IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,482

VICTOR TONY JONES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT,
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

Defendant Victor Tony Jones appeals from the judgment and from two sentences of death (two counts of first degree murder) and two sentences of life in prison (two counts of armed robbery). The parties will be referred to as Mr. Jones (the appellant) and the State (the appellee or the prosecutor).

The record on appeal is consecutively numbered from 1 to 2,873. The two volumes of record are referred to by "R," and the trial transcript is referred to by "T."

Exhibit A is attached to the brief in an Appendix.

STATEMENT OF THE CASE

Victor Tony Jones was arrested at Jackson Memorial Hospital's Neurosurgical Intensive Care Unit on December 21, 1990, two days after he was shot in the head, allegedly by Jacob (Jack) Nestor after Mr. Jones allegedly stabbed him in the chest. (R 11-12) Those events, in turn, occurred after Mr. Jones allegedly stabbed Matilda (Dolly) Nestor once in the back. (R 12) Mr. Jones had been working for the Nestors for a short time prior to that date, having been released from prison on conditional release on November 27, 1990. (R 50, T 2574-2575)

On January 11, 1991, Victor Tony Jones, also known as Charles Thompson, also known as Charles Adams, was indicted for the first degree murders of Matilda (Dolly) Nestor, and her husband, Jacob (Jack) Nestor. (Counts 1 and 2; R 13) Mr. Jones was also charged with robbery of each of the Nestors. (Counts 3 and 4; R 14) Count 5 of the indictment charged Mr. Jones with possession of a firearm by a convicted felon. (R 15) This count was not read to the jury during the guilt phase of the trial, and was later dropped by the State. (T 2871) The defense motion to strike the aliases on the indictment was granted (unless the defendant were to testify and deny the convictions). (R 215-216, T 401)

The State filed a Notice of Intent to Rely on Evidence of Other Crimes; that is, to introduce Williams rule evidence. (R 108-109) Defense counsel moved to set aside each of Mr. Jones's felony convictions, on the general grounds that each was deficient for failure of the trial judge to inquire into the factual basis for

the plea. (R 129, 160, 170) All three defense motions were denied. (R 29)

Honorable Leonard Glick, Circuit Judge, presided over all of the pre-trial matters. A motion to suppress evidence seized in searches at the homicide scene and at the hospital was denied (after hearing) on November 25, 1992, along with a motion to suppress various statements given to officers George Cadavid, John Buhrmaster, and Oscar Tejeda. (R 197, 213)

One venire was questioned but not sworn in December, 1992. (R 17-20; from T 450 in Volume 3, through all of Volume 4, to T 860 in Volume 5)

All motions were completed by January 25, 1993, before Judge Glick. (T 920) Trial commenced before Honorable Rodolfo Sorondo, Jr., Circuit Judge, on January 26, 1993. The State was represented at some pre-trial proceedings by Paul Ridge, and at trial by John Kastrenakes and Kenneth Behle; the defense was represented throughout the case by Assistant Public Defenders Edward (Art) Koch and Rosa Rodriguez.

The guilt phase was tried from January 26 through February 1, 1993; the jury found Mr. Jones guilty of all four counts presented to them (count 5 was severed before trial). (R 48)

At the request of the defense a competency hearing was held on February 11, 1993. (T 2273) Doctors Lloyd Miller, Charles Mutter, Jorge Herrera testified for the State, and doctors Lawrence Zagray (who had sat at the defense table throughout the trial) and Hyman Eisenstein testified for the defense. (T 2273-2432) The court found

that Mr. Jones was competent. (T 2432-2437)

The penalty phase took place on February 12, 1993. (beginning at T 2444) At the end of the State and defense cases, the jury returned an advisory verdict of death as to Matilda Nestor (10-2), and as to Jacob Nestor (12-0). (R 51; T 2774) The jury was then excused. (T 2775)

At the sentencing hearing held on February 22, the court permitted the defense to re-open the competency hearing, without objection by the State. (T2789-2834) Dr. Eisenstein testified again; Mr. Jones's foster parent and great-aunt, Mrs. Laura Long also testified. (T 2834-2842)

On Monday, March 1, 1993, Mr. Jones was sentenced to death for each of the first degree murders, and to life in prison for each of the robbery counts. (R 323-327, 467-477, T 2859-2870) The court departed from the sentencing guidelines for the robberies based on the unscoreable capital felonies. (R 478, T 2870) Mr. Jones was thereupon committed to the Department of Corrections. (R 479)

Defense counsel filed a notice of appeal on March 3, 1993, and the State filed a notice of cross-appeal on March 11, 1993. (R 484-485, 486)

This appeal followed.

STATEMENT OF THE FACTS

Guilt Phase

On December 19, 1990, a United Parcel Service delivery man went to Nestor Engineering Company at 148 N.E. 28th Street, Miami, Dade County, Florida, as he did on a daily basis, to make a delivery. (T 325, 1630) When he arrived, he noticed that both cars belonging to business owners Jacob (Jack) and Matilda (Dolly) Nestor were parked there as usual (a Cadillac and a Volvo). (T 1313-1314)

When the UPS man rang the buzzer, knocked on the door (it was closed, as it often, but not always, was (T 1639, 1645)), and yelled, Mrs. Nestor neither buzzed him in, nor called out, "Who is it?" as she usually did. (T 1640) When he continued to receive no response, he peered through the mail slot, and saw everything thrown around, and the feet and legs of a man. (T 1631, 1634)

The door to the business was on the second floor, reached by a flight of stairs (there was also a large warehouse-type door, through which Mr. Nestor received shipments, but there were no stairs to it; items were hoisted up to it for delivery). (T 189, 325) The Nestors had installed bars on all of the windows, and at least two locks on the entry door. (T 188-189, 190)

Next-door neighbor mechanic Ernesto Sorondo, called on for assistance by the UPS man, confirmed the view through the mail slot, including a substantial amount of blood, and the police were called. (T 1326)

Firemen broke the door down, and Fire Rescue workers entered

first in an attempt to aid any injured people. When it was discovered that the man (Jack Nestor) seen through the mail slot was dead, and that a woman (Dolly Nestor) found in the bathroom was similarly beyond their help, Fire Rescue left. (T 249-250, 1284-1288, 1530)

After the Fire Rescue workers left, police officers entered, and saw, first, the body of the man (Jack Nestor) whose legs were seen through the mail slot. (T 1283) Then a live man, Victor Jones, was seen sitting on a couch wearing no shirt but with a woman's vinyl coat pulled over him. (T 108, 1286) His clothes (work pants, sneakers) were covered with what appeared to be blood. (T 110, 1290-1291) The officers had their guns drawn, and aimed at him when they saw that there was a revolver by his left arm, telling him to stand. (T 110 Garcia M/S, 1290)

Mr. Jones hesitated for a moment, then stood up, was handcuffed, and Officer Garcia walked with him down the stairs to his marked car. (T 110-112, 1290)

Continuing toward the back of the premises officers found Dolly Nestor (Jack's wife) dead, facedown, in the bathroom. (T 1292)

The medical examiner determined that Mrs. Nestor had died of one stab wound to her back. (T 1803) Mr. Nestor had been stabbed once in the chest, and died of that wound. (T 1817)

Technician Steve Evans testified that a .22 caliber semi-automatic firearm was recovered from a chair in the office, cocked, ready to fire. There was one round in the chamber, but the clip

was empty. (T 1372) Five casings (ejected from the firearm) were recovered from the scene; one projectile was received from Officer Mark Johnston at Jackson Memorial. (T 1380-1381) Tech. Evans also noted a holster on the waistband of Mr. Nestor that was consistent with the .22's size. (T 1384)

Mr. Nestor, the State theorized, had drawn the .22 caliber revolver that he carried on his person, and shot it five times, hitting Mr. Jones once, in the forehead. The gun taken from the couch next to Mr. Jones was registered to Jack Nestor. (T 191)

Officer Garcia was joined at his car by then-Officer Vance, who patted Mr. Jones's front pocket after he noticed a lump there. (T 113) The items removed were keys, a cigarette lighter, a key fob, and $238.67 in cash. (T 1356-1357)

Mr. Jones began to complain that his head hurt (he was sitting on the backseat of Officer Garcia's car, with his feet outside). (T 114, 1717) Officer Garcia then asked him, "What happened?" Mr. Jones replied, "The old man shot me." (T 114, 1718) Until this point, he testified, Officer Garcia had not realized that Mr. Jones was injured. He then called Fire Rescue, which was already on the scene because when the call went out it was not known whether the people behind the bolted door were dead or alive. (T 1718)

Instructed to do so by his supervisor, Officer Garcia rode with Mr. Jones to Jackson Memorial Hospital. (T 116, 1719) Although Officer Garcia attempted to obtain a statement from Mr. Jones by asking him in the Fire Rescue unit, "What happened; what do you mean, 'the old man shot you'?" Mr. Jones refused to comment

further. (T 117, 1720)

In the trauma room, while doctors and nurses worked on the critically wounded Victor Jones, hospital unit secretary Shirley Ricks took the clothes that were cut off him by the treating personnel, preparatory to making an inventory. (T 118, 1507) She found two wallets (one in each of the back pockets), containing identification and credit cards that she exclaimed did not belong to the patient (Mr. Jones is young and black; the Nestors were in their 60's and white) (T 118, 1513)

Ms. Ricks wrote a receipt which Officer Garcia signed, and she gave him the pants, and the wallets and their contents, which he turned over to an ID technician, after showing them to Homicide Detective George Cadavid. (T 120)

Officer Garcia also obtained from hospital secretary Shirley Ricks two sets of keys, taken from Mr. Jones's front pants pockets. (T 121) The keys were identified as belonging to Mr. and Mrs. Nestor, as were the wallets. (T 122, 1726) Finally, Officer Garcia, at the direction of Detective Cadavid, put paper bags over Mr. Jones's hands, so that tests for gunshot residue could be made. (T 124) There was no testimony that Mr. Jones had fired any gun. Officer Garcia testified at the motion to suppress hearing, and at the trial.

Lead investigator Homicide Detective John Buhrmaster testified about a statement taken from Mr. Jones only at the motion to suppress hearing on November 12, 1992. According to Detective Buhrmaster, Mr. Jones volunteered, on December 21, 1990, "Mother

fucker [Nestor] owed [me] $2,300., and would not pay. So I took a knife and took it." "No one's keeping anything from me," Mr. Jones allegedly told Detective Buhrmaster. (T 211)

These statements were made, the detective testified, before he had a chance to ask any questions, but after Mr. Jones had told him that he wanted to talk, after the detective identified himself, and after Detective Buhrmaster had taken down some background information, including the fact that Mr. Jones had worked at Nestor Engineering for two weeks, four days a week, for five dollars an hour. (T 208-211)

After hearing the inculpatory statements the detective stopped Mr. Jones, and allegedly read him his rights off a printed form, which he produced at the hearing. (T 211, 213-215) The fact that the form was blank was because, the investigator explained, Mr. Jones could not see to sign it (Mr. Jones's eyes were swollen shut as a result of his recent brain surgery). (T 212)

Detective Buhrmaster testified that he was alone when Mr. Jones made this statement, but that his colleague Detective Tejeda and Nurse Lobo came into the room almost immediately, and Detective Tejeda thereafter (5-10 minutes) took notes. (T 216-217) At no time, according to him, did Mr. Jones ask for an attorney. (T 217) No inculpatory statements were made in Detective Tejeda's or Nurse Lobo's presence.

Despite Detective Buhrmaster's insistence that Mr. Jones gave him a voluntary, indeed a spontaneous, inculpatory statement, when the investigator had entered the room moments earlier, accompanied

by Detective Tejeda and attending physician Bradley Ruben, Mr. Jones had emphatically told Dr. Ruben and Detective Buhrmaster, "I don't want to talk to [cops, indicating Buhrmaster and Tejeda]." (T 203)

At that earlier point, according to Detective Buhrmaster's motion to suppress testimony, he formally placed Mr. Jones under arrest for the first degree murder of Jacob and Matilda Nestor, and related charges. (T 204) Detective Buhrmaster told Mr. Jones that he would leave his business card on the chart in case he wanted to talk; the nurses would then call the investigator. (T 201) Also, he said, he would be in the area outside Mr. Jones's room for a while, doing the paperwork to transfer Mr. Jones to Ward D (the jail ward at the hospital).

It was during this period, while Detective Buhrmaster was alone outside the room, that Mr. Jones called out ("Hey, hey, someone come here, where are you?"), Detective Buhrmaster entered, identified himself again, and the statement was made. (T 208, 234)

Although the motion to suppress Mr. Jones's statements to the police was denied (R 213-214), the State did not elicit any testimony from Detective Buhrmaster on that subject at trial.

Instead, the State introduced a statement purportedly made by Mr. Jones to nurse Edwina Crum. (T 1832) Nurse Crum had contact with Mr. Jones in her capacity as associate head nurse in the neurosurgical intensive care unit (NICU) during the 7 p.m. to 7 a.m. shifts on December 20, 21, and 22, 1990 (she then left on vacation over the holidays). (T 1823)

According to Ms. Crum, on the second of these shifts, Mr. Jones wanted to leave the hospital. He was sitting up in bed when he told her, "I killed those people and I have to leave here." (T 1832) In response to her question he said, "They owed me money and I had to kill them." (T 1832) She did not call the police or otherwise report these statements; only when she was contacted by Detective Buhrmaster upon her return from her vacation did Ms. Crum give him a statement, she said. (T 1833-1834)

The State called a DNA expert to testify that the blood on the knife found on the office floor at Nestor Engineering was that of Jack Nestor. (T 1689) This witness, Dr. Roger Kahn, was unable to say whether his DNA tests established that Mrs. Nestor was stabbed with the same knife. (T 1689, 1699, 1700)

Medical Examiner Joseph Davis testified that the blade of the knife was 5 7/8 inches long. (T 1813)

The medical examiner testified that all of the injuries to Mrs. Nestor (superficial injuries to right eye, lips; fatal stab wound) indicated that she did not struggle at all; indeed, that she was not "even aware" of the attack before it happened. (T 1795-1798) The stab wound was to the aorta, so she bled to death very rapidly. (T 1803)

Dr. Bradley Ruben was from 1975 to 1991 an associate professor of anesthesiology, neurological surgery, internal medicine and surgery at JMH, and an expert in critical care, and neurosurgical intensive care. At the time of treating Mr. Jones in December 1990, Dr. Ruben was the medical director of the Neurosurgical

Intensive Care Unit at Jackson and co-director of the trauma unit there. (T 1875) He testified about the nature of Mr. Jones's wound. (T 1881)

A penetrating-type wound to the forehead, it required a right frontal craniotomy: the bones of the head were opened, injured tissue from the path of the bullet was removed, and the bullet itself was excised. (T 1881) Part of the frontal lobe was removed. (T 1881) Dr. Ruben was not at the operation, so he did not know how much of the frontal lobe was removed. (T 1900) The wound was closed and a very tight head dressing was placed on the patient. (T 1881-1882) Post-surgical treatment included antibiotics and Dilantin, an anti-convulsant to help prevent seizures. (T 1889)

Dr. Ruben testified that, while the injury was not painful (there are no nerve endings in the brain), complications from burst blood vessels are quite possible given the brain's extremely vascular nature. (T 1891-1892) There were no complications following Mr. Jones's surgery. (T 1882, 1893)

Officer Johnston testified that he was present during the surgery on Mr. Jones, watched the removal of a projectile from his head, and gave the projectile, received from a person in the operating room, to Technician Steve Evans. (T 1524-1527)

The defense case introduced the testimony of nurses Ramona Bouzy and Betsy Augustine, who both said that they did not hear Mr. Jones admit anything to Ms. Crum, although both worked in NICU with her on the relevant shifts. (T 1939, 1948) Mr. Jones did not testify.

Penalty Phase

After Mr. Jones was found guilty of two counts of first degree murder and two counts of robbery on February 1, 1993 (R 319-322) the penalty phase was set for February 12, 1993. In the meantime, defense counsel asked the court to hold a competency hearing. Counsel argued that Mr. Jones was so hostile to counsel that he feared actual physical violence. (T 2203)

While the court refused to let counsel withdraw, he agreed to have Mr. Jones evaluated, and appointed psychiatrist Dr. Mutter, neuropsychologist Dr. Herrera, and psychiatrist Dr. Miller. In addition, neuropsychologist Dr. Eisenstein, who had evaluated Mr. Jones in March or April, 1991, was appointed to evaluate him again. (T 2341)

It was undisputed that Mr. Jones continued to suffer, more than two years after he was shot, from serious headaches for which he took painkillers, and he was still taking Dilantin (to prevent seizures) as well as Verapamil for hypertension, and Sinequan for depression. (T 2300, 2305, 2364) Moreover, lead trial counsel told the court that he wanted Mr. Jones to be shackled during the penalty proceedings because of threats of physical violence that he had made toward lead defense counsel and toward both prosecutors. (T 2205) That request was refused, the court commenting that Mr. Jones was rational, articulate, and understanding in his colloquies with the court. (T 2233-2337) In fact, the court said, two days before the competency hearing, that Mr. Jones "certainly seems competent to me." (T 2238) Again on the day of that hearing, before

it began, the court opined that Mr. Jones was "rational" when speaking to the court, and denied lead counsel's ore tenus motion to substitute other counsel. (T 2279, 2283)

Lead counsel correctly noted that the court had made up its mind on the competency issue, before the hearing was held. (T 2280) Co-counsel reported to the court that Mr. Jones had no confidence in lead counsel, and Mr. Jones himself advised the court that he could not communicate with co-counsel either, for which he blamed lead counsel. (T 2276-2277)

At the competency hearing the court heard from psychiatrists Miller and Mutter, defense trial consultant (identified as a Ph.D., but not further qualified) Zagray, neuropsychologist Dr. Eisenstein, and neuropsychologist Herrera. Drs. Zagray and Eisenstein testified for the defense; the others were called by the State. Before the competency hearing began, the court volunteered that Mr. Jones was "rational" in his dealings with the court. (T 2279) Earlier, when the court was appointing doctors to evaluate Mr. Jones, he had noted that Mr. Jones appeared to be rational and articulate, and appeared to understand the proceedigs. (T 2233-2237) He "certainly seems competent to me," the court asserted, before the hearing was held. (T 2238)

Dr. Miller, although he had an abbreviated interview with him, and could not find the Dade County Jail medical records, declared that Mr. Jones was competent. (T 2288, 2300) In Dr. Miller's opinion Mr. Jones was not mentally ill, he was in good contact with reality. (T 2305) Mr. Jones was taking Dilantin (anti-convulsant),

Verapamil (for high blood pressure), and Sinequan (anti-depressant) when Dr. Miller saw him. (T 2300) His courtroom behavior was appropriate: quiet. (T 2298)

Dr. Mutter, also a State witness, testified at the competency hearing that he evaluated Mr. Jones for aggravating or mitigating circumstances, and it was his view that Mr. Jones was competent. (T 2310) The gunshot wound, according to this psychiatrist, did not affect Mr. Jones's competency. (T 2313)

It was established on cross-examination that Dr. Mutter is neither a neurologist nor a neuropsychologist, and in fact had failed one part of the board certification test, that for clinical neurology. (T 2315)

Lawrence Zagray, a criminal trial consultant who had sat at the defense table throughout the trial, was called by the defense. (T 2317) He told the court that Mr. Jones was particularly concerned when he realized that the venire did not contain many blacks, and feared that Hispanics, of whom there were many in the jury venire and ultimately on the jury, would not understand Mr. Jones's plight. (T 2317-2318) Mr. Jones was fearful that he would not get a fair trial. (T 2317)

According to Dr. Zagray (a Ph.D.), Mr. Jones became increasingly agitated as the trial progressed, finding it harder to control himself, and lead counsel became increasingly concerned that Mr. Jones would act out in court, to his detriment. (T 2320, 2324)

Mr. Jones, for example, would scowl at the jurors when they

looked "surly," and he watched Michael Nestor (son of the victims), a Customs agent, in fear that Agent Nestor would kill him. (T 2322)

As the trial wore on through long days, Dr. Zagray noted that Mr. Jones began to make verbal threats toward the lead prosecutor, especially when he cross-examined the defense witnesses. He wanted the prosecutor dead, Dr. Zagray testified. (T 2326) Dr. Zagray would distract him by pointing out attractive women in the courtroom. (T 2321)

Mr. Jones, according to Dr. Zagray, would watch people entering the courtroom, and would watch the prosecutors, regardless of who was speaking. (T 2323)

After nurses Bouzy and Augustine testified for the defense, Dr. Zagray discussed with lead counsel whether Mr. Jones could testify. It was felt that Mr. Jones could testify on direct examination, but that he would be explosive on cross. (T 2328) He had, Dr. Zagray told the court, a vendetta against the lead prosecutor. (T 2328)

The lead prosecutor cross-examined Dr. Zagray, who readily agreed that, despite the threats that the witness had described, Mr. Jones had not caused any outbursts during the trial. (T 2330) Nevertheless, as Dr. Zagray repeated on re-direct, he believed that Mr. Jones might well jump the lead prosecutor during cross-examination, if he were to testify in his own defense. (T 2335)

After this testimony, the defendant himself told the court that his lead counsel was planning with Dr. Zagray to make him look like a "monster." (T 2336) Mr. Jones's request at this point for a

new attorney was denied. (T 2337-2338)

Dr. Eisenstein, a psychologist with a specialty in neuropsychology, was then called by the defense. (T 2339) His lengthy testimony included an account of his extensive examination of Mr. Jones some three or four months after he had sustained the head wound. (T 2341) It was his conclusion that Mr. Jones was incompetent in 1991, and that he continued to be incompetent. (T 2368)

Dr. Eisenstein tested Mr. Jones's IQ: the results were in the "borderline" range of verbal 76, performance 69, full scale 72, the 4th percentile of the general population. (T 2350) Dr. Eisenstein explained that 90-110 is average; 80-90 is low average; 70-80 is borderline; less than 70 is mildly mentally retarded. (T 2350) Mr. Jones was "flat" across all tests (visual, spatial, motor skills). (T 2351) He had a diminished ability to process information. (T 2351)

Notably, Dr. Eisenstein explained, if Mr. Jones could not see the problem, he could not do it. (T 2358) Throughout the testing (which occurred over a five-day period) Mr. Jones was irritable, hostile, isolated, depressed; without doubt he was in great distress. (T 2361, 2362)

Dr. Eisenstein testified that Mr. Jones had tried suicide (via overdose) twice as a child, and a third time when he was 18 (T 2364-2365) Mr. Jones was very concerned that he not be thought to be "crazy," and insisted that he was neither crazy, stupid, nor violent. (T 2365) Mr. Jones reported that his third suicide attempt

occurred after his mother died, an event which hurt him a great deal. (T 2365) His aunt, the doctor told the court, was described as having been very strict. (T 2365)

Although Dr. Herrera agreed with Drs. Mutter and Miller that Mr. Jones was competent, he agreed with Dr. Eisenstein that he might not be able to stand the stress of cross-examination. (T 2405) Dr. Herrera (a State witness) considered that Dr. Eisenstein was a competent neuropsychologist (Dr. Herrera's own specialty). (T 2413)

Dr. Herrera attributed Mr. Jones's affect lability (quick changes in mood) to a right frontal lobe disorder. (T 2414) Consistent with that disorder were Mr. Jones's low frustration tolerance, poor impulse control, and increased irritability. (T 2415) Like doctors Miller and Mutter, Dr. Herrera concentrated on the damage done by the gunshot wound inflicted in the course of the December 1990 events, and made to attempt to learn whether there was any pre-gunshot problem.

Neither Dr. Eisenstein, Dr. Mutter, Dr. Miller, nor Dr. Herrera discussed the possibility that Mr. Jones might suffer from Fetal Alcohol Syndrome/Fetal Alcohol Effect. All of the doctors assumed that Mr. Jones's state of mind, behavior, and performance on the range of tests (from mental status examination to IQ tests) was the result of his head wound; none of them looked for any congenital cause.

Defense witness Dr. Toomer testified before the judge and jury in the penalty phase. (T 2593-2675) A psychologist with 16 years

experience, he had access to many sources of information about Mr. Jones, and he interviewed him on three occasions (in May and June, 1992). (T 2596-2600) School records, records of prior interviews, information from Mr. Jones's foster mother and aunt, Laura Long, and from elementary school teacher Edwards, jail and prison files, and two prison psychological evaluations: these were all available to Dr. Toomer, and they all dated from before Mr. Jones was shot in the head by Mr. Nestor. (T 2596-2600, 2619, 2654, 2673)

The doctor told the judge and jury that Mr. Jones had been born to an alcoholic and drug-abusing mother (T 2600), and that he was strongly aware of being abandoned, despite being raised by his mother's aunt, Mrs. Long, and her husband, a minister. (T 2605, 2607)

Although, Dr. Toomer testified, Mr. Jones's early grades were average, the school's comments were illustrative: he had trouble with directions, with self-control, with authority. (T 2610) Around 11 and 12 years of age Mr. Jones was reported as skipping school, experimenting with marijuana, being involved in some juvenile burglaries. (T 2611) He was not suicidal at this point, but increased his drug use. (T 2611)

Mr. Jones began to run away from the Long household, in an effort to find his mother somewhere in New York, when he was as young as 14. (T 2611, 2619) When, after several tries (he would stow away on buses, get caught, and be returned to the Longs), he reached his mother, she was not, the doctor reported, glad to see him. (T 2613) Thus, there was no compensation for his deficit-

ridden years. (T 2613)

According to Dr. Toomer, the secondary thought processes (those that assess consequences, weigh alternatives, conduct reality testing) were wanting in Mr. Jones throughout his life. (T 2617) While acknowledging that other children in the same family of five boys and two girls might not get into trouble, as Mr. Jones did, Dr. Toomer told the jury that the appellant felt from the beginning an early, ongoing deprivation, especially abandonment by his mother. (T 2621) Notably, she kept some, if not all, of her other children with her, but not Mr. Jones. (T 2611) Mr. Jones's mother died of cirrhosis of the liver in 1983. (T 2649; personal communication with Mrs. Long in December, 1993; Ex. A)

It was Dr. Toomer's opinion that the statutory mitigating circumstance of "extreme mental or emotional disturbance" at the time of the offenses applied to Mr. Jones. (T 2625)

Dr. Toomer observed that Mr. Jones required structure and counseling; he was aware that even in the jail and in prison Mr. Jones had had disciplinary problems. (T 2626-2627) Control "in terms of interactions and stressors" was, the doctor agreed, necessary for Mr. Jones. (T 2629)

It was Dr. Toomer's diagnosis that Mr. Jones suffered from a lifelong borderline personality disorder. (T 2641) In addition, the doctor agreed on cross-examination, drugs continued to be a problem; he was offered drug treatment at least five times (once in Atlanta, four times in South Florida, once in the state prison system), and refused to participate each time. (T 2653-2654) Mr.

Jones lacked the capacity to choose, so he would have to be required to undergo drug treatment. (T 2655)

Dr. Toomer attributed Mr. Jones's borderline personality disorder to a perceived lack of love in the Long home plus abandonment by his mother. (T 2664-2666)

Mr. Jones was never treated in the state prison system for any mental defect or disorder. (T 2673)

Psychiatrist Dr. Mutter, who testified before the jury for the State in the penalty phase, opined that Mr. Jones was of at least average intelligence. (T 2686) Dr. Mutter had access to the Jackson Memorial Hospital (post-gunshot wound) records, Dr. Toomer's notes and his deposition, results of MMPI, Carlson and Bender tests, police reports, Mr. Jones's arrest record (1987-1990), his disciplinary and medical records from the state Department of Corrections, and his jail records. (T 2686)

Dr. Mutter stated with finality that the statutory mitigating circumstance of "extreme mental or emotional disturbance" did not exist. (T 2687-2688) The doctor said that a psychotic, or one who was paranoid about the victims, or one acutely intoxicated by drugs, or one suffering from post-trauma flashbacks could have that mitigating condition. (T 2688) Mr. Jones, the doctor testified, was none of those, so he did not fit that mitigator. (T 2688)

It was Dr. Mutter's view that Mr. Jones's feelings of abandonment and lack of love provided no excuse or mitigation. (T 2689) After the objection was sustained to the doctor's statement that Mr. Jones denied being on drugs when he was arrested, Dr.

Mutter told the prosecutor that he diagnosed Mr. Jones as a person with an "antisocial personality disorder." (T 2697)

According to the testimony of this forensic psychiatrist who has testified over a thousand times in court, for both sides (T 2678-2680), Mr. Jones's history and the prevalence of symptoms showed only that Mr. Jones was in conflict with the law, impulsive, perhaps a substance abuser, has little remorse or loyalty, and minimal if any conscience. (T 2697) On cross-examination Dr. Mutter readily agreed that the perception of parental love by the son is very important, especially if the non-verbal signals differ from the words. (T 2700) Abandonment feelings are traumatic; one of a child's greatest fears. (T 2700-2701) Nevertheless, Dr. Mutter told the court and jury that Mr. Jones decided, consciously, when he was in the sixth grade that he would no longer behave. (T 2702) The doctor noted that Mr. Jones would get caught, be punished, and do the same thing again. (T 2703)

There are people, Dr. Mutter testified, from intact nurturant families who become sociopaths. (T 2706) But he insisted that people raised with the same parental deficits as Mr. Jones do well because they choose to do so. (T 2707)

After closing arguments and jury instructions, the jury retired to deliberate in the penalty phase, returning with a recommendation of death as to Mrs. Nestor (10-2) and Mr. Nestor (12-0). (T 2774)

The sentencing hearing was held on February 22, 1993. Mr. Jones was sentenced on March 1, 1993, to two counts of death and

two periods of life in prison, all to run consecutively. (T 2870) The court did not find the statutory mitigating factor of "under the influence of extreme mental or emotional disturbance," and rejected the non-statutory mitigator of childhood abandonment (because he was raised in an "infinitely superior environment"), or drug use. (T 2867-2870) Each sentence was consecutive to the other; count 5 was nolle prossed by the State. (T 2871)

SUMMARY OF ARGUMENT

Guilt Phase

I. The State's evidence demonstrated only that any thefts from victims Mr. and Mrs. Nestor were committed after both of them had died. There was no testimony or other evidence to indicate that there had been any confrontation or demand prior to the stabbings of each victim. On the other hand, there was testimony (from the Medical Examiner) proving that Mrs. Nestor, stabbed in the back, was entirely unaware of the impending assault. Mr. Nestor had no defensive wounds on his hands, which was consistent with him being taken totally by surprise (according to the Medical Examiner). Because it was alleged that the property taken from each victim totalled less than $300.00, the defendant should be convicted and sentenced to two counts of petit theft.

Penalty Phase

I. Although the court recited in his sentencing order that he was not doubling the aggravating factors of commission of the capital felony during a robbery and commission of the capital felony for pecuniary gain, the jury was given both of those aggravating factors to consider, and was not told that it would be improper doubling to consider both. A new penalty phase, with a jury that has been properly instructed, is thus required.

II. There was ample evidence that Mr. Jones committed the capital felonies while he was under the influence of extreme mental or emotional disturbance, a statutory mitigating factor. However,

under case law including Cheshire v. State, infra, it was not necessary for the defense to prove "extreme" mental or emotional disturbance in order for the jury to be instructed to consider it. Refusal to follow this case law requires a new penalty proceeding, with a properly instructed jury.

III. During the competency hearing in front of the court, and during the penalty phase before the jury, a total of six doctors (psychiatrists, psychologists, neuropsychologists, and a Ph.D. defense trial consultant) testified about their evaluations of the defendant. None of them, despite the sheer volume of information available to them, and despite all of the clinical indicators in Mr. Jones's psychosocial history, school, jail and prison records, and IQ and other testing, even considered the extreme likelihood that Mr. Jones suffers from the congenital birth defect called fetal alcohol syndrome or fetal alcohol effect. Failure to examine this possibility deprived Mr. Jones of a fair trial, equal protection, due process, and constituted a violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, and requires a remand for a new penalty hearing, with these factors fully explored.

IV. In the course of the State's closing argument in the penalty phase, the prosecutor impermissibly sought to inflame the jury with improper references to such factors as "community spirit" and "when you read the papers. . . ." In addition, the prosecutor emphasized that the jury should consider both the aggravating circumstance of the capital felony having been committed during a robbery, and the capital felony having been committed for pecuniary

gain. Thus, the State improperly argued in favor of doubling aggravators. These arguments were harmful beyond a reasonable doubt, and deprived Mr. Jones of Fifth, Sixth, Eighth and Fourteenth Amendment rights; he is entitled to a new fair penalty hearing before a jury.

ARGUMENT

THE MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE TWO COUNTS OF ROBBERY SHOULD HAVE BEEN GRANTED, BECAUSE THE STATE PROVED ONLY THAT APPELLANT, AT MOST, COMMITTED THEFT AFTER BOTH VICTIMS HAD DIED; FAILURE TO GRANT THE MOTION FOR JUDGMENT OF ACQUITTAL DENIED APPELLANT FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

The State's theory was that Mr. Jones intended to rob Mr. and Mrs. Nestor. Robbery is a specific intent crime, and it may be that Mr. Jones did, indeed, have the intent to rob the couple. That does not end the inquiry, however. One of the elements of robbery is what the victim perceived, that as a result of the defendant's actions he or she was aware of "the use of force, violence, assault, or putting in fear." §812.13, Fla. Stat.

In the case of Royal v. State, 490 So. 2d 44 (Fla. 1986), overruled on other grounds in Taylor v. State, 608 So. 2d 804 (Fla. 1992), it was explained that

> the threat or force used to accomplish the taking of property or money is the element that distinguishes the offense of robbery from the offense of theft.

Citing Montsdoca v. State, 84 Fla. 82, 93 So. 157 (1922). Royal, like Montsdoca, was concerned with the timing of the violence or intimidation, although in those cases there was no question that the victims felt threatened and put in fear by the defendants'

actions.[1]

The situation in the case at bar is not concerned with the shoplifting-followed-by-assault that was under scrutiny in Royal. Rather, the evidence introduced by the State demonstrates uncontrovertibly that neither Mrs. Nestor nor Mr. Nestor was robbed. All asportation that was done occurred well after both were dead, as the State carefully demonstrated.

Mrs. Nestor was walking away from Mr. Jones, on her way to the bathroom, when, the State asserts, he suddenly and without provocation stabbed her once in the back. According to veteran medical examiner Joseph Davis, she was "not even aware" of the attack, and died almost at once. (T 1798, 1803) Mr. Jones may have intended to take her money, but it is evident that Mrs. Nestor did not know that.

As for Mr. Nestor, according to the State's witnesses, after Mrs. Nestor fell, Mr. Jones went back into the main office, was met by Mr. Nestor, and immediately stabbed him in the chest. (T 1805) The events that then transpired, the State averred, were that Mr. Nestor attempted to reach a telephone to call for help, and that he simultaneously shot five times at Mr. Jones, striking him once in the head. (T 1810)

Dr. Davis testified that there were no defensive wounds on Mr. Nestor's hands (cuts on the hands indicating that he had put up his hands to ward off a blow). (T 1810)

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[1]After Royal v. State, supra, the Legislature amended the robbery statute so that one could be convicted whether the violence or putting in fear occurred before, during, or after the theft.

> [PROSECUTOR]: Is it [the lack of defensive wounds] consistent with the fact that Mr. Nestor, despite facing his assailant, was surprised by the attack?
>
> DR. DAVIS [After defense objection to the question was overruled]: It's consistent with that.

(T 1810)

Dr. Davis's testimony was that Mr. Nestor had been turned over from his back onto his side for the purpose of removing his wallet from his back pocket, a wallet that was later recovered from Mr. Jones's back pocket by unit secretary Shirley Ricks at the trauma room. (T 1817, 1513) Dr. Davis, with the aid of a photograph (State's Exhibit 84), showed the jury the "peculiar pattern" that appears when the body is moved from the bloody floor. (T 1817) "This is characteristic," the doctor explained, "of a floor that's wet with blood when it's lifted. When you see a tile floor you always get this pattern." (T 1817) It is evident from that testimony that there was no robbery, but only a posthumous theft from the body of Mr. Nestor. As for Mrs. Nestor, the entire scenario, according to the State's evidence, is consistent with Mrs. Nestor's turning her back to a person whom she trusted; such a course cannot coexist with a theory that she was being "robbed" at that time.

The State made rigorous efforts to convince the appellate court that a defendant could be found guilty of robbery without the element of "force, violence, assault, or putting in fear" in R.P. v. State, 478 So. 2d 1106 (Fla. 3d DCA 1985), rev. denied, 491 So. 2d 281 (Fla. 1986), to no avail. This commonsense approach

continues to be the law, despite repeated efforts to argue that a robbery can occur where there is no force used, or where the victim is entirely unaware of it, due to age, inattention, thief's skill or, as in this case, because the victims were not alive.

The line of cases that support this position includes S.W. v. State, 513 So. 2d 1088 (Fla. 3d DCA 1987). In that case the appellate court cogently observed that a taking, without more, cannot constitute "force, violence, assault or putting in fear," the element that distinguishes robbery from theft.

> Plainly, something more in the way of physical force is required for robbery, else all thefts from the person would be robberies.

Id., at 1090. The court, in reducing S.W.'s adjudication to one for petit theft, agreed that the State "had failed to establish an essential element of robbery" when it showed only that S.W. gently unclasped a necklace, and used on a bracelet only that amount of force necessary to break the thread that held it together.

Awareness by the victim that the theft is taking place, and some degree of resistance thereto, are necessary to a robbery conviction. S.W. v. State, supra; Walker v. State, 546 So. 2d 1165 (Fla. 3d DCA 1989); Harris v. State, 589 So. 2d 1006 (Fla. 4th DCA 1991) (victim failed to discover missing money and jewelry until after sexual battery was completed). When, as in Walker, there is some apprehension on the part of the victim from another cause (the defendant was a strange black male, and the victim was in an unfamiliar neighborhood at night), it cannot transform what is otherwise a theft (because no force or violence was used) into a

robbery. Walker v. State, at 1167.

There are, of course, many cases where a robbery and a murder are part of the same set of occurrences. These cases are factually very different from that sub judice. In Taylor v. State, 557 So. 2d 138 (Fla. 1st DCA 1990), for example, the testimony showed that there was a confrontation between the defendant and victim Durham, in which Taylor tried to force Durham to give him money that Durham supposedly owed Taylor for selling fake cocaine.

> The evidence showed that the money Taylor forced from Durham at gun point was within Durham's custody, control, and temporary possession, and that Durham disputed Taylor's right to possess the money.

Taylor shot Durham in the course of this dispute. Id., at 142 (emphasis added).

Trial counsel, in his motion for judgment of acquittal at the close of the State's case, raised the point that what the State proved was theft, not robbery. (T 1928-1930) Counsel had to rely on his recollection of what the testimony was, but he correctly pointed out that Mr. Jones's characterization to Ms. Crum of why he had to leave the hospital ("They owed me money and I had to kill them" (T 1832)) does not end the discussion. What the transcript shows, what the State's evidence shows, is that there was no evidence that the Nestors were ever conscious of any robbery intent, or that any asportation was from either of them while they were alive.[2]

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[2]As to Mrs. Nestor, all of the evidence was that any of her property that was taken was not taken from her person or from her immediate custody or control.

Although the statement that Mr. Jones allegedly gave to Detective Buhrmaster might have cast more light on whether Mr. Jones intended to rob the Nestors, the fact is that that statement was not introduced during the trial. Furthermore, what Mr. Jones intended, and what he told Ms. Crum he did, insofar as it was a legal conclusion, were both irrelevant. Where the State's own evidence clearly demonstrated that there was no confrontation between Mrs. Nestor and Mr. Jones, there was no robbery of Mrs. Nestor.

Mr. Nestor, according to the State, was stabbed immediately after his wife was, thus negating any possible conjecture that there was any exchange of words relative to "Give me your money, or else." And because Mr. Nestor was wearing a firearm, and Mr. Jones was not, Mr. Jones would have been more likely to be "put in fear," armed as he was with only a 5 7/8" knife, than a forewarned Mr. Nestor.

Lacking any evidence that there was anything but a theft after the fact, the two counts of robbery cannot stand, and the convictions and sentences as to counts 3 and 4 must be reversed. Because the allegations in counts 3 and 4 were of thefts of less than $300.00, Mr. Jones should be adjudicated and sentenced only for two counts of petit theft. (R 14)

Because the aggravating circumstance of "commission of the capital felony during a robbery" cannot apply to a petit theft, Mr. Jones is entitled to a new sentencing hearing, without that aggravating factor. §921.141 (5) (d), Fla. Stat.

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH, THEREBY DENYING HIM DUE PROCESS OF LAW AND EQUAL PROTECTION, WHILE IMPOSING A CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

I. THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY THAT IF IT FOUND COMMISSION OF THE CAPITAL FELONY DURING A ROBBERY, AND THAT THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN, THE JURY WOULD HAVE TO CONSIDER THE TWO FACTORS AS ONE; FAILURE TO SO INSTRUCT DEPRIVED THE APPELLANT OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

In his sentencing order the trial court recited that two aggravating circumstances "are considered as one for purposes of the weighing process required by F.S. 921.141." (R 468-470, 469-471[3]) Those, as to each victim, were "the capital felony was committed while the defendant was engaged. . . in the commission of, or an attempt to commit or in flight after committing or attempting to commit any robbery. . . " and "the capital felony was committed for pecuniary gain." §921.141 (5) (d); §921.141 (5) f).

The court should have advised the jury that considering both of those aggravating factors amounted to an impermissible doubling. Appellant is mindful of Suarez v. State, 481 So. 2d 1201 (Fla. 1985), cert. denied, 476 U.S. 1178, 106 S. Ct. 2908, 90 L. Ed. 2d 994 (1986),

> which found that it was not reversible error to instruct the jury on both factors as long

[3] The first few pages of the sentencing order were assembled out of order; in order to read them in sequence, they must be read as R 467, 468, 470, 469, 471, 472. The rest, through R 477, are in the correct order.

> as the trial court did not give the factors double weight in its sentencing order.

Id., at 1209. But in Castro v. State, 597 So. 2d 259, 261 (Fla. 1992), this court, clarified Suarez, unmistakably finding that not telling the jury about doubling amounted to error.

> A limiting instruction properly advises the jury that should it find both aggravating factors present, it must consider the two factors as one, and thus the instruction should have been given.

Compare, Johnson v. State, 438 So. 2d 774, 779 (Fla. 1983), where the court acknowledged, without citation of authority, the validity of the argument that the robbery aggravator plus the pecuniary gain aggravator together improperly double the aggravating circumstances (Johnson's result was different because there were separate underlying felonies of arson and kidnapping).

Trial counsel in Castro specifically requested a jury instruction relative to doubling of aggravating factors:

> The state may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance. For example, the commission of a capital felony during the course of a robbery and done for pecuniary gain relates to the same aspect of the offense and may be considered as being only a single aggravating circumstance.

Id., at 261. Although appellant is aware that a limiting instruction was not specifically requested in this case, the jury was told specifically that they could consider each of the four aggravators read to them, and they were certainly not told that two

of them, as a matter of law going back to Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2929, 53 L. Ed. 2d 1065 (1977), must be considered as one aggravating circumstance. To fail to so advise the jury was to give them an 'extra' aggravator to consider; clearly, that amounts to a violation of Mr. Jones's constitutional rights, under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

The defense anticipates that the State will argue that this amounted to harmless error, beyond a reasonable doubt. Applying the standards of Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), and State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), it is clear that the error was not harmless.

Central to the sentencing in death penalty cases is the concept of individual sentencing. Espinosa v. Florida, _U.S,__, 112 S. Ct. 2926, 120 L. Ed. 2d 854, reh. denied, 113 S. Ct. 26 (1992). Error of constitutional magnitude may not require reversal, but only if the State can meet its burden to prove beyond a reasonable doubt that the error did not contribute to the verdict, or that there is no reasonable possibility that the error contributed to the conviction (in this case, to the jury's recommendation as to the sentence). DiGuilio, supra. In view of the fact that the State not only did not prevent the court from erroneously instructing the jury on the doubling of these aggravators, but itself argued vociferously that the jury should consider both of them in its weighing process (T 2736-274), the State clearly cannot argue that the error was harmless.

II. THE TRIAL COURT ERRONEOUSLY REJECTED THE APPELLANT'S MENTAL OR EMOTIONAL DISTURBANCE AT THE TIME OF THE OFFENSE AS A STATUTORY MITIGATING FACTOR, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

During the penalty charge conference the court read Rogers v. State, 511 So. 2d 526 (Fla. 1987), especially page 534, where "mitigating factors" is defined:

> [Those] factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed.

(T 2588-2589) The court agreed to use the Rogers language in the penalty instructions, but rejected the defense proposal to omit "extreme" from the statutory mitigating circumstance that the accused was "under the influence of an extreme mental or emotional disturbance." §921.141 (6) (b), Fla. Stat. (T 2712)

In doing so, the court discounted the defense evidence relative to that statutory mitigating factor, and thereby violated the express teachings of Cheshire v. State, 568 So. 2d 908 (Fla. 1990).

> Florida's capital sentencing statute does in fact require that emotional disturbance be "extreme." However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say. Lockett [v. Ohio, 438 U.S. 586, 98 S. Ct. 2958, 57 L. Ed. 2d 973 (1978)]; Rogers [supra].

Id., at 912 (emphasis in original). By leaving the word "extreme" in the jury instruction, however, the court deprived the jury of

the Cheshire analysis, and held the defense to a higher standard of proof than Cheshire, Lockett, and Rogers intended. This violated Mr. Jones's Fifth, Sixth, Eighth and Fourteenth Amendment rights, and requires a new sentencing proceeding.

III. A NEW SENTENCING PROCEEDING IS REQUIRED, BECAUSE THE SEVERAL DOCTORS WHO EVALUATED APPELLANT FAILED TO BRING THE WELL-DOCUMENTED CONGENITAL DEFECT OF FETAL ALCOHOL SYNDROME/FETAL ALCOHOL EFFECT TO THE COURT'S ATTENTION AS A LIKELY STATUTORY OR NON-STATUTORY MITIGATING FACTOR, AND WHERE THE COURT REFUSED TO CONSIDER THAT ABANDONMENT BY APPELLANT'S ALCOHOLIC MOTHER CONSTITUTED A MITIGATING FACTOR

At various points during the trial, especially during the competency hearing and the penalty phase, references were made to Mr. Jones's abandonment by his mother, due, at least in part, to her alcoholism and substance abuse. (T 2600) It was uncontroverted that his mother was an alcoholic, and that her death during his early adulthood was a direct result of that disease. (T 2600, note 9, infra)

Despite repeated references to Mr. Jones's mother's alcoholism, and his own use of alcohol and drugs, little consideration was given by the court to the likelihood that Mr. Jones suffered from a well-documented congenital defect known as Fetal Alcohol Syndrome (FAS), or the less severe Fetal Alcohol Effect (FAE), and that FAS/FAE may have been a major contributor to Mr. Jones's prior commission of violent felonies (the basis for a finding of one of the aggravating circumstances), and to commission of the instant offenses. In particular, FAS/FAE warrants examination as a statutory or non-statutory mitigating factor.

FAS/FAE has been fully accepted by the medical community as an identified congenital syndrome as the result of studies in France reported in 1968, which were confirmed by American researchers in

the early 1970s.[4] FAS is thought to be the third most common cause of mental retardation (after Down's syndrome and spina bifida), occurring in 1-3 per thousand live births.[5] In Seattle, Washington, the prevalence rate for the full syndrome is one in about 700 live births.[6] Some 5,000 children are born with FAS every year, and for every FAS child, some two to three children are born who suffer from FAE. While it has been established that, because ingestion of even a very small amount of alcohol at the early stages of pregnancy (even before a woman may be aware that she is pregnant) can lead to FAS/FAE, perhaps 30% to 40% of the children of chronic alcoholic mothers drinking during pregnancy will have FAS, because they will drink daily, and in substantial amounts.[7]

The syndrome is characterized by numerous major and minor

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[4]Lemoine, Harousseau, Borteryu, and Menuet, Les Enfants de Parents Alcooliques: Anomalies Observees, 25 Archives Francaise de Pediatrie 830 (1968); Jones, Smith, Ulleland, and Streissguth, Pattern of Malformation in Offspring of Chronic Alcoholic Mothers, 1 Lancet 1267 (1973); Jones and Smith, The Fetal Alcohol Syndrome, 12 (1) Teratology 1 (1975). A "teratogen" is any substance that causes developmental malfunctions or monstrosities (birth defects).

[5]Ann Streissguth and Robin LaDue, Fetal Alcohol, Teratogenic Causes of Developmental Disabilities, in Toxic Substances and Mental Retardation 2 (S. Schroeder, ed., 1987), American Association on Mental Deficiency, Washington, D.C.

[6]Hanson, Streissguth, and Smith, The Effects of Moderate Alcohol Consumption During Pregnancy on Fetal Growth and Morphogenesis, 92 J. Pediatr. 457-460 (1978).

[7]Streissguth and LaDue, supra, note 5. Nonalcoholic women who drink one to two ounces of absolute alcohol per day during pregnancy have an 11% chance of producing babies with FAE. An ounce of absolute alcohol equals two to four shots of whiskey, two to four glasses of wine, or two to four beers. Eileen N. Wagner, Ed.D., J.D., The Alcoholic Beverages Labeling Act of 1988: A Preemptive Shield Against Fetal Alcohol Syndrome Claims? 12 J. Legal Med. 167-200 (June 1991), at 198 notes 182 and 184.

physical, mental, and developmental defects. In 1975 Kenneth L. Jones, M.D. (Professor of Pediatrics, University of California, San Diego School of Medicine), and David W. Smith described the physical and mental characteristics of the full fetal alcohol syndrome as follows:

Growth and Performance
* Prenatal onset growth deficiency more pronounced in length and in weight
* Concomitant microcephaly (small head circumference) even when corrected for small body weight and length
* Postnatal growth deficiency in weight and length, usually below 3rd percentile
* Delay of intellectual development and/or mental deficiency (mean IQ from Seattle study = 64, Range 16-92)
* Fine motor dysfunction (poor coordination)

Head and Face
* Microcephaly
* Short palpebral fissures (narrow eye slits)
* Midfacial (maxillary) hypoplasis (underdevelopment of midfacial region)
* Flattened, elongated philtrum (middle of upper lip) associated with thin, narrow vermilion lip borders (highly specific to FAS)
* Minor ear anomalies including low set ears

Limbs
* Abnormal creases in the palm of the hand
* Minor joint anomalies
    -syndactyly (fingers or toes joined together)
    -clinodactyly (abnormal bending of fingers or toes)
    -camptodactyly (one or more fingers constantly flexed at one or more phalangeal joints)

Heart
* Ventricular and atrial sepal defects (valve defects)

Brain
* Absence of corpus callosum
* Hydrocephalus (excess fluid in cranium)
* Brain cell migratory abnormalities

Other
* Minor genital anomalies
* Hamangiomas in infancy (benign tumors made up of blood vessels)

Jones and Smith, supra, note 4, quoted in Wagner, supra, at 167 note 2.

Distinctive to this syndrome, even when the physical and mental problems are less obvious, are what may be described as judgmental deficits: poor social judgment and lack of impulse control in children; in adolescence, problems with self-direction, decision-making, pursuing goals and attaining independence become more apparent. Jan L. Holmgren, Legal Accountability and Fetal Alcohol Syndrome: When Fixing the Blame Doesn't Fix the Problem, 36 S.D. L. Rev., 92 (Spring 1991); citing Streissguth and LaDue, supra, note 4.

Fetal Alcohol Effect (FAE) refers to alcohol-induced impairment that has less severe, and less obvious, features.

> [FAE] is harder to diagnose, more subtle, but in many respects just as debilitating as the full syndrome--and it is far more widespread within the general population.

Dorris, infra, at 153. In contrast to FAS babies, who may show physical problems from birth (low birth weight, inability to suck, failure to thrive, and so on), those with relatively mild cases of FAE may appear to be "normal," until problems with multiplication tables, inability to gauge time, and repeated failure to conform to expected social patterns (unawareness of long-term consequences or of "morality") arise. Dorris, at 154; see also, Frank L. Imber, Fetal Alcohol Syndrome, 15 Nutrition Today (5) 1980, p. 7.

> [FAE] might be indicated by persistent head and body rocking, clumsiness, difficulty with peers, or life management problems.

Dorris, at 154.

> [FAE children may] show poor judgement and may repeat behaviours that have had bad outcomes in the past. . . . Some of these children have been observed using large vocabularies without really understanding the content of what they are saying. As a result, they may initially sound more capable that they are.

Ronald Forbes, Alcohol-related Birth Defects, 98 Public Health, London, 1984, p. 239, quoted in Dorris, at 154.

As Mr. Dorris added, "In other words, they don't learn from their mistakes, and they don't know what they're talking about." Id. This is so strikingly applicable to Mr. Jones's case, and may explain why Dr. Mutter and Dr. Toomer testified that Mr. Jones was of "at least average intelligence." (T 2286, 2637-2638)

Virtually every commentator and authority ultimately refers to and quotes from Michael Dorris's elegantly-told story of his adopted son Adam, a Lakota Sioux Indian from Pine Ridge, South Dakota. See, Holmgren, supra, at 92; Ann Streissguth et al., Fetal Alcohol Syndrome in Adolescents and Adults, 265 J.A.M.A. 1961 (1991); David A. Davis, A New Insanity -- Fetal Alcohol Syndrome, 66 Fla. Bar J. 53-57 (December 1992). What Michael Dorris wrote of Adam can be said equally of Mr. Jones:

> His [Adam's] greatest problem, the day-in, day-out liability with which it was hardest for the world to cope, was his lack of a particular kind of imagination. He could not, cannot, project himself into the future: 'If I do x, then y (good or bad) will follow.' . . . When he did venture forth. . . he made wrong choices, saw only part of the picture, was either too literal or too casual in his interpretation of detail. If left to monitor his own [seizure] medication he might take all three of a day's doses at once in order to 'get them over with' or might sequester them in a drawer 'so that I won't run out.' He

> might take a dollar bill out of my wallet, even when he had ten of his own, 'because I wanted to save mine.' The question 'why' has never had much meaning for Adam; the kind of cause-effect relationship it implies does not compute for him.

Michael Dorris, The Broken Cord, p. 201 (1989).[8]

Mr. Jones is, of course, not a Native American; he is a black Afro-American. One study, cited in Holmgren, supra, at 93 note 117, reported that black infants had a seven times greater risk for FAS than Caucasian infants receiving the same prenatal alcohol exposure; these results were consistent with another study indicating that blacks had a higher susceptibility to FAS than Hispanics. Id.

Studies have established that a FAS/FAE child will most likely be born to a mother over 25 years of age, and later children will be more at risk. Dorris, at 152. Mr. Jones was the fifth child of seven; his mother began having children at around 15 years of age, and there were several years between the first and second; after that, there were about two years between each of them. Thus, his mother was at least 25 when Mr. Jones was born.[9]

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[8] Michael Dorris's book is far more than a personal story. An anthropologist and Dartmouth College professor himself, he became deeply involved in research into FAS/FAE, in part motivated by a desire to find out why Adam was as burdened by intellectual, emotional, and developmental deficits as he was, and in part because he (a half Native American) became alarmed at the widespread occurrence of FAS/FAE among Native Americans. A fifteen-page bibliography of books, research studies, and professional articles accompanies the text of The Broken Cord (pp. 285-300).

[9] Mr. Jones's great-aunt and foster mother, Mrs. Laura Long, provided the obituary program for Mr. Jones's mother, Mrs. Constance Mills Adams, which appears in the Appendix as Exhibit A.

The court emphasized in its sentencing order that Mr. Jones, although abandoned by his mother as an infant or small child, had been raised in a caring environment by his aunt and her husband, a minister. (R 473) Clearly, the court was of the view that "nurture" could overcome whatever disadvantages that "nature" in the form of Mr. Jones's natural mother had inflicted. What is evident from scientifically valid longitudinal studies, however, is that although FAS/FAE is preventable, it is not curable. Streissguth et al., supra, 265 J.A.M.A. 1961. Thus, no matter how caring and "middle class" Mr. Jones's foster parents were, the damage had been done long before he was ever put into their home.

The court's somewhat facile conviction is entirely unsupported by the hard scientific data. Mr. Dorris's efforts over a twenty-year period, for example, are illustrative of the futility of nurturance as a "cure" for FAS/FAE:

> Study after scientific study weighted "nature" as more important than "nurture" in predicting not just a person's physical makeup but his or her behavior as well. . . . Communication with a national organization of single adoptive parents, in which I was once an officer, suggested that a disproportionate number of men and women who had adopted children from troubled backgrounds--alcohol or drug abuse, especially--and who had raised them in all variety of environments--religious, agnostic, urban, rural [etc.]--were experiencing a uniform set of problems as their children got older. . . . I had heard of several cases where adoptive parents

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It reflects that Mrs. Adams was born in January 1935; Mr. Jones was born in May, 1961 (R 11), when she was more than 26 years old. She died in 1983, at age 48. According to Mrs. Long, she died of cirrhosis of the liver. The obituary program also confirms that Mr. Jones was the fifth of Mrs. Adams's seven children.

> discovered after the fact that their sons or daughters were victims of FAS or FAE and then sued the placement agency for not warning them what to expect. Few if any sought to undo their act of parenthood, but all resented the years of self-incrimination, confusion, and misdirected effort they had expended in ignorance on a condition that was neither their fault nor within their power to solve.

Dorris, at 231.

Similarly, despite Reverend and Mrs. Long's efforts, Mr. Jones was doomed if he suffered from FAS/FAE. It is suggested to this court that Mr. Jones was not only afflicted with a number of the FAS/FAE factors, but that they provided powerful evidence of the statutory mitigating factor of "extreme mental or emotional disturbance." §921.141 (6) (b), Fla. Stat. The record contains ample support for this position, by way of the testimony elicited from the doctors at the competency hearing.

Moreover, FAS/FAE is by this time so well known and so well documented in the literature that all of the psychiatrists, psychologists, and neuropsychologists should have considered this, and should have presented information to the court relative to the syndrome as it affected Mr. Jones. See, Ernest L. Abel, Fetal Alcohol Syndrome, An Annotated Bibliography, 1986 (148 pages of lists of articles, from American, Canadian, German, Swedish, Spanish, and French sources); Dorris, at 143 (by 1979, more than 200 FAS-related articles had been published; in 1985, "annual rate of FAS-related professional documentation" had increased to almost 2,000 articles; emphasis added).

First, as has been indicated, Mr. Jones's mother was

concededly an alcoholic. Thus, it is highly probable that she was consuming alcohol on a daily basis at the time that he was conceived, even if (as is unlikely for a drinking alcoholic) she stopped once she became aware that she was pregnant.[10]

Dr. Toomer's testimony was particularly full of indicators that Mr. Jones suffers from his mother's preparturition drinking. Constantly seeking his absent mother. (T 2601) Repeated difficulties with directions, self-control, and authority as an elementary school student, though his grades were average. (T 2610) Inability to weigh consequences. (T 2604) Rebelliousness, running away, juvenile lawlessness beginning at eleven and twelve years. (T 2610, 2620) Difficulty with weighing alternatives, testing reality; lacked tools to make choices; he was not successful or stable. (T 2617, 2619) Suicidal ideation. (T 2621)

Dr. Toomer concluded that Mr. Jones lacked the ability to choose a different path; he opined that he would always need considerable structure and control. (T 2655, 2657) These observations and conclusions apply to the FAS/FAE person.

FAS/FAE adults who have been studied have, without exception,

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[10]"The most critical period is within the first 85 days. High alcohol concentration during this period, resulting from intermittent binges or daily heavy drinking, can produce [brain lesions.]" Alcohol Labeling and Fetal Alcohol Syndrome, 1978: Hearing before the Subcommittee on Alcoholism and Drug Abuse of the Committee on Human Resources, 95th Cong., 2nd Sess. 27 (1978), (citing Clarren, Alvord, Sumi, and Streissguth, Brain Malformations in Human Offspring Exposed to Alcohol in Utero, in Alcoholism: Clinical & Experimental Research (1977)), Wagner, supra, at 170 note 11.

evidenced maladaptive behavior. Streissguth et al., supra, 265 J.A.M.A., at 1965. This ranges from poor concentration, dependency, stubbornness or sullenness, social withdrawal, or other frequently noted categories, to a tendency to lie, cheat, or steal. Id. Because they seem to be incapable of learning from experience -- 'why' does not compute for them -- FAS/FAE adults are poor candidates for rehabilitative programs. Mr. Jones's pattern of lawless behavior exactly fits that model.

The testimony of the Debbie School robbery, for example, demonstrated superficial planning: donning a "security guard's" uniform, and carrying a "radio," so that he could move around unchallenged. The "plot" failed almost at once, as he did little to conceal his intent to steal, and when he was caught, instead of fleeing down a convenient stairway, he fought with more people, allowed ample time for security and police to be called, and fought with the security guard instead of running away. Moreover, there can have been no realistic expectation in the first place that there would be any amount of cash in a facility like the school. (T 2513-2528)

The Debbie School events took place just a short time after Mr. Jones had been released from prison, just as the crimes sub judice did. Clearly, Mr. Jones demonstrated the inability to weigh consequences that Dorris and the commentators cited therein, particularly pioneer researcher and leading theoretician Dr. A.P. Streissguth, have reported in FAS/FAE adults.

It is equally evident that the evidence to make a diagnosis of

FAS/FAE was in the doctors' hands, and in the record at bar.

FAS/FAE people, juveniles and adults, crowd the criminal justice system. Although there has been some work that indicates that perhaps as many as one-third of the Death Row population suffer from some form of FAS/FAE, the largest studies seem to have been conducted among Native Americans, perhaps because the sheer enormity of the numbers of FAS/FAE births in that population has forced attention to the problem.

In 1989 on the Pine Ridge Reservation in South Dakota, for example, which has a population of 12,000, there were 10,269 arrests, 95% of which are believed attributable to alcohol and drug abuse, despite the prohibition against the sale of alcohol on the reservation. Holmgren, supra, at 93. And although Native Americans comprise about 7% of South Dakota's population, they show up in disproportionately large numbers in correctional facilities. For example, they made up some 45% of the males and 50% of the females at one juvenile facility, 22% of all juveniles at another, and 29% of the girls at a third residential program. Native Americans comprise 24% of the men and 30% of the women in adult correctional facilities. Id., note 121. When it is noted that an estimated 30 to 40% of Native American children are born with a greater or lesser degree of FAS/FAE impairment, it may be hypothesized, given the behavioral symptoms that invariably appear with FAS/FAE, that there is some cause and effect relationship between the birth figures and the inmate figures.

Similar studies have not been conducted among other general

prison populations (South Dakota is, as well, far less populated than Florida, for example).

On this record, and with the extent of the evidence that points to FAS/FAE as a significant factor in Mr. Jones's life, FAS/FAE should have been squarely addressed by the numerous doctors who examined him, and who testified at his penalty phase and during the competency hearing. Failure to do so deprived the trial court and the jury of important mitigation information, and deprived Mr. Jones of a fair trial, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

> Certainly it is true that, considered alone, any one or even two of these deportments [difficulty with peers, life management problems, poor judgment, repeated behaviors that have had bad outcomes in the past] might be nothing more than a passing phase of a normal child's development. Certainly, it is true that when grouped in clusters of three or four, these symptoms might be accounted for by any number of causes other than or in addition to maternal drinking. But when they occur in tandem, when the physical and behavioral anomalies more or less coalesce into a repeated, cumulative set of fixed actions or signs, the alarm bell sounds. The very opposite of deduction by default, a diagnosis of fetal alcohol syndrome or fetal alcohol effect is a reluctant conclusion pressed out by the overpowering weight of connected evidence.

Dorris, at 154-155 (emphasis in original).

Rogers v. State, supra, at 534, in defining mitigating factors in general, did not limit those factors to, for example, sexual or physical abuse, or other gross physical deprivation or infliction of pain or humiliation on the defendant. The trial court refused to consider the effect that birth to an alcoholic mother, and

abandonment by her, could constitute mitigating factors. This was error. The court assumed, without any evidence to support his assumption, that "nurture" in the form of a middle class upbringing by caring foster parents could offset the genetic burden that Mr. Jones likely suffered, and the lifelong bitterness and pain that have accompanied his childhood abandonment.

Although, as has been seen, the several professionals who examined Mr. Jones had all of the (pre-gunshot wound) information that they needed -- family history, school and medical records, jail and prison evaluations -- to determine whether he suffered from the results of FAS/FAE at the time of the crimes, none of them reported on this factor to the court. This, despite its obvious relevance to the sentencing decision.

Even so, the information that was presented to the court was relevant mitigating evidence, and for the court to dismiss this factor, and to decide that a roof over his head and enough to eat should have made up for a possible congenital defect and certain parental abandonment, was

> [To] refuse to consider, as a matter of law, [that] relevant mitigating evidence. . . . The sentencer, and [the reviewing court], may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings v. Oklahoma, 455 U.S. 104, 114-115, 102 S. Ct. 869, 876-877, 71 L. Ed. 2d 1 (1982) (emphasis in original, footnote omitted), Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987), Lockett v. Ohio, supra (Eighth and Fourteenth Amendments require that

sentencer not be precluded from considering as mitigating factor any aspect of defendant's character or record, and any of circumstances of offense that defendant proffers as basis for sentence less than death).

A new sentencing hearing, taking the FAS/FAE factors into account, is required.

IV. THE PROSECUTOR'S CLOSING ARGUMENT IN THE PENALTY PHASE WAS HARMFUL BEYOND A REASONABLE DOUBT, VIOLATING APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

In his closing the prosecutor violated virtually every rule of argument, especially for a case where he was seeking the death penalty.

The assistant state attorney's characterization of the capital felonies as "assassinations" was both factually incorrect and gratuitously inflammatory. To describe Mrs. Nestor's death as an "assassination" amounted to instructing the jury that they could consider the additional aggravating factor of having been "committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." (T 2741) §921.141 (5) (i), Fla. Stat. Under Florida's sentencing scheme, the jury must, necessarily, not be permitted to weigh invalid aggravating circumstances, despite the trial court's independent duty to weigh aggravating and mitigating circumstances, and enter sentence accordingly. Espinosa v. Florida, supra. The trial court must give "great weight" to the jury's recommendation, so an erroneous argument as to an extra aggravator tips the scale impermissibly against a fair sentencing proceeding under the Eighth and Fourteenth Amendments. Id.

Moreover, the prosecutor is not allowed to appeal to the jury's passion or prejudice, as this prosecutor did. U.S. v. Rodriquez, 765 F. 2d 1546 (11th Cir. 1985). He argued that Supreme Court Justice Clarence Thomas (an Afro-American) was a self-made man, and that Mr. Jones was an insult to him, and to (adopted)

former president Gerald Ford. (T 2742) This argument departed wildly from the summary of facts and testimony that is supposed to constitute proper closing in the penalty phase. Closing argument is not to be used to inflame the minds and passions of the jurors, so that the verdict reflects an emotional response to the crime, or to the defendant, rather than a logical analysis of the evidence in light of applicable law. Bertolotti v. State, 476 So. 2d 130 (Fla. 1985), post-conviction relief denied, 565 So. 2d 1343 (Fla. 1990).

Objections to these characterizations were sustained (T 2742), but motions for mistrial were reserved by the court until the end of the argument. (T 2747-2755) Defense counsel then went over the five separate grounds for a mistrial, plus the sixth, that in the aggregate all of these errors required a mistrial. (T 2747) Counsel pointed out to the court that references to "community spirit" were also improper, as were references to "when you read in the papers [about homicides]." (T 2748) That was because the jury was put in the position of being responsible, in general terms, for enforcement of criminal laws in the community, a highly improper argument.

Defense counsel also pointed out to the court that the prosecutor's argument that Mr. Jones (during the Debbie School robbery, the 1989 case used to prove the prior violent felony aggravator) had threatened security guard Tyrrell, had nothing at all to do with a statutory aggravating factor. Even if a threatening statement had come into evidence, the State was not allowed to argue it in their closing; doing so was specifically

violative of the Eighth Amendment. (T 2749) The court agreed: "I'm sorry, I misunderstood," but the damage was irretrievably done. (T 2749)

Defense counsel correctly did not ask for a curative instruction, fearing, as he told the court, that it would focus attention on Mr. Jones, to his further prejudice. (T 2755)

The totality of the prosecutor's closing argument, particularly as it was permitted to roll on uncontrollably, violated Mr. Jones's Fifth, Sixth, Eighth and Fourteenth Amendment rights, and requires a new sentencing proceeding.

CONCLUSION

Appellant Victor Tony Jones was erroneously convicted of robbery, when the evidence clearly demonstrated that, at most, only petit theft was committed. Therefore, the aggravator of commission of the capital felony during the commission of a robbery could not apply.

A new sentencing proceeding is required because the court impermissibly instructed the jury that it could double aggravating factors; the court rejected out of hand the statutory mitigator of "extreme mental or emotional disturbance"; there was ample evidence that Mr. Jones is a victim of a congenital birth defect known as fetal alcohol syndrome or fetal alcohol effect which should have been considered as to competency and in the penalty phase; and the prosecutor's closing in the penalty phase was inflammatory and also argued in favor of impermissible doubling of aggravators.

Respectfully submitted,

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Fla.Bar No. 181500

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North Miami Beach, FL 33160
(305) 935-6680

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Fariba Komeily, Assistant Attorney General, Suite N921, 401 N.W. 2d Avenue, Miami, FL 33128, this 20th day of December, 1993.

VICTOR TONY JONES v. STATE OF FLORIDA

CASE NO. 81,482

APPENDIX

EXHIBIT A	Obituary program for Mr. Jones's mother, born January 18, 1935, died May 29, 1983

PSALM 23

The Lord is my shepherd; I shall not want.

He maketh me to lie down in green pastures;
He leadeth me beside the still waters.
He restoreth my soul: he leadeth me in the paths of
righteousness for His name's sake.

Yea, though I walk through the valley of the shadow
of death, I will fear no evil: for Thou art with me;
Thy rod and Thy staff they comfort me.

Thou preparest a table before me in the presence of
mine enemies: Thou anointest my head with oil:
my cup runneth over.

Surely goodness and mercy shall follow me all the days
of my life: and I will dwell in the house of the Lord
forever.

IN
APPRECIATION

The Family of the late
SISTER CONSTANCE ADAMS
wishes to express their sincere thanks
to all their many friends and neighbors who,
through their acts and words of kindness and sympathy,
have made this sad hour of bereavement easier for us to bear.
We are deeply grateful to each and every one of you,
and pray God's richest blessings will
continue to be
yours.

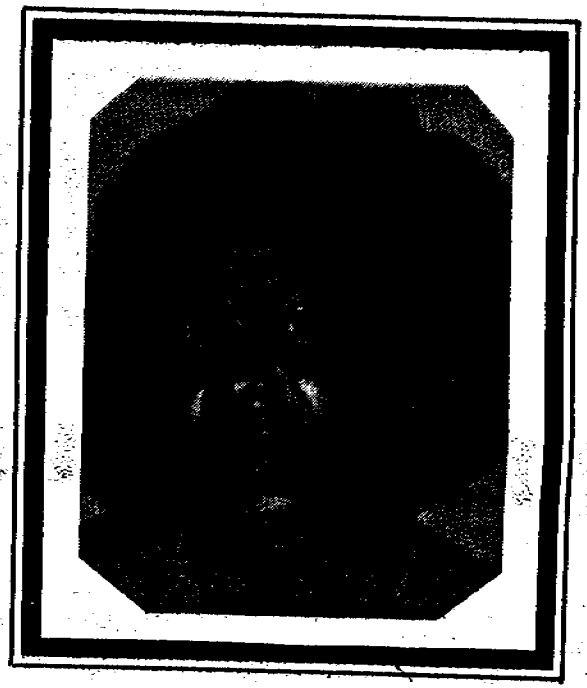
INTERMENT:

LINCOLN MEMORIAL PARK
Miami, Florida

EXHIBIT A

Funeral Services

FOR THE LATE



SISTER CONSTANCE ADAMS

TUESDAY, JUNE 7, 1983
2:00 P. M.

ST. PAUL A. M. E. CHURCH
1892 Northwest 51st Street
Miami, Florida

REVEREND SAMUEL L. GAY, Officiating

POITIER FUNERAL HOME, Directing

Obituary

MRS. CONSTANCE MILLS ADAMS was born to the late Clara Brooks on January 18, 1935 in South Miami, Florida. The foster daughter of Mrs. Beatrice Brown, she received her eawrly education in South Miami. Later Mrs. Beatrice Brown moved to Miami, Florida, taking Connie with her, where she furthered her education at Booker T. Washington High School.

Then she met and married the late John Henry Mills and to this union seven children were born; one son has preceded her in death.

She joined St. Paul A. M. E. Church under Reverend Kelly, and later rejoined under the leadership of Reverend Gay.

On May 29, 1983, the angels came and closed the Book of Life of Mrs. Constance Mills Adams.

She leaves to mourn: a loving foster mother, Mrs. Beatrice Brown; children: Mr. Lionel B. Jones, Mr. Michael Mills, Miss Pamela B. Mills, Miss Valerie Johnson, Mr. Victor Jones, Mr. Frank J. Mills and Mr. Ellis Hicks; one brother, Edwin Holton of Pasadena, California; foster brother, Paul J. Lumpkin of Miami; one daughter-in-law; eight grandchildren; four aunts; two uncles-in-law; God-child, Mrs. Lauretta Wright Jackson; a best friend, Willie Brown; and a host of nieces, nephews, cousins, and other sorrowing relatives and friends.

Order of Service

PROCESSIONAL ..... "Abide With Me"

HYMN ..... "What A Friend We Have In Jesus"

PRAYER

SELECTION: "Oh, They Tell Me Of A Home" ..... Choir

SCRIPTURE ..... 90th Psalm

SOLO ..... Sister Agnes Brown

TRIBUTES:
As A Member ..... Brother Michael Cousin
As A Friend

POEM ..... Sister Galvin

ACKNOWLEDGEMENTS ..... Poitier's Staff

RESOLUTIONS ..... Sunday School, St. John A. M. E. Church
South Miami, Florida

OBITUARY ..... (Read silently to soft music)

SELECTION ..... "Does Jesus Care"

EULOGY ..... Reverend S. L. Gay

VIEWING OF REMAINS

RECESSIONAL ..... "We'll Understand It Better Bye And Bye"