IN THE SUPREME COURT OF FLORIDA

MARVIN BURNETT JONES,

Appellant,

v. Case No. 84,014

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee generally accepts Appellant's Statement of the Case and Facts, subject to the following additions and/or clarifications:

As noted in the Initial Brief, Jones filed two pretrial motions pertaining to the cold, calculated and premeditated aggravating circumstance, § 921.141(5)(i) (R 68-91; 156-7). In the first motion, Appellant asserted that § 921.141(5)(i) was unconstitutional because it was vague, overbroad and arbitrary both on its face, and as applied. In the second motion, Appellant moved to preclude instruction on this aggravating circumstance because it was impermissibly vague and overbroad, had been impermissibly applied, and, in the given case, did not apply as a matter of law. In neither motion did Jones expressly attack the jury instruction on this aggravating circumstance on vagueness or other grounds, and, during the charge conference, defense counsel's only objection to the jury being instructed on this aggravating circumstance was his view that it did not apply under the facts or the law (T 1296-7, 1301-3).

As to the facts of the case per se, Appellee notes that a good deal of the version set forth in the Initial Brief derives from the

testimony of Jones which was, of course, rejected by the jury. Accordingly, the State would briefly set forth the following:

Appellant purchased a used 1984 Saab from Ezra Stow, the owner of San Pablo Motors, on July 31, 1992, for a total price of $6,184,83 (T 387-8); Jones paid $1780 down and agreed to make bi-weekly payments of $192.00 (T 388-9). Stow had purchased the car from another dealership, and showed Appellant paperwork indicating that the engine had been completely rebuilt (T 369). Jones immediately encountered a minor mechanical problem, which was fixed, at no charge to him, at the transmission shop next door (T 369). Sometime afterwards, Appellant reported that the car was overheating, and Stow advised Jones to take it to the transmission store, although Jones failed to do so (T 370). Two weeks later, Appellant brought the car back to San Pablo Motors with the engine "blown" (T 370). Stow advised Appellant that it would cost $1500 to fix the car, with $800 required in cash and an additional $700 in financing, and Jones agreed to this arrangement (T 370). During the time that the vehicle was in the shop, Jones regularly made his biweekly payments (T 370); the vehicle was in the shop, however, primarily due Jones' inability to come up with the $800 for the repairs (T 397).

In late February of 1993, Jones was one payment behind when he came to the dealership and gave Stow a check for the entire amount owing, $4300 (T 396). At the time, Appellant indicated that he had borrowed the money from his father, and nothing was said about any need to "hold" or postdate the check (T 372, 402, 407). When Stow attempted to deposit the check, however, the bank returned it for insufficient funds and charged him a fee (T 372-3). Ezra Stow directed his daughter Monique, the victim in this case, to call Appellant and to advise him of the situation; Appellant stated that he would "come in and take care of it." (T 374). On March 3, 1993, Ezra Stow told a friend of his, Norman Zilahy, that he had expected Appellant to come in around 1:00 that day to "make good" on the check; it was then later in the afternoon (T 362-3). Accordingly to Zilahy, Stow was "a little bit upset" and said that he knew that he could press charges for the bounced check but that he really did not wish to do so (T 363).

Zilahy stated that Appellant arrived at the dealership at around 6 p.m. and that he himself left shortly afterwards; the witness testified that, at this time, Monique Stow was positioning the last of "blocker" cars at the entrance to the car lot (T 358-9). Ezra Stow testified that he saw Appellant's car pull up on the grass of the median by Atlantic Avenue (T 361, 377); accordingly to

Stow, his daughter was inside the office bathroom putting the keys to the "blocker" cars under the carpet, at the time that Appellant arrived (T 405). Jones walked up to Stow's office, stuck his head in the door for a moment, and then said that he had to retrieve something which he had forgotten from his car (T 377). The witness watched Appellant as he slowly walked out to his car and removed a purple bag from underneath the seat (T 379). Ezra Stow saw Appellant re-enter the trailer and then heard two shots (T 380). The witness reached behind his desk for a gun which he kept in a holster mounted on the credenza (T 380, 395). As he was doing so, Appellant came into the office and shot him; Stow threw his arm up, and the bullet went through his arm and into his eye (T 381). Stow fell to the ground, and Jones shot him again, this time in the neck (T 382).

Stow kept reaching for his own gun, and secured it as Appellant walked out of the office (T 382). Stow managed to reach the porch, and fired at Appellant several times as he was about to climb into the Saab (T 383); a number of witnesses driving by saw Jones crouching behind the Saab at this time (T 471, 478-9). Ezra Stow testified that Appellant had "acted like he was going to come back and finish me off," although, apparently deterred by the gun fire, Jones drove away (T 383-4). At this point, Bengy Widener,

who worked in the transmission shop next door, came over to assist Stow, who was then leaning against the bannister" with . . . like the whole right side of head shot off." (T 433). Widener called 911 from the phone inside the office, and, as he was walking out, heard a moan; upon opening the door to the bathroom, he found Monique Stow lying on the floor, with a gunshot wound between the eyes (T 438-9).

At this point in time, Appellant was living with a friend from the Navy, Tracy Taylor. Taylor testified that Jones had left the Navy in February of 1992 and had been unemployed ever since (T 568); despite this fact, Appellant had owned two cars, including a BMW which he had wrecked (T 569). In February of 1993, Appellant had moved in with Taylor and his family, while Appellant's wife and children moved to Pensacola (T 572-4). Taylor had accompanied Jones to San Pablo Motors on a number of occasions when he made his payments (T 576-7). On March 3, 1993, Appellant had told Taylor that he had to "go up to San Pablo Motors to take care of a check," stating that his father had loaned him some money to pay off the car (T 581). When Taylor had returned from work that night, he had seen a number of police cars at San Pablo Motors, and he asked Appellant if he had "done anything stupid;" Jones just looked at him and said nothing (T 585-6).

Later that night, Taylor again talked to Appellant about this matter, and Jones told him that he had given Stow cash to pay off the car (T 590). When he asked for the title in return, Stow had allegedly threatened to have Jones put in jail for writing a bad check, and had demanded an additional two thousand dollars (T 590-1). The two then argued, and, as they did so, Stow began to "reach around" for something, and as Stow "came around," Appellant shot him twice (T 592). Jones then claimed to have been "in a sort of daze," and said that he had walked towards the bathroom; when something in the bathroom "startled" him, he shot Monique (T 592). Appellant stated that he then left the building, and stood in the parking lot intending to come back in and call 911, until the victim had come out and begun shooting at him (T 593). Jones maintained that he had thrown away the clothes which he had been wearing and that he had driven by the police station, waiting to turn himself in (T 593). At around midnight, Appellant asked Taylor if he would help him put the Saab in a nearby storage shed, and the two did so (T 595-7); the witness described Appellant as quiet and sullen that night (T 617).

When Taylor woke up the next morning at around 9 or 10, neither Jones nor his other vehicle (a Monte Carlo) was present, and some of his belongings were gone as well (T 598). The witness

was later contacted at work by the authorities, and, at their request, returned to his apartment with them (T 599). There, he identified Appellant's Monte Carlo which was then in the parking lot, as well as Appellant, who was then standing in close proximity to it (T 600). When the officers stopped the car and stepped out of it, Appellant took off running (T 633); after a pursuit of approximately 60 to 70 feet, Appellant surrendered (T 635). Jones called Taylor from the jail later that night and told him that he had thrown the murder weapon into the river, as he had been crossing the intercoastal bridge (T 601-2); according to Taylor, Appellant had owned a .25 caliber six shot handgun which he had kept in the purple Crown Royal bag (T 603). Taylor also testified that Jones had received ribbons in the Navy for marksmanship (T 602-3).

In regard to Appellant's finances, Chester Brigidini, fraud investigator with the Navy Federal Credit Union, testified concerning his examination of Jones' records (T 639-648). He stated that in late 1992 and early 1993, Appellant had had a savings account, as well as a checking account (T 640). In January of 1993, Jones had a balance of $5.00 in the savings account and an overdraft of $46.60 in the checking account, the latter amount the result of six (6) returned checks (T 642-3). The Navy closed

Jones' accounts on February 12, 1993, and Appellant was sent a notice to that effect on such date, after previously having been sent a "warning" notice on January 15, 1993 (T 643-5).

In regard to the victims, Dr. Martin testified that Ezra Stow had been brought to the emergency room with two gunshot wounds (T 652-3). The wound to his neck was life-threatening, as the trauma from the bullet had caused significant swelling, necessitating a tracheotomy (T 653). The bullet apparently also had partially sectioned the carotid artery, resulting in a partial stroke (T 654). Dr. Martin also examined Monique Stow and noted the presence of two bullet wounds to the head; Monique died approximately six hours after arriving at the hospital (T 652). The medical examiner, who later performed the autopsy, testified that the victim had been shot twice, once just behind the left ear and once at the bridge of the nose by the midline (T 750). This latter bullet entered the right cerebral hemisphere of the brain, whereas the former bullet broke the temporal bone and injured the left cerebellohemisphere (T 755). The shot which entered the victim's face had been discharged at very close range, from only 4 to 6 inches away, as there was gunpowder stippling on the victim's nose, forehead and cheeks, as well as upon the white of her right eye (T 752-3; 767); the other shot was fired from at least 15 inches away

(T 769). Both bullets were recovered from the victim's body and proved to .25 caliber (T 751, 756).

Search of the crime scene revealed, inter alia, five .25 caliber shell casings (T 540). One casing was found on a piece of newspaper on a desk at the main entrance, whereas another was found just inside the bathroom (T 542). Three other shell casings were found in the back office (T 542), and a bullet fragment was also recovered from such location (T 544); the victim's brother subsequently found a sixth shell casing on the desk in the back office (T 727, 741-2). A firearms expert later testified that all of the cartridge cases had been fired from the same weapon, as had the two bullets recovered from the body of Monique Stow (T 805-810). Although the murder weapon itself was never recovered, the witness stated that, based upon his analysis of the recovered bullets, it had most likely been a Sterling model 300 semi-automatic pistol (T 802-3); the trigger pull for such weapon is between 5 ½ and 12 pounds of pressure (T 820).

In addition to the above, search of the crime scene revealed the presence of blood inside the credenza where Ezra Stow had nailed the holster which held his gun (T 670). Search of the crime scene did not reveal any of the paperwork relating to the Saab, such as the title, which Stow testified had been on his desk at

this time (T 409-410, 421, 693), nor did it turn up the $4300 in cash which, as set forth below, Jones claimed he brought with him to the office that day (T 692; 907).

Marvin Jones testified in his own behalf at trial (T 862-988). During his testimony, Appellant conceded that he had been unemployed in 1992 and 1993, receiving compensation payments of $842 per month between February of 1992 and February of 1993 (T 874, 890, 969). Jones maintained that it was actually Ezra Stow's idea that he write the check on February 20, 1993, which he could not cover, and actually claimed that, at the time that he wrote the check, he had had with him in the car the $4300 in cash (T 896-7, 978). Appellant stated that he had borrowed $2000 from his father, and that he had "saved" the remainder (T 899-900). According to Jones, Stow assured him that he would hold the check until the first week of March (T 896, 973-4). Jones also acknowledged that, by virtue of making his prior payments, he was familiar with the layout of the trailer, as well as the fact that Monique Stow was often at the dealership at the close of the day (T 974-5).

Jones testified that he arrived at San Pablo Motors at around 6 p.m. on March 3, 1993 to make good on the check. Indeed, Appellant stated that once again he had more than $4300 in cash in his possession, and that he carried the money in a Crown Royal bag,

along with a calculator and his Sterling .25 caliber semi-automatic (T 904). According to the trial testimony, Jones did not make an additional trip back to his car to retrieve the bag, but rather went directly into the office where he met with Mr. Stow; Appellant stated that his arrival broke up a card game between Stow and Zilahy, the latter of whom properly left (T 906-7). The defendant stated that he paid Mr. Stow the entire amount in cash, adding an additional $20 for the service charge on the returned check, and that he then asked for the check back, as well as the title to the car (T 907).

At this point, Mr. Stow began "yelling and screaming," demanding an additional $2000 and threatening prosecution (T 908); the two were then sitting opposite each other in the back room (T 909). Stow began "reaching behind" his desk, and when Appellant saw a weapon in his hand, Jones grabbed his own gun and fired; the defendant stated that he had cocked the gun several days before (T 909). Appellant began to feel sick after he saw Mr. Stow fall and a pool of blood emerge from underneath him, and he then ran towards the bathroom with the gun still in his hand (T 910-11). According to Appellant, the door was partially open, and he hit it with his hand and the gun went off; Jones expressly testified that the door to the bathroom opened inward (T 911, 955-6). Appellant stated

that this "startled" him, and he screamed and fired again automatically; he stated that he did not know that anyone was in bathroom at the time (T 911, 959). Jones claimed that he had had about $350 left in the bag after paying Stow the money for the car (T 937); he also stated that this money remained in the bag, along with the gun, when he threw it into the river (T 914). Appellant also specifically testified that he had not, in fact, received any awards for marksmanship (T 961).

The State re-called Mr. Stow to the stand, and he testified that the door to the bathroom opened outward (T 993).

SUMMARY OF THE ARGUMENT

Appellant presents no point on appeal in regard to his conviction for the first-degree murder of Monique Stow, or his conviction for the attempted murder of her father, Ezra Stow. Although Jones raises four claims in regard to his death sentence, no basis for reversal exists. The sentencer properly found that this crime was committed for pecuniary gain and that it was committed in a cold, calculated and premeditated manner; Appellant's attack upon the jury instruction on this latter aggravating circumstance is procedurally barred.

In this case, the defendant bought a car which he could not afford and wrote a check which he could not cover. When this latter situation was brought to his attention, he promised to "take care of it." Jones chose to "take care of it" by setting up an appointment at the dealership, arriving with his semi-automatic pistol, and systematically shooting both Stow and his daughter, taking care to remove all of the paperwork linking him to the car, including the title, prior to his departure. Monique Stow was shot twice in the head, once at point-blank range, while she was unarmed and no threat to Jones; Ezra Stow was also shot twice in the head, but survived, although losing the sight in one eye and the full use of the right side of his body. This was truly an aggravated crime,

and Appellant's final contention, that the death sentence is disproportionate, is plainly without merit, as, inter alia, no significant mitigation was presented. The instant sentence of death should be affirmed in all respects.

ARGUMENT

POINT I

THE SENTENCER'S FINDING OF THE PECUNIARY GAIN AGGRAVATING CIRCUMSTANCE WAS NOT ERROR.

As his first challenge to his sentence of death, Jones attacks the sentencer's finding that the homicide was committed for pecuniary gain, pursuant to § 921.141(5)(f), Fla. Stat. (Fla. 1991); the judge's findings read as follows:

> When the defendant picked up his car from Stow in February of 1993, the only amount due at that time was $800 for engine repair. However, the defendant gave Stow a check for $4,200 to pay off the entire car debt and engine repair.
>
> At that time the defendant had not worked for a year, had been receiving unemployment compensation which had run out - and his bank balance from December, 1992, up to and including the date he wrote the check was only $5.00.
>
> The defendant gave the worthless check to get possession of the car - knowing the bank would dishonor the check. What thought process or plan defendant had at that time is not known, but later events revealed his plan to commit murders, take the car papers - and thus eliminate his financial responsibility and also have the car.
>
> After the murder of Monique and the attempted murder of Mr. Stow the car papers were missing from the office - yet they had been on Stow's

> desk in sight and reach of the defendant before he shot Stow.
>
> CONCLUSION
>
> The attempted murder of Mr. Stow was for financial gain. The murder of Monique was to remove an obstacle to her father's murder and eliminate a witness. This is an aggravating circumstance. (R 325-6).

On appeal, Jones contends that this finding was error under Chaky v. State, 651 So. 2d 1169 (Fla. 1995) and Simmons v. State, 419 So. 2d 316 (Fla. 1982), in that the evidence below was allegedly fully consistent with alternative hypotheses, such as that the murder was committed during a rage or to avoid detection for Jones' prior presentation of the worthless check (Initial Brief at 23).

Appellee initially questions the exculpatory nature of the latter hypothesis, but contends that the instant aggravating circumstance was properly found. This Court has held that the pecuniary gain aggravating circumstance applies "only where the murder is an integral step in obtaining some sought-after specific gain." See Chaky, supra; Peterka v. State, 640 So. 2d 59, 71 (Fla. 1994); Hardwick v. State, 521 So. 2d 1071, 1076 (Fla. 1988). This Court has also held that this factor is properly found where the State has proven "a pecuniary motivation for the murder," see Allen v. State, 662 So. 2d 323, 330 (Fla. 1995), or where the State has

proven "that the murder was motivated at least in part by a desire to obtain money, property or other financial gain." See Finney v. State, 660 So. 2d 674, 680 (Fla. 1995); Clark v. State, 609 So. 2d 513, 515 (Fla. 1992). Under the above precedent, it is clear that no error has been demonstrated.

The murder of Monique Stow (as well as, of course, the attempted murder of Ezra Stow) was an integral step in Jones' continued possession of the Saab. Although Appellant had physical possession of the car, he did not have the title to it, and, indeed, would have had to pay a substantial sum in order to pay off what he already owed on the car. Jones obviously chose an expeditious means to extract himself from this financial quagmire, and it was clearly his intent to murder both of the Stows, so that he could keep the car, steal the title and "extinguish" any remaining debt or obligation.

While this is certainly not a "garden variety" homicide, it was unquestionably one with a pecuniary motivation, and it is certainly not the first one in which the defendant's objective was to secure the use/possession/enjoyment of a motor vehicle. See e.g., Jones v. State, 612 So. 2d 1370 (Fla. 1992) (death penalty proper, and pecuniary gain factor properly found, where defendant murdered two persons to secure possession of truck); Medina v.

State, 466 So. 2d 1046 (Fla. 1985) (death penalty proportionate, and pecuniary gain factor proper, where defendant murdered victim in order to obtain her car). Given the clarity of Jones' objective, his reliance upon Simmons is misplaced, and the finding of this aggravating circumstance is comparable to that in Clark, Craig v. State, 510 So. 2d 857 (Fla. 1987) and Parker v. State, 458 So. 2d 750 (Fla. 1984). See Clark, 609 So. 2d at 515 (aggravating circumstance properly found where defendant murdered victim to secure his job on fishing boat); Craig 510 So. 2d at 868 (circumstance applicable where defendant murdered victims to protect cattle-rustling scheme and to eliminate individual who could endanger scheme); Parker, 458 So. 2d at 754 (factor properly found where defendant committed murders in order to establish a renumerative drug-dealing network and to establish reputation as collector of debts).

Appellant's suggestion that this crime was committed "during a rage" is completely without support in the record (indeed, Jones' own testimony does not substantiate it), and, to the extent that there was any conflict in evidence, the State's evidence, or theory of the case, was "more consistent with the facts of the case" than that of Jones. Wuornos v. State, 644 So. 2d 1012, 1019 (Fla. 1994) (pecuniary gain factor properly found where state's theory that

taking of property was primary motivating factor for murders more consistent with facts of case than defendant's theory that such had been an afterthought). This aggravating circumstance was properly found, and the instant sentence of death should be affirmed in all respects.

POINT II

NO CLAIM OF ERROR, REGARDING THE JURY INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATOR, HAS BEEN PRESERVED FOR REVIEW.

As his next claim, Jones contends that the instruction given to the jury on the cold, calculated and premeditated aggravating circumstance was unconstitutionally vague under this Court's decision in Jackson v. State, 648 So. 2d 85 (Fla. 1994); Appellant notes, however, that the penalty proceeding before the jury in this case preceded the Jackson decision by several months (Initial Brief at 24). Jones argues that this claim is preserved for review due to the filing of two pretrial motions, and maintains that, because there was allegedly insufficient evidence to support this aggravating factor, any error was harmful and requires a new sentencing proceeding.

The State disagrees with all of the above, and would note that the sufficiency of the evidence to support this aggravating circumstance will be addressed in Point III, infra. For the purposes of this claim on appeal, it is the State's position that no claim of error has been preserved for review, in that, contrary to this Court's precedents, no contemporaneous objection was made

to the jury instruction, on the grounds of constitutional vagueness, nor was an alternative instruction requested or submitted. This Court has consistently held that such acts are prerequisites for appellate review of claims of this nature, and the instant claim is procedurally barred. See e.g., Wuornos v. State, 21 Fla. L. Weekly S202 (Fla. May 9, 1996); Larzelere v. State, 21 Fla. L. Weekly S147 (Fla. March 28, 1996); Gamble v. State, 659 So. 2d 242 (Fla. 1995); Windom v. State, 656 So. 2d 432 (Fla. 1995). The record in this case indicates that defense counsel's only objection at trial was to the fact that the jury was being instructed on this factor, given his view that the facts did not support it and/or that it did not apply as a matter of law (T 1296-7; 1301-3). Under the precedent set forth above, this is plainly insufficient for preservation.

Appellant's contention that his pretrial motions preserved this issue is likewise unavailing, in that neither motion specifically attacked, or even discussed, the jury instruction, and no attempt was made to "renew" such at the penalty phase (R 68-91; 156-7). See Beltran-Lopez v. State, 626 So. 2d 163 (Fla. 1993) (pretrial motion in limine seeking to preclude consideration by judge and jury of aggravating circumstance allegedly "unconstitutionally vague" insufficient to preserve attack upon

jury instruction thereon); Espinosa v. State, 626 So. 2d 165 (Fla. 1993) (same). Accordingly, no claim of error has been preserved for review, and the instant sentence of death should be affirmed in all respects.

POINT III

THE SENTENCER'S FINDING THAT THE INSTANT HOMICIDE WAS COLD, CALCULATED AND PREMEDITATED WAS NOT ERROR.

Jones next contends that it was error for the sentencer to have found this aggravating circumstance, under Jackson, in that, allegedly, none of the four "elements" set forth in that opinion is present; Appellant maintains that the evidence "shows this to be a killing which occurred during a dispute which aroused Jones' passion and overcame his usual good judgment." (Initial Brief at 34). The lengthy finding as to this aggravating circumstance reads as follows:

> FACT:
>
> Evidence at trial showed that the defendant had been in Stow's office on many occasions in late afternoons to make car payments and he knew Monique worked in the office with her father.
>
> FACT:
>
> After Mr. Stow called about the bounced check, the defendant agreed to go by and pay it off. At 6 p.m., on March 3, 1993, the defendant parked in front of the lot - but had no money to pay the check but did have a .25 caliber automatic pistol in a Crown Royal bag. He went in the office and saw that only Mr. Stow

and Monique were there and excused himself saying he had to get something from his car and would be right back.

At the car he got the Crown Royal bag containing the pistol and walked back to the office. Once inside he immediately sought out Monique who was washing her hands in the bathroom and he pulled open the door, reached in and shot her between the eyes from a distance of 9 inches, and after she fell he leaned over and shot her behind the left ear to be sure she was dead. (See Exhibits 6, 45 and 46 attached.) Then he rushed into Mr. Stow's office and shot him twice.

The defendant coldly, calculatedly and premeditatedly decided to sacrifice 22-year-old Monique's life so he would have no witness to her father's murder. She was executed first to get rid of an obstacle; she was not killed as an afterthought or while defendant was escaping from the attempted murder of Mr. Stow.

HEIGHTENED PREMEDITATION

In Rogers v. State, 511 So. 2d 526 (1987) the Florida Supreme Court enunciated the requirements of "heightened premeditation" as applied to crimes committed in a cold,calculated and premeditated manner. In Jackson v. State, (April 1994), the Florida Supreme Court said that the words cold, calculated and premeditated "encompass something more than premeditated first degree murder."

. . . . . .
. . . . . .
. . . . . .

FACT:

The defendant went to Stow's lot to pay off the worthless check with no money but with a

> .25 caliber pistol. This was not a spur of the moment act or a short period of premeditation but was planned by defendant in advance of March 3. This was "heightened premeditation" and encompasses something more than set forth in the premeditation instruction supra.
>
> When defendant saw that Monique and her father were alone in the office, he went for the gun in his car knowing then - at the latest - that he was going to sacrifice Monique's life to eliminate her as a witness.
>
> Whether her murder was an assassination - since she gave no direct provocation or cause of resentment to the person who murdered her, or whether it was an execution (she was shot between the eyes and behind her ear) - there is no doubt that the murder was cold and calculated and with heightened premeditation. (R 327-330).

The above order indicates that Judge Olliff was aware of this Court's decision in Jackson, which had been rendered between the time of the penalty proceeding in February of 1994 and the sentencing order, which was signed on the last day of May. It is the State's position that the finding of this aggravating circumstance, under § 921.141(5)(i) Fla. Stat., (1991), was in complete conformity with Jackson, as well as other precedent.

Turning to the first element of Jackson, this crime was, beyond doubt, "cold," in the sense of being the product of cool and calm reflection; it assuredly was not an act "prompted by emotional

frenzy, panic or a fit of rage." At the time that Jones entered the trailer, he had already determined to kill its occupants, and after an initial "sweep" of the offices (no doubt to ascertain the number of occupants), he returned to his vehicle to retrieve his gun; in shooting both of the victims, it was clearly Jones' intent to kill them, and it is simply fortuitous that Mr. Stow survived. Appellant's trial testimony, to the effect that his shooting of Monique Stow was somehow an "accident" or unplanned, is contradicted by all of the other evidence in the case, including that of the surviving victim. Jones' assertion that he knocked the door of the bathroom open and that the gun discharged accidentally (twice) is not only implausible on its face, but refuted by the evidence, inter alia, to the effect that the door opened outward, that the gun required 5 ½ to 12 pounds of pressure in order for the trigger to be pulled, and that the victim was shot at point blank range, as well as behind the left ear. Neither the judge nor the jury was required to accept Jones' account of the murder under these circumstances, see Walls v. State, 641 So. 2d 381, 387-8 (Fla. 1994), Wuornos v. State, 644 So. 2d 1000, 1008 (Fla. 1994), and, as in Walls, this type of execution-style slaying was truly inconsistent with any assertion of "loss of control" or "passion."

This homicide was likewise the product of "a careful plan or prearranged design to commit murder before the fatal incident." As noted above, Jones had already formed a prearranged design to murder the occupants of the San Pablo office at the time he arrived. He went to the office right before it closed for the day (T 389-390), and, as Judge Olliff noted in his order, Jones had previously been to the office to make his payments, and was aware of its physical layout, as well as the possibility that Monique Stow would be there (R 327). Although Jones brought the murder weapon with him to the scene, he did not immediately bring it into the offices. Rather, he entered first to look around, and then returned to his car and retrieved the gun. Appellant re-entered the trailer and executed Monique Stow with two shots to the head, before proceeding to the back office and emptying the gun into her father. Because Jones had set up an appointment with Stow for that day, the paperwork pertaining to the Saab was on his desk, and Appellant took it, such paperwork including the "title"; Appellant stated during his testimony that he had "cocked" the gun several days before (T 909). The above facts demonstrate that there was a pre-arranged design, and that the intended crime was murder. This case is clearly distinguishable from one in which the defendant planned a felony, and later found it necessary to murder someone in

order to effectuate such. Cf. Valdes v. State, 626 So. 2d 1316 (Fla. 1993); Hardwick v. State, 461 So. 2d 79 (Fla. 1984). Here, given Appellant's prior possession of the vehicle, the only crime which he intended to commit was murder, and this aggravating circumstance is proper under Jackson, Walls and Wuornos.

Further, the sentencer was absolutely correct in finding another element of this aggravating circumstance, i.e., heightened premeditation (R 328-330). In Walls and Wuornos, this Court observed that this factor is present when the prevailing theory of the case establishes "deliberate ruthlessness." Walls, 641 So. 2d at 388; Wuornos, 644 So. 2d at 1008. Such factor was established sub judice. This crime essentially began on February 20, 1993 when Jones wrote a check which he knew he could not cover; Appellant's own testimony establishes this knowledge (T 896, 978). When the victim in this case, Monique Stow, called Appellant to advise him that the check had bounced, Appellant stated that he would "take care of it" (T 374), and Appellant was expected at the dealership on March 3, 1993; Mr. Stow apparently expected Appellant at around 1 p.m., although, of course, Appellant did not arrive until closing time (T 363). By the time that he arrived at the dealership, Jones had had more than ample time to contemplate the consequences of his actions, and when he carried out his attacks upon the Stows, he did

so with "deliberate ruthlessness." Monique was in the bathroom, unarmed, when Appellant shot her twice in the head, one shot fired from such close proximity that gun powder residue was present in the white of her right eye; Appellant then attempted to murder her father, by likewise shooting him twice in the head, and after this crime, disposed of the murder weapon and hid the automobile involved. This case is distinguishable from either Crump v. State, 622 So. 2d 963 (Fla. 1993) or Vining v. State, 637 So. 2d 921 (Fla. 1994), relied upon by Appellant, in that through the testimony of the surviving victim, it can be known, with certainty, what did and what did not occur at the time of the murder.

Finally, there is no pretense of moral or legal justification. This Court has defined this term as encompassing "any claim based at least partly on uncontradicted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide." Walls, supra; Wuornos, supra. Here, the most that can be said is that, if Ezra Stow had died, Appellant might have been able to argue an "incomplete" justification of self-defense; the presence of blood "up inside the credenza . . . where the holster was nailed in" (T 670), however, would seem to suggest that the victim had already been shot before he reached for his weapon, in contravention of

Appellant's account. As to the Monique Stow, not even a pretense of pretense can be said to exist. As noted, she was unarmed when she was shot, and Appellant's claim of "accident" is neither uncontroverted nor believable. Accordingly, all four of the "elements" of this aggravating circumstance, identified in Jackson, are present, and the finding of the cold, calculated and premeditated aggravating circumstance was not error.[1]

In addition to the above Jackson elements, this Court has also held that this aggravating circumstance can be indicated by such factors as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. See e.g., Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988); Thompson v. State, 648 So. 2d 692 (Fla. 1994). All of these factors are present sub judice, and this case is additionally comparable to Sweet v. State, 624 So. 2d 1138 (Fla. 1993). In such case, the intended victim had initially been the victim of a robbery and beating, and was assisting the police in identifying

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[1] Given that the four elements of this aggravating circumstance would exist "under any definition of the terms," as noted above, the jury instruction error, identified in Claim II, would be harmless beyond a reasonable doubt, should this Court find any issue cognizable. See, Archer v. State, 21 Fla. L. Weekly S119 (Fla. March 14, 1996); Fennie v. State, 648 So. 2d 95, 99 (Fla. 1994).

and apprehending the culprits. Sweet, who was involved in that prior crime, came to the victim's apartment, forced his way in and shot all four persons inside, killing a neighbor of the intended victim. This Court held that the CCP aggravator had been properly found, in that the defendant's motive had been to remove a potential witness in a pending investigation, and the fact that another individual had died was not determinative, in that it was the manner of killing, rather than the target, which was the focus. This Court rejected Sweet's contention that he had merely intended to scare or harass the victim, and further observed that the key to this factor was the level of preparation, "not the success or failure of the plan." Id. at 1142. (". . . planning is not the equivalent of shooting skill.").

While there are some obvious differences between this case and Sweet, there are more commonalities. Here, Jones was motivated by a desire to retain actual possession of the Saab, to obtain title to it, to extinguish the necessity to pay the amount owing and/or to avoid prosecution for the worthless check. He was familiar with the personnel and layout of the dealership office, and, once advised that the worthlessness of the check had been discovered, resolved to "take care" the situation - by eliminating the Stows. Accordingly, Appellant went to the dealership at closing time, went

into the offices to ascertain the number of occupants, returned to his car and retrieved his gun, and, systematically and ruthlessly, shot both victims; the fact that this was not a double homicide would seem to be attributable to Mr. Stow's reflexive attempt at self-preservation. Before leaving the scene of the crime, Jones took the paperwork linking him to the car and/or to the dealership, and later hid the car itself. This crime evidences premeditation "over and above" that required for conviction of first degree murder, and this aggravating circumstance was properly found. The instant sentence of death should be affirmed in all respects.

POINT IV

THE INSTANT DEATH SENTENCE IS PROPORTIONATE.

As his final claim, Jones maintains that the instant sentence of death is disproportionate, citing such cases as Caruthers v. State, 465 So. 2d 496 (Fla. 1995), Rembert v. State, 445 So. 2d 337 (Fla. 1984), Clark v. State, supra, and Richardson v. State, 437 So. 2d 1091 (Fla. 1983). Appellant claims that the mitigating circumstances in this case are "overwhelming", and contends that death is disproportionate because the instant murder was so clearly "out of character" for Jones (Initial Brief at 35). Appellee would contend that the above cases are clearly distinguishable, and that the instant sentence of death is proportionate, proper and appropriate in every respect.

In sentencing Jones to death, Judge Olliff found three (3) aggravating circumstances - the two previously discussed, as well as a finding of prior conviction, under § 921.141(5)(b) Fla. Stat. (1991), due to the attempted murder of Ezra Stow; should either of the contested aggravators be stricken, any error would be harmless beyond a reasonable doubt under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). In mitigation, the judge found that Jones had no significant history of prior criminal activity, under §

921.141(6)(a) Fla. Stat., (1991), and also found, as non-statutory mitigation, that Appellant had distinguished military service; was a good father and husband, and that he had had the advantage, while growing up, of a secure middle-class home with caring parents (R 331-2); Appellant raises no claim that the judge failed to consider or weigh all proffered mitigation. The sentencing judge was well aware of any dichotomy between Jones' upbringing and the instant crime, and, indeed, discussed such in a special section of the sentencing order entitled, "Startling Contrast of Crimes and Background" (R 333). It was, nonetheless, the judge's conclusion that death was the appropriate sentence, given that these were carefully planned and pitiless crimes, committed for financial gain, and that, inter alia, Jones had shown no evidence, such as emotional or psychiatric problems, which would suggest that his behavior in carrying out these offenses was not deliberate or calculated (R 333). Appellant has failed to demonstrate any basis for disturbing this well-reasoned and sound conclusion, which was reached after all due deliberation and with full knowledge of its consequences.

Initially, the cases relied upon Appellant are inapposite. Richardson is a jury override, whereas the three remaining cases only involved a single aggravating circumstance each. In this

case, there are three valid aggravating circumstances, and relatively minimal mitigation. As noted by the sentencing judge, there was no claim of any mental or emotional disturbance on the part of Jones, and, the mitigating evidence, while uncontradicted, is not of substantial weight. Cf. Zeigler v. State, 580 So. 2d 127, 130 (Fla. 1991) (evidence in mitigation of defendant's active participation in church and community and his good, compassionate character insufficient basis to sustain life sentence where such "no more than society expects of average individual").

This was, as Judge Olliff found, a well-planned and coldly carried-out crime, committed for pecuniary motives. This Court has affirmed the death sentence under comparable circumstances. See Gamble, supra (death penalty appropriate where defendant murdered landlord for pecuniary motive, even where defendant twenty-years-old and had abused childhood, severe emotional problems and had used drugs and alcohol; co-defendant received life and defendant remorseful); Jones v. State, 652 So. 2d 346 (Fla. 1995) (death penalty appropriate where defendant murdered employers for pecuniary gain; defendant has been under sentence of imprisonment and presented evidence of abused childhood and mental and emotional disturbance); Melton v. State, 638 So. 2d 927 (Fla. 1994) (death penalty appropriate where defendant, with prior conviction,

committed crime for pecuniary gain; evidence of defendant's good conduct in prison and difficult family background weighed in mitigation); Jones, 612 So. 2d at 1375-6 (death penalty appropriate where defendant shot two persons in order to obtain truck, and aggravators identical to those sub judice; non-statutory mitigation found as to defendant's childhood, coping disorder and capacity for rehabilitation); Sireci v. State, 587 So. 2d 450 (Fla. 1991)(death penalty appropriate where defendant murdered owner of car lot in order to steal car and/or rob owner; evidence of defendant's brain damage, bleak childhood and good working and family relationships found in mitigation).

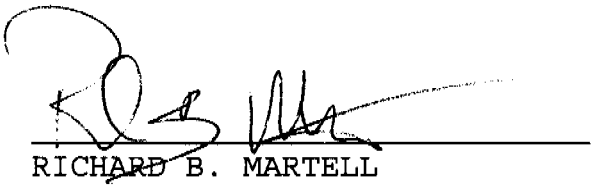
This Court's proportionality review involves a consideration of the totality of the circumstances in a given case, and a comparison of such case to other capital cases. See Porter v. State, 564 So. 2d 1060 (Fla. 1990). In light of the above cases, especially Gamble and Jones (Randall), it is clear that this case is one of the most aggravated and least mitigated homicides, for which death is the appropriate penalty under State v. Dixon, 283 so. 2d 1 (Fla. 1973). Accordingly, the instant sentence of death should be affirmed in all respects.

CONCLUSION

_____WHEREFORE for the aforementioned reasons, the instant convictions and sentence of death should be affirmed in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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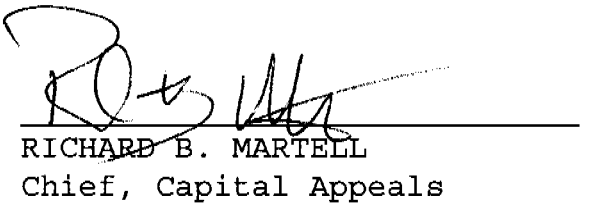
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Lynn A. Williams, Esq., 902-A N. Gadsden Street, Tallahassee, Florida 32303, this 11 day of June, 1996.



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