IN THE SUPREME COURT IN AND FOR THE STATE OF FLORIDA

MARVIN BURNETT JONES :
Appellant

:

vs.

: CASE NO. 84,014

STATE OF FLORIDA : Cir. Court Case No. 93-2757CF
Appellee :

INITIAL BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

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PRELIMINARY STATEMENT

This is an appeal from a sentence of death.

Appellant, MARVIN BURNETT JONES, was the defendant in the trial court below and will be referred to in this brief as appellant or Jones.

References to the record and transcript will be referred to as "R" and "T" respectively, followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

On February 10, 1994, Marvin Burnett Jones plead not guilty to an amended indictment charging him in Count One with first degree murder for the death of Monique Stow and in Count II with attempted first degree murder of Ezra Harold Stow (T 82-83; R 220).

Prior to trial the court considered and ruled on several pre-trial motions. Two of these motions included a Motion To Declare Section 921.141(5)(i), Florida Statutes Unconstitutional (R 68-91) and a Motion to Prohibit Instruction on Aggravating Factors 5(h) and 5(i) (R 156-157). (Section 921.141(5)(i) deals with the aggravating circumstance of "cold, calculated, and premeditated). These motions contained the grounds for the motion as well as the legal argument in support of the motions. The motions were submitted to the Court at a motion hearing without oral argument (T 45). The trial considered each motion and orally denied them (T 46-49). A written order was entered denying the motions (R 186; R 194).

The charge of first degree murder was submitted to the jury on the sole theory of premeditated murder -- the state did not pursue a felony murder theory for the death of Monique Stow and in fact stated that there was no evidence of a felony murder(T 1166; T 1008-1009). The jury was instructed as to third degree felony murder, with aggravated assault being the underlying

felony, on the charge involving Ezra Harold Stow (T 1176).

The jury found Jones guilty of first degree murder and attempted first degree murder as charged in the indictment (R 280-282; T 1209-1210).

The penalty phase of the trial was held before the jury as to the conviction on Count One for First Degree Murder.

Over Jones' objection, the jury was instructed on the pecuniary gain aggravator (T 1290-1295; T 1342), the cold, calculated and premeditated aggravator (T 1296-1297; T 1301-1310; T 1342; R 68-91; R 156-157; T 45-49; R 186; R 194}, and prior conviction of a violent felony (based solely on the contemporaneous conviction of attempted murder on Ezra Howard Stow).

As to the cold, calculated and premeditated aggravator the judge instructed the jury only as follows: "That the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification" (T 1342).

After the penalty phase jury instruction, the defense attorney answered "No, sir" when the trial judge asked the defense attorney, "Mr. Tassone [defense attorney], in behalf of the defense, do you take exception or objection to the charges as given by the court other than those that you previously took exception to?" [Emphasis supplied] (T 1346).

The jury recommended a death sentence (T 1347).

Circuit Judge R. Hudson Oliff conducted a sentencing hearing on March 11, 1994, and imposed sentence at a separate proceeding on May 31, 1994. (T 1352-1362; T 1370-1378; R 306-337). Judgments and sentences were rendered on the same day. (R 306-337).

The court sentenced Jones to death for the murder. (R 306-325).

In the findings of facts in support of the death sentences, the court found (1) Jones had a previous conviction for a violent felony based on the contemporaneous conviction for attempted first degree murder of Ezra Howard Stow (2) the homicide was committed in a cold, calculated and premeditated manner and (3) the homicide was committed for pecuniary gain. (R 325-330).

In mitigation, the court found that (1) Jones had no significant history or prior criminal activity -- a statutory mitigator and (2) aspects of Jones' character which included that Jones served in the Navy for 8 years in responsible positions and with commendations and he received an honorable discharge. Jones is married with two children whom he and his wife supported. During his formative years, Jones had the advantage of a secure middle class home with caring parents. There was no evidence that he suffered any material or spiritual or moral privation. His parents were supportive, hard-working, industrious, and successful. (R 331-332).

successful. (R 331-332).

Notice of Appeal was timely filed (R 364).

Facts -- Guilt Phase

As brought in unrebutted testimony at the guilt phase, prior to the tragic events before this Court, which occurred on March 3, 1993, Marvin Jones, twenty-seven years old, was a stranger to the criminal justice system (T 889). Jones moved to Georgia when he was five years old, and graduated from high school at the age of seventeen in 1983. On April 23, 1983 joined the Navy in a delayed entry program, and entered boot camp in February 1984 (T 866-869). Jones entered the Navy as a recruit E-1. After serving four years and being honorably discharged, Jones re-enlisted in 1984 for another four years. He received another honorable discharge after completing his term of service and had achieved the rank of E-5 as a second class petty officer (T 869-870). Jones was stationed aboard the Forstall and his service included the Perian Gulf campaign in 1992 at a time when it was still considered a combat zone (T 872).

Jones was in a position of authority as a flight deck director, in charge of maintenance on sixty aircraft and also supervising the launch and recovery of those aircraft (T 871).

Jones left the ship in December 1991 but remained a member of the Navy until February, 1992 (T 870-871). Subsequent to leaving the Navy, and while in the process of trying to obtain

employment, Jones received unemployment compensation. Jones had obtained a job and was supposed to begin work on March 4, 1993, the day after the murder (T 873).

Jones was married in 1986 to Tracey Jones. They had two children, Brittney Danielle, seven years old, and Brittney Nicole, three years old (T 866-867). During the time that Jones was drawing unemployment compensation, Mrs. Jones was employed (T 873-874).

According to the testimony of Mr. Stow, on July 31, 1992, Mr. Jones entered into a contract with San Pablo Motors, owned by Mr. Ezra Stow, to purchase a 1984 Saab. Mr. Stow did on the lot financing. Mr. Jones made a cash down payment of $1,780.81. The total purchase price including interest at an annual percentage rate of 30.10% was $6,184.33. Payments were $192 to be made every other week beginning on August 8, 1992 and Mr. Jones faithfully, usually around six in the evening, and made the payments (T 388-391).

Stow testified there was a minor problem with the car the first day Jones had it, and that Stow had it fixed without charging Jones.

A few weeks later Jones brought the car in and the engine was blown. Stow took the position that it was Jones' fault because Jones had earlier advised Stow the car was overheating and Stow had told Jones to have it looked at. Stow told Jones

that Stow would have the car repaired if Jones would pay an additional $1500, i.e., $800 in cash and finance the remaining $700 on the repair bill by adding it to the contract price. Stow also told Jones he would not begin work on the car until Jones paid the $800 (T 369-371).

The car sat at Stow's lot for several months because while Jones paid the $192 biweekly payments, Jones did not pay during that period of time the $800 in cash (T 397).

After a few months, Stow went ahead and had the car repaired because his mechanic did not have any work to do. However, the car remained on Stow's lot (T 397-398).

Stow testified that in late February of 1992, Jones came in and not only paid the $800 plus the car payment due, but also paid the remaining amount due on the car. Jones did this by check. Stow said Jones did this even though Jones only needed to pay $800 plus the car payment due to get the car back. Jones explained to Stow that Jones had borrowed some money from his father in order to pay off the car (T 372; T 399-400). In stark contrast to Stow's testimony, Jones testified that Stow agreed to take the check and hold it until Jones could put the money to cover the check in the bank (T 896-897).

Stow did not hold the check and instead deposited it that day or the next. The check was returned to Stow about a week later for insufficient funds (T 372-373). According to Ezra

Stow, Monique Stow called Jones per Ezra Stow's instructions. Monique Stow informed Ezra that Jones was coming in on March 3rd to take care of the check (T 372-373).

Stow agreed there was a lien recorded on the vehicle and that would be reflected in state records in Tallahassee (T 392).

Norman Zilhaly testified that on March 3, 1993, as was his habit, he was at San Pablo Motors a little before six playing gin rummy with Mr. Stow. Monique Stow was also there, taking care of the last minute details of closing the business -- which included putting "blocker cars" along the front of the lot to prevent the theft of the cars on the lot, and then hiding the blocker car keys in the bathroom (T 358-359).

When Zilhaly first arrived, Mr. Stow "was a little bit upset and we sat down and started talking, he had told me that the gentleman had, quote, bounced a check on him, a considerable amount of money for repairs and for the purchase price of a car. And that he was suppose to show up sometime shortly after 1 o'clock in the afternoon to make good on that check. .... [A]nd I said, boy, that was very very disconcerting, what will you do? And he said well, we can press charges but he didn't really want to do that" (T 363).

Mr. Jones came into the office, said hello to Mr. Stow, and stood to the side and watched Stow and Zilhaly finish the last hand of cards (T 359). As Zilhaly went out the door, he watched

Mr. Stow go down the hall toward Stow's office with Jones following Stow (T 360). Zilhaly observed Monique Stow walking back into the trailer as he was leaving (T 359).

Zilhaly also testified that he had parked his car in a grass median strip which was between a wall outside San Pablo Motors and Atlantic Boulevard. He had moved his car there from inside the San Pablo Motors lot because Monique Stow had been placing blocker cars around the entrances. Zilhaly noticed that appellant's car was parked in front of Zilhaly's and headed in the same westward direction as Zilhaly's car (T 360-361).

In contrast to Zilhaly's testimony, Stow testified that Zilhaly left, and that Stow had time to go back to his office and sit behind his desk before Jones came in (T 377). Stow said that Jones stuck his head in Stow's office, stuck his head in the office, and then told Stow that Jones' had forgotten something. Stow observed Jones walk out to his car and retrieve a faded Crown Royal bag (T 378-379). Stow believed his daughter was still in the bathroom in the middle office washing her hands. Jones re-entered the office trailer and Stow heard two shots in rapid succession. He assumed Jones had shot Monique Stow but couldn't believe it. Stow testified that he then reached back behind his desk to a credenza for a .38 caliber gun that he kept in a holster nailed to the inside top of the credenza (T 377-380). According to Stow, at that point Jones barely came into

the door of Stow's office and shot at Stow. Stow raised his hand to ward off the shot and was struck in the arm and the eye. Stow lay on the floor and passed out for a second. Stow then was shot again in the neck. Stow then managed to get the gun from his credenza, went to the door of the office, and fired three or four shots at Jones who at the time was walking toward his car (T 382-283). Stow's gun was found in the trailer (T 385).

Ezra Stow survived. Monique Stow died at midnight without regaining conciousness. The medical examiner testified that Monique Stow suffered two gunshot wounds to the head, that the shot to the front which was between her eyes occurred approximately four to six inches from her face, and that Stow's eyes were open at the time. This latter conclusion was due to a few stippling marks on one of Stow's eyes. The other shot went into the side of Monique Stow's head and traversed across the brain. The medical examiner could not determine which bullet was fired first but did opine that either would have been fatal (T 744-780).

A business neighbor, Bengy Widener, rushed over after hearing the shots fired outside. He observed Stow leaning over the porch railing of the office bleeding profusely. He also saw a light colored car pull out on Atlantic Boulevard and head west (T 432-433). Stow was pointing toward the trailer. Widener lay the bleeding Stow on the porch and went inside and called 911.

Widener did not remember if he got blood on himself when assisting Stow. After calling 911, Widener heard a moan. He opened the door to the bathroom, which he was pretty sure had been closed, and observed Monique Stow lying on the floor with her eyes closed. Widener observed a gunshot wound between Monique Stow's eyes (T 436-439; T 460).

Emergency help arrived. Widener then went through the office trying to locate keys to move the blocker cars to permit the rescue vehicles access to the business. He was never able to find any (T 444-445).

Two women who were driving by the business in separate cars at the time of the incident identified appellant as a person they saw get in the car on the median strip and drive away. The of the women testified that Jones' was dodging up and down behind the car (T 471-472; T 475-478).

Office Mark Curry testified that firefighter Officer Hagan showed Curry a glove with a partial name written on it. It appeared to say Jone. Hagan testified that at one point Mr. Stow had written on one of Hagan's medical gloves with a pen. Curry gave Stow a notepad at which point Mr. Stow wrote Marvin Jones on the notepad. Curry had experience in the car business and asked Stow if there was an account receivable or deal pack in the office. When Stow indicated in the affirmative, Curry advised Detective Baer that such a pack might be in the office and likely

places to look for it (T 500-504; T 524).

A wallet containing $1,520 was recovered from Mr. Stow (T 507).

Evidence technician John B. Frascello testified that he collected three .38 caliber casings, two live .38 caliber bullets, one green glove with writing on it, five .25 caliber shell casings, a Smith and Wesson .38 revolver, one projectile, and a set of keys on a key ring (T 540). All these items were collected from San Pablos Motors. The .38 caliber casings and live casings were found inside the .38 revolver (T 540-549).

One of the .25 caliber casings found in the bathroom had been moved from one side of the bathroom to another side between the time crime scene arrived, photographs were taken, and the emergency personnel had already left. No one was able to explain how the casing was moved (T 547; T 552-554; T 696). Another .25 caliber casing was found on a desk in the middle office outside the bathroom (T 551).

Detective Baer, over appellant's discovery objection that he had only been furnished the items that morning, testified that he had made a written accounting of some money found in a bank bag contained in a brief case in Mr. Stow's office. Widener and Sergeant McLeod initialed the accounting. According to Baer's accounting, the contents of the bank bag were $394 in cash, a check made out to Candice Preston, and assorted change totalling

about $13(T 681-690).

Baer stated no other money was found on the premises (T 692).

Baer also testified that after appellant's arrest, appellant stated that appellant said he had thrown the gun off the Matthews Bridge (T 695-696).

Baer stated that a .25 caliber shell casing and a holster nailed to the top of the credenza were not observed by law enforcement until the next day. The holster was not taken into custody nor did law enforcement take the holster into evidence or do any testing to determine if blood was on the holster (T 697-698). There were also empty bank bags found.

No paperwork concerning Marvin Jones concerning the car purchase was found in the office (T 693).

Tracy James Taylor testified that he was a friend of Jones'. Taylor first met Jones on the USS Forstall. Jones supervised Taylor. Jones lived at Mayport Landing with his wife and children during this time (T 569-570). Jones had a Monte Carlo. and a BMW. The BMW was wrecked and that was when Jones decided to buy another car (T 566-569).

Jones moved his wife and children to Pensacola to live with her parents the weekend before the shooting. Jones moved in temporarily with Taylor. Jones' plan was to get back on his feet with regular employment, and then bring his family back to

Jacksonville.

The night of the shooting, Taylor noticed that Jones' was acting strange. Jones told Taylor that he paid off the check and that Mr. Stow then requested more money or he would have Jones thrown in jail. Jones said an argument ensued between him and Stow (T 589-591). Jones told Taylor that he had shot at Mr. Stow in self-defense because he thought that Stow had a weapon, and that the shooting of Monique Stow occurred accidentally when he heard a noise in the bathroom and reacted to the adrenaline and just having been threatened by Mr. Stow (T 591-593).

Taylor advised Jones to turn himself in. Taylor assisted Jones in placing the Saab in a storage room that Jones had rented when Jones moved his wife to Pensacola (T 594-597).

The next day, the police had found Jones name by looking at an "alpha index" which indicated who owned what type of car. Marvin Jones came up as the only Jones owning a Saab (T 692-693).

The police picked up Jones after having Taylor identify him.

Jones testified in his behalf. Over the state's objection, Jones was not allowed to testify that he had never been arrested before (T 889).

Jones stated that he had given Mr. Stow a check when Mr. Stow had insisted on getting the check, and that Mr. Stow had agreed not to deposit the check until early March. Jones was subsequently advised the check had been deposited and returned.

Jones went to San Pablo Motors with $4300.20 in cash to pay off the balance. After paying, Stow became angry, was yelling, and would not give Jones any paperwork on the car and requested an additional $2000. Jones stated Stow then began to pull out a gun. Jones shot rapidly in self-defense and then, sick at the sight of Mr. Stow shot, went to the bathroom to vomit. At that point, he heard a noise in the bathroom and shot reflexively. These were the shots that killed Monique Stow. Jones stated that this was not intentional on his part. Jones stated he did not do anything at that point but run out to the car. When he thought of going back to call 911 and get help, he saw Mr. Stow on the porch shooting at him. At that point Jones got back in his car and left the scene. Jones went and sat outside a police department for awhile, planning to turn himself in. Jones threw the crown royal bag containing the gun and other contents into the intracoastal. Jones went to the Taylor home. Jones sat in the room in the dark, until Taylor came in and spoke to him. Jones then told Taylor what had happened. Jones denied taking back the money or the paperwork (T 905-933).

Jones also testified that he did not believe it was his fault that the car had malfunctioned, that he had left the car at San Pablo Motors for repairs, and that he had made the regular payments of $192 biweekly in the interim (T 879-889).

Penalty phase

The state presented testimony from a friend of Monique Stow's that she was a peaceful, friendly, loving person (T 1222).

Arthur Lee Jones, appellant's father, testified that he had four children and had been married to Mrs. Jones for thirty years. The oldest was in the Navy on a classified assignment, a daughter worked for the state, and another son was in college.

Mr. Jones stated that appellant had never been in any trouble with the law while growing up. Mr. Jones also said it was not unusual for him to lend his children money (T 1223-1226).

Mrs. Mabel Jones, appellant's mother, worked for a manufacturing company and then started her own business. With the exception of the present offense, Marvin Jones had never been in any trouble. When Mrs. Jones visits Marvin, he hugs her and cries, which Mrs. Jones takes as remorse on Marvin's part (T 1227-1230).

Ardee Mahalia Jones Harris, appellant's sister, testified that she worked for the state at the welcome center. Marvin always helped at home with the chores, was a fun loving person, participated in the band in high school, and looked after Ardee who was younger than Marvin (T 1230-1232).

Ronald Ray McCorvey, appellant's brother-in-law, testified that appellant always took time to interact with both appellant's family and McCorvey's family. McCorvey said that it was hard for

appellant to be separated from his wife (McCorvey's sister), that appellant enjoyed being with appellant's wife and children. McCorvey described Marvin as soft-spoken, always going out of his way to help others. Marvin helped two of McCorvey's teenage sons navigate through their teen years by spending a lot of time with them (T 1233-1234).

Appellant's wife, Tracey Lynn Jones, testified that she and Marvin had been married since 1986 and that they had two children, ages seven and two. Tracey said that except for Marvin's deployments, she had never been separated from Marvin. Tracey planned to stay a couple months in Pensacola while Marvin got situated in a new job, and then move back to Jacksonville. Prior to her leaving, they had rented a storage area in Jacksonville to store their belongings until she returned.

Tracey said that Marvin participated in their marriage and was a loving and caring father (1236-1240).

Marvin Jones testified that he was stationed on a flight deck when he was in the Navy. He was in charge of all launch and recovery maintenance of all aircraft on the flight deck. Jones testified it was a dangerous situation everytime he went to work. Jones said that one time a man fell over the side and the elevator was down and Jones held onto the man until the elevator came back up.

Marvin had no previous arrests. He had hoped to pursue a

career in law enforcement after leaving the Navy and had explored different job possibilities.

Marvin stated that he was 28 years old, that he participated in several clubs in high school, that he played several musical instruments, and that he had taken place providing free entertainment for different activities.

Marvin read from a document known as a DD-214. It contained awards given in the service. In Marvin's case, this included a National Defense Service Medal, a Southeast Asia Service Medal, a Sea Service Deployments Ribbon Third Award, Armed Forces Expeditionary Medal, Meritorious Accomodations Second Award, Navy E-Ribbond and the Care Group Six Letter for accomodation (T 1257-1258). Marvin received excellent ratings every year on his service record (T 1259-1260).

Marvin said that he had spent daily time with his children when he was home, including getting them ready for school, taking them to the park, and taking them with him when he went on errands.

Marvin said he had expressed remorse daily since the shootings occurred (T 1249-1266).

SUMMARY OF ARGUMENT

1. This Court has held that the pecuniary gain aggravator cannot be found absent proof beyond a reasonable doubt that the murder was an integral step in some sought after gain. Such a finding must exclude all reasonable hypothesis of innocence. In the case at bar, the taking of paperwork identifying appellant was consistent with an afterthought by appellant to remove the papers to delay or avoid detection. Therefore the trial court erred in finding pecuniary gain as an aggravating circumstance.

2. This Court held the standard jury instruction on the cold, calculated and premeditated aggravating circumstance to be unconstitutional in Jackson v. State, 648 So.2d 85 (Fla. 1994). The trial court in this case did not have the benefit of Jackson, since the trial was held before Jackson was decided. Although the defense objected to the standard instruction as unconstitutionally vague, the court used the unconstitutional standard instruction. Use of this unconstitutional instruction tainted the penalty phase Jones' trial.

3. The trial court erred by finding the aggravating circumstance of cold, calculated, and premeditated. The evidence failed to establish beyond a reasonable doubt that the killing was the product of cool and calm reflection, that the murder was the product of a careful plan or prearranged design to commit murder before the fatal incident, that there was heightened

premeditation, and that there was no pretense of moral or legal justification. See Jackson v. State, supra.

4. The death sentence imposed for the homicide in this case is disproportionate. When compared to other similar, and some instances more aggravated, cases where this Court reversed death sentences, the sentence imposed here cannot stand.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN AND FURTHER IN INSTRUCTING THE JURY ON PECUNTIARY GAIN

The trial judge instructed the jury on pecuniary gain and made a finding that pecuniary gain had been established as an aggravating circumstance in the case at bar.

This was based on the state's theory of prosecution that appellant had gone into the car dealership with the intent to steal the title and sales paperwork to a car even though he already had physical possession of the car.

In Chaky v. State, 651 So.2d 1169 (Fla. 1995) this Court rejected the state's claim that pecuniary gain had been proven beyond a reasonable doubt. This Court noted:

> This aggravating circumstance [pecuniary gain] applies "only where the murder is an integral step in obtaining some sought after specific gain". Hardwick v. State, 521 So.2d 1071, 1076 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988). See also Peterka v. State, 640 So.2d 59 (Fla. 1994), cert. denied, 115 S. Ct. 940 (1995). Moreover, proof of this aggravating circumstance cannot be supplied by inference from circumstances unless the evidence is inconsistent with any other reasonable hypothesis other than the existence of the aggravating circumstance. Simmons v. State, 419 So.2d 316 (Fla. 1982).

Chaky, 651 So.2d at 1172.

Applying the principles of Chaky and Simmons, 419 So.2d 316 (Fla. 1982) to this case, the evidence is insufficient to prove this aggravating circumstance beyond a reasonable doubt. The state's evidence fails to exclude a reasonable hypothesis that appellant entered the premises merely to work out an agreement between appellant and Stow concerning the car.

Taking the state's evidence, Jones went to the car lot at a time when he had to know, from numerous prior visits, that the surrounding area would be in the middle of rush hour traffic. While he parked his car outside the business premises on a median strip, he parked exactly the same way and on the same median as Mr. Zilhaly, who was there to play cards with Mr. Stow. According to Mr. Stow, Jones originally came in the business without any weapon or other means of forcibly taking the paperwork, and they proceeded to Mr. Stow's office. At that time, a conversation ensued. Only after that conversation did Mr. Jones walk out to his car and return with the bag which contained the .25 caliber pistol. It was at that time, according to the state witness Mr. Stow, that the shooting began in which Monique Stow was killed and Mr. Stow was injured. The shootings occurred in a matter of moments.

Mr. Stow stated in his testimony that all the paperwork which reflected the transaction between Stow and Jones was sitting on the desk, and was clearly marked with the name of

Marvin Jones.

The state's theory is that Jones went into the business with a heightened premeditation and the intention to secure these papers and fully culminate his ownership of the car.

The evidence is fully consistent with an alternative hypotheses. Jones went into the business to negotiate a settlement to the dispute between him and Stow. After all, Jones was starting employment the next day and was in a position to explain that he would be able to continue to regularly make payments on the automobile as he had done for the five preceding months -- four of those months when he did not even have use or possession of the car. A disagreement ensued and Jones went into a rage. Jones went out to his car, retrieved his gun, and came back into the building shooting.

The clearly marked papers with Jones name on them, sitting atop Stow's desk, were grabbed and taken by Jones to avoid detection.

The Court's finding of pecuniary gain, coupled with the jury instruction on this circumstance, violated appellant's right to a fair and reliable sentencing in contravention of Article I, Sections 9, 16, and 17 of the Florida Constitution and Amendments 8 and XIV of the United States Constitution.

ISSUE II

THE TRIAL COURT ERRED IN GIVING THE STANDARD JURY INSTRUCTION TO DEFINE THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE.

A). The jury instruction is unconstitutional under this Court's decision in Jackson v. State, 648 So.2d 85 (Fla. 1994).

This court held the standard jury instruction on the cold, calculated and premeditated aggravating circumstance to be unconstitutional in Jackson v. State, 648 So.2d 85 (Fla. 1994). The trial court in this case did not have the benefit of Jackson, since the trial was held two months before Jackson was decided.

Therefore, the court used the unconstitutional standard instruction and instructed the jury on the aggravating circumstance provided for in Section 921.141(5)(i) Florida Statutes as follows: "That the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification" (T 1342).

Use of this unconstitutional instruction tainted the penalty phase of Jones' trial. His death sentence has been imposed in violation of the Eighth and Fourteenth Amendments and Article I, Sections 9, 16 and 17 of the Constitution of Florida.

In Jackson, this Court also held that the use of the unconstitutional instruction at trial could not be reviewed on appeal unless a specific objection to the instruction was made in the trial court. Ibid. at 90; see, also, Gamble v. State, 659 So.2d 242, 245 (Fla. 1995). Jones met this requirement. The objection to the constitutionality of the instruction was presented to the trial judge in two detailed pretrial motions - a Motion to Declare Section 921.141(5)(i), Florida Statutes Unconstitutional (R 68-91) and a Motion to Prohibit Instruction on Aggravating Factors 5(h) and 5(i) (R 156-157). After consideration of the motions and the argument contained therein, the trial judge orally and by written order denied both motions (T 45-49; R 186; R 194).

After the penalty phase jury instruction, the defense attorney answered "No, sir" when the trial judge asked the defense attorney, "Mr. Tassone [defense attorney], in behalf of the defense, do you take exception or objection to the charges as given by the court other than those that you previously took exception to?" [Emphasis supplied] (T 1346).

B) There was insufficient evidence to support a finding that the murder was cold, calculated and premeditated.

This is fully argued in Issue III and appellant's adopts the argument in Issue III to support this contention.

This use of the unconstitutional instruction cannot be

considered harmless error. Unless the state can demonstrate beyond a reasonable doubt that the unconstitutional jury instruction did not contribute to the jury's sentencing recommendation, the error is not harmless. See, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Jackson v. State, 648 So.2d at 90. The state cannot meet its burden.

Most telling as to the importance of the use of this aggravating circumstance to the state, is revealed in the state's own closing argument in penalty phase where the prosecutor argued to the jury: "Ladies and gentlemen, the third aggravating factor that the state expects the court to instruct you on is perhaps the most important one. The crime for which the defendant is to be sentenced was committed in a cruel, cold, and calculated, and premeditated manner without any pretense of moral or legal justification" (T 1321).

The jury did not have the proper legal guidance it needed to decide the issue of the existence of the cold, calculated, and premeditated aggravating circumstance. Because the jury was not properly instructed on the law to be applied to the facts on this question, there is no way to determine if the jury reached a correct result. A reviewing court may presume that a properly instructed jury did not reach a decision for which there was insufficient evidence to support it. However, this presumption is not available where, as in this case, the

jury was improperly instructed with an unconstitutional instruction. Sochor v. Florida, 504 U.S. 527, 112 S.Ct. 2114, 2122, 119 L.Ed.2d 326 (1992). In this case, there was insufficient evidence to support the cold, calculated and premeditated circumstance and the jury was not given a legal instruction on how to apply the law to that evidence. It is impossible to determine if the jury erroneously considered the cold, calculated and premeditated circumstance, which was not factually supported, in the sentencing equation. Given the state's emphasis on the importance of the circumstance to their case, it is likely the jury did consider it. The unconstitutional instruction could have mislead the jury's decision.

Jackson's penalty phase trial has been unconstitutionally tainted by the use of the unconstitutional cold, calculated, and premeditated instruction. His death sentence must be reversed and remanded for resentencing with a new jury.

ISSUE III

THE TRIAL COURT ERRED BY FINDING THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED, AND PREMEDITATED

To support the finding of an aggravating circumstance, the state must first prove beyond a reasonable doubt that the aggravating circumstance existed.

Where the evidence supporting the finding of an aggravating circumstance is circumstantial, the aggravator cannot be found unless the state's theory excludes all reasonable hypothesis' that the aggravator has not been proven. Simmons.

In the case at bar, the trial judge found that the murder was committed in a cold, calculated, and premeditated mannter (R 327). Section 921.141(5)(i), Florida Statutes.

This Court has defined and applied this aggravating factor as requiring more than the premeditation element for first degree murder. See, e.g., Hill v. State, 515 So.2d 176 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla 1986); Preston v. State, 444 So.2d 939 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981). The evidence must prove beyond a reasonable doubt that a heightened form of premeditation existed--one exhibiting a cold, calculated manner without any pretense of moral or legal justification. Ibid. There must be "...a careful plan or prearranged design to kill...." Rogers v. State, 511 So.2d 526 (Fla. 1987).

In Jackson v. State, 648 So.2d 85 (Fla. 1994), and Walls v. State, 641 So.2d 381 (Fla. 1994), this Court discussed the four elements which must be established before the cold, calculated, and premeditated circumstance is proved:

> Under Jackson, there are four elements that must exist to establish cold calculated premeditation. The first is that "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage." Jackson [648 So.2d at 89] ...
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> Second, Jackson requires that the murder be the product of "a careful plan or prearranged design to commit murder before the fatal incident." Jackson, ...
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> Third, Jackson, requires "heightened premeditation," which is to say, premeditation over and above what is required for unaggravated first-degree murder.
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> Finally, Jackson states that the murder must have "no pretense of moral or legal justification." ... Our cases on this point generally establish that a pretense of moral or legal justification is any colorable claim based at least in part on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide ...

Walls, at 387-388. The facts of this case failed to prove each

of the four elements required for a cold, calculated, and premeditated finding.

This Court has adopted the term "heightened premeditation" to distinguish the aggravating circumstance of cold, calculated, and premeditated from the premeditation element of first degree murder. See, e.g., Crump v. State, 622 So.2d 963 (Fla. 1993); Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988); Rogers. To show heightened premeditation, the State must prove beyond a reasonable doubt that the defendant planned or arranged to commit the murder before the incident began. Crump, 622 So.2d at 972; Hamblen, 527 So. 2d at 805; Rogers, 511 So. 2d at 533. Moreover, this Court has found that heightened premeditation is inconsistent when the killing occurs in a fit of rage. Crump, 622 So.2d at 972; Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988). Applying these principles to the instant case, the evidence is insufficient to prove beyond a reasonable doubt that the killing occurred with the necessary heightened premeditation.

In Crump, the accused had invited the victim into his truck, was at the time in possession of a strangling device, bound the victim's wrists, manually strangled her, and dumped her body. Crump had previously been convicted of strangling another prostitute in a similar manner and received a life sentence. This Court held that "the state did not prove

evidence to show beyond a reasonable doubt that Crump had a careful pre-arranged plan to kill the victim before inviting her into his truck" Id. at 972.

In Vining v. State, 637 So.2d 921 (Fla. 1994) this Court rejected the trial court's finding that the murder was cold, calculated, and premeditated. The evidence in Vining showed a careful planning by Vining to meet with the victim. The victim had a valuable amount of diamonds for sale. Vining met with the victim at her place of business three times to discuss "buying" the diamonds. After the last visit, and after accompanying Vining voluntarily from her place of business, the victim's body was discovered three weeks later with two gunshot wounds to the head. This Court rejected the trial judge's findings that the murder was cold, calculated, and premeditated stating:

> However, we find that the murder was not cold, calculated, and premeditated because the State has failed to prove beyond a reasonable doubt that Vining had a "careful plan or prearranged design" to kill Caruso. Rogers, 511 So. 2d at 533. The sentencing order addresses this aggravating circumstance by concluding that the "only explanation of this murder is as a cold and calculated act, far beyond mere premeditation." However, as we explained in Rogers, "while there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must

> bear the indicia of 'calclation.'" Id. Although there is evidence that Vining calculated to unlawfully obtain the diamonds from Caruso, there is insufficient evidence of heightened premeditation to kill Caruso. Thus, we find that the trial court erred in finding the cold, calculated, and premeditated aggravating circumstance.

Vining, 637 So.2d at 928.

In Valdes v. State, 626 So.2d 1316 (Fla. 1993), Valdes was part of a plan to effectuate the escape of state prison inmate Jame O'Brien who was transported to a doctor's office for *examination. During the escape attempt, Valdes and co-perpetrator William Van Poyck attacked the prison van. A prison guard, Griffis, was forced out of the van at gunpoint and shot and killed. Officer Turner escaped only because a gun held by Van Poyck misfired. In an unsuccessful attempt to leave the scene, Van Poyck hit four police cars. In determining that the state had not proven that the murder was cold, calculated and premeditated, this Court stated:

> Valdes argues that the State failed to prove beyond a reasonable doubt that the murder was cold, calculated, and premeditated. In order to establish this aggravator, the State must show a heightened level of premeditation establishing that the defendant had a careful plan or prearranged design to kill. Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct.733, 98 L. Ed. 2d 681 (1988). Here, while it is evident the escape was well planned, there is no evidence that Valdes had a plan to actually kill anyone. The evidence is entirely consistent with an escape attempt that got out of hand. While a plan to kill could be inferred from Officer Gaglione's testimony that Valdes admitted the murder was planned beforehand, Gaglione specifically testified that Valdes stated "they" had planned the murder, referring to someone other than himself. On the facts of this case there was insufficient evidence to prove that

> this murder was cold, calculated, and premeditated beyond a reasonable doubt. Cf. Gore v. State, 599 So. 2d 978, 987 (Fla.), cert. denied, 113 S. Ct. 610, 121 L. Ed. 2d 545 (1992); Hill v.State, 515 So. 2d 176, 179 (Fla. 1987) cert. denied, 485 U.S. 993, 108 S. Ct.1302, 99 L. Ed. 2d 512 (1988).

Valdes, 626 So.2d at 1322-23.

Nor can a plan to kill be inferred from the lack of evidence; a mere suspicion is insufficient. Lloyd v. State, 524 So.2d 396, 403 (Fla. 1988); see also, Gorham v. State, 454 So.2d 556, 559 (Fla. 1984). Similarly, the presence of multiple gunshot wounds is insufficient. E.g., Caruthers v. State, 465 So.2d 496 (Fla. 1985) (victim shot three times); Blanco v. State, 452 So.2d 520 (Fla. 1984) (victim shot seven times).

The evidence in the case at bar, as outlined in Issue One, shows this to be a killing which occurred during a dispute which aroused Jones passion and overcame his usual good judgment.

This Court must reverse Jones' death sentence which has been imposed in violation of Article I, Sections 9, 16, 17 of the Florida Constitution and Amendments V, VIII, XIV of the United States Constitution

ISSUE IV

THE DEATH SENTENCE IMPOSED IN THE CASE AT BAR IS DISPROPORTIONATE

In performing proportionality review, this Court evaluates the totality of the circumstances and compares the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. E.g., Terry v. State, 21 Fla. Law Weekly S9 (Fla. Jan. 1, 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). Such a review in this case demonstrates that the death sentence is not proportional and must be reversed. Art. I, Secs. 9, 17, Fla. Const.; Amendments V, VII, and XIV of the United States Constitution.

Many other times this Court has been faced with killings which were caused by out-of-control emotions. In almost every one, this Court has concluded that a death sentence was disproportionate. See, e.g., Caruthers, supra; Rembert v. State, 445 so.2d 337 (Fla. 1984); Clark v. State, 609 So.2d 513 (Fla. 1992); Richardson v. State, 437 So.2d 1091 (Fla. 1983).

Moreover, the mitigating circumstances in this case are overwhelming. Before the court is a defendant with no prior record, an excellent and recent service record, a loving family whose love he reciprocated. This clearly out of character act can only be described as one occurring during a provocation brought on either by the events at the car dealership that day,

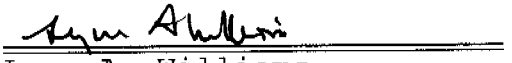
or by months of frustration. The defendant was further stressed in that he had not been able to obtain employment in a timely enough fashion to keep his wife in Jacksonville and in fact had to move in with a friend temporarily.

Marvin Jones death sentence should be reversed for imposition of a sentence of life in prison.

CONCLUSION

For the reasons presented in the foregoing brief, Marvin Burnett Jones asks this Court to reverse his death sentences and remand for imposition of sentences of life imprisonment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to Richard Martell, Assistant Attorney General, Criminal Appeals Division,

The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Marvin Burnett Jones, on this 8th day of March, 1996.

[redacted] LYNN A WILLIAMS