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

REPLY BRIEF OF APPELLANT

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ARGUMENT

Guilt Phase

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

In its brief the State has missed the point that Mr. Jones thoroughly discussed in his initial brief: the evidence in this case supports only a conviction for posthumous petit theft. Awareness of a taking on the part of the victim is, simply, a prerequisite to any robbery conviction.

While most of the cases that discuss this point have been litigated in the district courts of appeal, this issue was squarely brought to the court's attention at least once before, in R.P. v. State, 478 So. 2d 1106 (Fla. 3d DCA 1986), reh. and cert. denied, rev. denied, 491 So. 2d 281. R.P. was adjudicated delinquent when the trial court determined "that R.P. committed a robbery when he reached into the front of an elderly woman's dress and snatched her purse." Id. The appellate court forcefully rejected that characterization, and denied rehearing and certification. This court denied further review. Clearly, by so doing, this court found that the absence of force or violence or assault or putting in fear foreclosed a robbery conviction.

The State argues that the result should be different here, although it went to some pains to prove that Mrs. Nestor had no

prior awareness of the attack on her, and where any items identified as hers were taken, if at all, from a totally different room. But nothing about this case warrants a ruling that is different from R.P., supra.

Similarly, all of the evidence as to Mr. Nestor demonstrated that he was stabbed immediately after his wife; there was no evidence that supports the scenario required by R.P., S.W. v. State, 513 So. 2d 1088 (Fla. 3d DCA 1987), and the rest of the cases cited by Mr. Jones in his initial brief. As Medical Examiner Davis pointed out, the pattern of blood on the floor proved that Mr. Nestor's body was rolled over after he died, for the purpose of accessing his back pockets.[1] Then, too, given that Mr. Nestor was armed with a gun, while Mr. Jones at most had a fish knife, a robbery with Mr. Nestor as the victim challenges the imagination.

Awareness by the victim of the use of force, violence, assault or putting in fear, the district courts and this court have consistently held, is a prerequisite to a valid robbery conviction. The facts here are even less supportive of a robbery than those in R.P., supra, where at least there was awareness and contact, if no force, violence, assault or fear.

Bruno v. State, 574 So. 2d 76 (Fla. 1991), appears to support the State's position, inasmuch as there, as here, any removal of property from the victim's premises was done after the death. In

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[1] Contrary to the way the State put it, Dr. Davis did not testify about the supposed events that followed the stabbing of Mr. Nestor, set out in the State's brief on pages 13-14. Dr. Davis merely assented to a hypothetical crafted and posed by the prosecutor, a very different thing. (T 1818)

Bruno, though, there was direct evidence that the defendant intended well before the day of the crimes to rob the victim. There is no such evidence as to Mr. Jones.

Also, Bruno directly contradicts the line of cases which uniformly requires evidence of perception on the part of the victim, coupled with the use of force, violence, assault or putting in fear, in order to sustain the conviction for robbery. The difference cannot be simply that on the one hand there is a dead person, and on the other hand there is not. Evidence of a robbery must be adduced: in Bruno, supra, there were numerous statements made by the defendant long before the event indicating that he planned well ahead of time to rob the victim of his stereo equipment. In the instant case there was no evidence of such a plot. Even the after-the-fact statement by Mr. Jones (made while he was in intensive care, sedated and heavily bandaged) that the Nestors owed him money can more accurately be described as an attempt to offer some excuse, rather than to rationally explain the course of events.[2] As this court observed in Hill v. State, 549 So. 2d 179, 183 (Fla. 1989), "The money could have been taken as an afterthought."

The motion for judgment of acquittal on the robbery count should have been granted; failure to do so deprived Mr. Jones of

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[2] The statement allegedly made to Detective Buhrmaster that Mr. Nestor "owed me $2,300., and would not pay me. So I took a knife and took my money" was not introduced at trial. Moreover, Mr. Jones had been working at just over minimum wage for a couple of days, so any claim that such a sum was owed is ludicrous. Its incredibility may be at least part of the reason why the State did not call the detective at trial.

Fifth, Sixth, Eighth and Fourteenth Amendment rights. Moreover, without a valid robbery conviction to support them, both of the aggravating factors that were based on it (homicide committed for pecuniary gain, and homicide committed during a robbery) must fall. The jury was permitted to consider them both (in error, as is discussed in Issue I (Penalty Phase)); a new sentencing proceeding is now required.

Penalty Phase

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

The State's response to Mr. Jones's argument on this point fails to grapple with the fact that the jury was instructed by the trial judge that they could consider both "the capital felony was committed while the defendant was engaged. . . in the commission of. . . [a] robbery" and "the capital felony was committed for pecuniary gain." §921.141 (5) (d); §921.141 (5) (f). The State also fails to note that Castro v. State, 597 So. 2d 259, 261 (Fla. 1992), affirmatively instructs trial courts:

> When applicable, the jury may be instructed on 'doubled' aggravating circumstances since it may find one but not the other to exist. 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.

(emphasis added). Clearly, after Castro, it is the court's duty to instruct the jury accordingly; there is no longer any question (as there might have been after Suarez v. State, 481 So. 2d 1201 (Fla. 1985)), that the jury must be warned that they may find one factor or the other, but not both. As the court said in Provence v. State, 337 So. 2d 783, 786 (Fla. 1976),

> [H]ere, as in all robbery-murders, both subsections [(d) and (f)] refer to the same aspect of the defendant's crime. Consequently, one who commits a capital crime

> in the course of a robbery will always begin with two aggravating circumstances against him, while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged. Mindful that our decision in death penalty cases must result from more than a simple summing of aggravating and mitigating circumstances, State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), we believe that [the defendant's] pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case.

(emphasis in original).

It was not enough for the court to recite in its order that it had merged the pecuniary gain and robbery[3] factors. As integral participants in Florida's death penalty sentencing scheme, it was necessary for the jury members to be told that they could not base their recommendation on the dual aggravating factors of pecuniary gain and robbery. Failure to instruct the jury accordingly requires a new sentencing hearing before a properly instructed jury.

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[3] The invalidity of the robbery conviction (argued, supra, in the guilt phase) additionally taints the improper doubling of these aggravating factors.

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

Mr. Jones's argument on this issue remains unshaken by the State's predictable response that the trial court's instruction on non-statutory mitigating factors adequately covered this issue. The State's reliance on Robinson v. State, 574 So. 2d 108, 111 (Fla. 1991), adds no strength to its position: the defendant in Robinson complained that the court combined all of the possible non-statutory mitigating instructions into one. In the case sub judice the situation is that the court refused to instruct the jury that his well-documented mental or emotional disturbance at the time of the offense (before he was shot) amounted to a statutory mitigating factor.

A disturbing aspect of this case, emphasized by the State in its brief, is that every error in the jury instructions is explained away by the State on appeal by a claim that the trial judge made up for the error by allegedly considering each matter himself. Such a process erroneously cut the jury completely out of the sentencing process, and made of the panel nothing more than straw men, whose job was only to occupy the jury box. See, for example, the State's brief at page 47, footnote 12: "The trial court here explicitly considered Defendant's arguments [relative to extreme mental or emotional disturbance], but found the evidence insufficient to support the mitigating circumstance"; and "The lower court's reasons for rejecting this as a nonstatutory

mitigating factor were clearly sufficient" (emphasis added).

Florida's sentencing scheme was specifically designed to authorize a very active role for the jury, however, and it is clear error for the trial court to usurp the panel's importance. See, for example, Tedder v. State, 322 So. 2d 908 (Fla. 1975) (judge may not override jury unless facts suggesting death sentence so clear and convincing that virtually no reasonable person could differ); Smith v. State, 407 So. 2d 894 (Fla. 1981) (decision as to whether a particular mitigating factor is proven and weight to be given it rests with judge and jury).

In the context of this case, it was a violation of Mr. Jones's Fifth, Sixth, Eighth and Fourteenth Amendment rights for the court to fail to instruct the jury that they could consider, as a statutory mitigating factor, the mental or emotional disturbance of Mr. Jones at the time of the offense. This failure warrants 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

What appellate counsel manifestly did not do in the initial brief was to present "an attorney's interpretation of medical treatises." (State's brief, at page 49) Rather, the testimony of the State's expert witnesses and the defense expert witnesses makes clear that Mr. Jones's family history, his experience in school, the courts and the prison system, and every other report of his behavior before he was shot demonstrates that only those who were determined not to see fetal alcohol syndrome/fetal alcohol effect (FAS/FAE) could possibly overlook that as a possible, even likely, diagnosis of Mr. Jones.

The enormous body of information on FAS/FAE is neither obscure nor abstruse. What is difficult to understand is how the State's witnesses, and the defense experts, overlooked what was literally staring them in the face.

In its brief the State says that it is not the trial judge's job to root out mitigators; Mr. Jones did not assert that it was. It was the job of the court, and one that the court supposedly took on when he appointed various purported experts, to appoint people who know what is going on in the scientific community today, even if it has developed in the period since they were in medical school or graduate school. Because FAS/FAE has been firmly identified as

a syndrome only since 1968 is no reason to disregard it, especially in view of the fact that the trial court's rejection of nearly all of the defense arguments relative to mitigation was the result of his unshakable belief that a middle-class upbringing can make up for time spent in an alcohol-soaked womb. That hypothesis, as some hundreds of writers and researchers have now proven beyond a reasonable doubt, has turned out to be plain wrong.

The point that was made in Mr. Jones's initial brief, supported by numerous well-respected authorities in the field, is that there should have been expert testimony from both the State's "experts" and those of the defense at trial on FAS/FAE as it affected Mr. Jones. It was, contrary to the State's assertion in its brief, uncontradicted that Mr. Jones's mother was an abuser of alcohol. The court rejected the issue of Mr. Jones's abandonment by her because he subscribed to the conventional wisdom that, having been brought up by his law-abiding aunt, any damage done by his mother in infancy[4] had been effectively counteracted by Mrs. Long's nurturance.

What has been brought before this court on appeal is what the so-called experts had as close as the nearest library or medical journal or law review or bar association journal.[5] It has been

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[4] As has been emphasized, of course, the damage to Mr. Jones was done <u>before</u> infancy.

[5] Research for the initial brief on this issue was done at the Otto G. Richter Library and the law library at the University of Miami. On-line access to the University of Miami Medical School and the University of Florida libraries confirmed the ready availability of the same sources. Some research was also done at the Miami-Dade Public Library, Coral Gables branch.

widely discussed on radio and television. Why they did not testify about FAS/FAE in connection with Mr. Jones, in view of the vast amount of background information about Mr. Jones that they had, and talked about, must raise serious questions about how "expert" all of these witnesses really were.

Mr. Jones was demonstrably deprived of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair trial in view of the doctors' failure to examine him in light of the probability that he is a victim of FAS/FAE. A new sentencing proceeding on this ground is required.

Michael
Dorris's book, The Broken Cord, written for a lay audience, was found to be available on order from local bookstores.

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 its brief the State has glossed over the fact that the prosecutor ignored, repeatedly, the court's instructions to limit his closing argument to a discussion of the aggravating and mitigating factors, finding it necessary, in fact, to tell this experienced lawyer that trust or a breach thereof is not a statutory aggravator. (T 2727) Two sidebars during the State's argument, one sustained objection, and another that the court acknowledged that he should have sustained (T 2749) may be a record for an argument that took up only about 20 pages of transcript.

Most of the State's arguments have been adequately rebutted in the initial brief. Its comment that the reference to the threat against the security guard at the Debbie School was proper because "it was not addressing any aggravating factor" is clearly erroneous. (State's brief, at page 65) Argument in a penalty phase, as the court instructed the prosecutor (T 2727), must be confined to the aggravating and mitigating factors. Bertolotti v. State, 476 So. 2d 1343 (Fla. 1985). And it was this very point that the court, at sidebar at the close of the argument, recognized was error; he apologized for letting it in. (T 2749)

The State's inexplicable inclusion of Clarence Thomas (hardly everyone's role model, by the way) and Gerald Ford in its argument can not provide a meaningful comparison to Mr. Jones. As has been seen, supra, in Issue III, if in fact Mr. Jones suffers from FAS/FAE, the fact that he was raised in a particular type of

environment is irrelevant. Clearly the State's intent was to indulge in an unnecessary comparison of Mr. Jones with other individuals, to Mr. Jones's detriment. That sort of argument has no place in the literally life-and-death atmosphere of a penalty phase, and a re-sentencing hearing is required to ensure that Mr. Jones's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments are preserved.

CONCLUSION

Appellant Victor Tony Jones deserves a new and fair trial, free from efforts to convict him erroneously of robbery, and to impermissibly use those robbery convictions to impermissibly double the aggravating factors of commission of a capital felony during a robbery and commission of a capital felony for pecuniary gain.

The issue of whether Mr. Jones suffers from the congenital defect of fetal alcohol syndrome or fetal alcohol effect must be resolved, as it was not at the trial, affecting as it does both his competency and the effect on penalty.

Further, the prosecutor's inflammatory and prejudicial closing argument, especially as he erroneously argued for doubling aggravating factors, was sufficiently egregious to require a new sentencing hearing.

Respectfully submitted,

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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 Ave., Miami, FL 33128, this 10th day of June, 1994.