on dry land, where the victim incurred the defensive injuries, then he was dragged to the lake and drowned while unconscious.

Finally, Appellee cites several cases to support the trial court's finding the heinous, atrocious, or cruel aggravating factor applies to the Appellant. Each of these cases is distinguishable from the instant cause. In each of the cited cases, contrary to Mr. Jones' case, the victim was both alive and conscious throughout the entire episode which lead to their deaths.

In Pope v. State, 441 So. 2d 1073 (Fla. 1983) the victim "had been shot from the rear, attempted to flee the attack, and had been shot twice with the gun pressed close to her abdomen. The wounds caused by the explosion of the bullets at impact would have been extraordinarily painful without causing unconsciousness or death." Pope v. State, 441 So. 2d 1077. Pope then clubbed his victim over the head with the gun barrel to the point of breaking the gun barrel before drowning the victim in a nearby canal.

In Waterhouse v. State, 429 So. 2d 301 (Fla. 1983) the victim's body was found with thirty lacerations, thirty-six bruises, semen in her rectum, lacerations around her rectum indicating the insertion of a large object like a coke bottle and a tampon stuffed in her mouth. The wounds were such that they were probably made with a hard object such as a steel tire tool.

Finally, in Arbelaez v. State, 18 Fla. L. Weekly S500 (Fla. September 23, 1993), the victim was a child who was beaten about the head and neck. Furthermore, while alive and conscious, the child was thrown off a bridge by Arbelaez.

In the instant case Young's injuries are not of the same magnitude as are the injuries suffered by the victims in the three cases cited by Appellee. The most serious injury cited by the State is a broken wrist and fractured ribs. Furthermore, despite the assertions of Appellate counsel, there was no evidence to show Young was conscious when he drowned. Alive yes, but conscious no. There was no testimony in the record which would support the court's finding the victim "experienced a great deal of pain and terror" or even that the victim was aware that he was going to be killed. Finally, the record is completely barren of 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). As such, the trial court erred in finding this homicide was perpetrated in a heinous, atrocious or cruel manner. Therefore, this cause should be reversed and remanded for a new sentencing hearing.

VI.

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

The trial court did abuse it discretion by failing to properly consider and evaluate the mitigation evidence presented in Mr. Jones' case. There was substantial uncontroverted competent evidence that established Mr. Jones intoxication the evening of Mr. Young's death, his disadvantaged childhood, abusive parents and lack of education. No rebuttal evidence was presented by the prosecution which would have diminished the forcefulness of Mr. Jones' mitigation evidence. State v. Wickham, 593 So. 2d 191, 194 (Fla. 1991).

The trial court found that the above-mentioned mitigating circumstances existed within the record. A mitigating circumstance must be "reasonably established by the greater weight of the evidence." Campbell v. State, 571 So. 2d 415 (Fla. 1990). "Evidence is mitigating if, in fairness or in the totality of the circumstances of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed." State v. Rogers, 511 So. 2d 526, 534 (Fla. 1987).

However, the trial court proceeded to contradict itself in its assessment of the mitigation evidence. It determined that the above-mentioned statutory and non-statutory mitigation circumstances were entitled to some weight. Yet, this conclusion contradicts the required standard of establishing mitigation cir-

cumstances by the "greater weight" of the evidence. Campbell supra. Also, the trial court's analysis that any abuse Mr. Jones suffered as a result of his parents or upbringing was too remote in time to be considered as mitigation evidence was erroneous and demonstrates its failure to properly find and evaluate this type of testimony:

> 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.

Finally, the trial court abused its discretion when it compared Mr. Jones and his sister in assessing non-statutory mitigation by stating, "...[T]he fact that his similarly situated sisters have become productive citizens, this mitigating circumstance is not entitled to great weight." Again, the trial court's analysis was erroneous and deprived Mr. Jones of individualized sentencing as required in Zant v. Stephens, 462 U.S. 862, 879-80 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

VI.

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 Appellant 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 an Appellant 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).

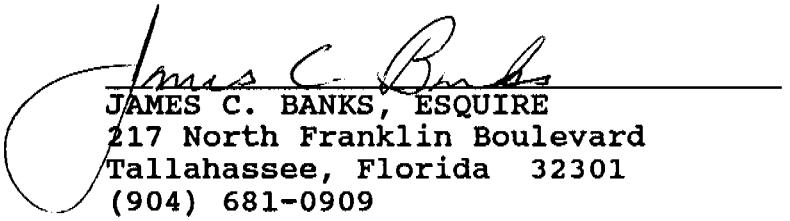
The heinous, atrocious, and cruel aggravating circumstance of the Florida death penalty statute (Section 921.141(4)(h)) is unconstitutionally vague and violation of the Eighth Amendment. Espinosa v. Florida, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992); Richmond v. Lewis, 113 S. Ct. 528 (1992); Johnson 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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VII.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and three copies of the foregoing REPLY 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 13 day of January, 1994.

James C. Banks

JAMES C. BANKS, ESQUIRE