IN THE SUPREME COURT OF FLORIDA

DAVID WYATT JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

Case #: 90,~~644~~ 664

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

Corrected

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

I. CASE

The State supplements Jones' rendition of the Case as put forth in his brief with the following procedural matters.[1] First, Jones' counsel filed a suggestion of incompetency, but he was found to be competent to stand trial (I/ 15-17; VII/1196). A hearing was conducted on Jones' motion to suppress his statements to authorities on August 11, 1995, and was continued to September 1, 1995 (I/35-37; VII/1230-1375; VIII/1386-1426). Jones' motion to suppress was denied (VIII/1426). A *Frye* hearing was conducted on September 5, 6, and 12, 1996, regarding DNA evidence (IX/1641-1753; X/1758-1946; XI/1949-1966). The trial court found:

> ...that the PCR is, in fact, accepted in the scientific community and all the procedures and protocol were followed. It meets the *Frye* standard so if you will, get me an order to that effect, Mr. Phillips.[2] (XI/1966)

A hearing was conducted on November 25, 1996, regarding Jones' motion to suppress identification (XII/2109-2172). The trial court

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[1]Appellant was the Defendant in the trial court below. Appellee, THE STATE OF FLORIDA, was the prosecution. Henceforth, Appellant will be identified as "Jones" or Defendant. Appellee will be identified as the "State". The Record and Transcript of this case are contained in 26 volumes. Therefore, the reference II/66-68 is to pages 66 to 68, located in volume II. There is one volume of Supplemental Record, which is in fact a corrected Volume VII. "p" designates pages of Jones' brief. All emphasis is supplied unless otherwise indicated.

[2]*Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *See Hayes v. State*, 660 So. 2d 257, 263-265 (Fla. 1995).

found:

> THE COURT: The motion to suppress the pretrial identification, the in-court identification is denied.
>
> The Court finds that there was, in fact, no likelihood of misidentification. The testimony of Mr. Chou was that it was part of his duties that night, which by the way was some 1:00 o'clock in the morning, which he indicated the fact that it was very light there in Walgreen's, but part of his duty that night was to be on the lookout for anybody that might be committing a crime such as robbery, shoplifting or whatever else.
>
> And we all must admit that the defendant with tattoos up and down his arms and his shirt unbuttoned on January 31st, 1995, a winter morning, would have been unusual and would draw you[r] attention to him anyway.
>
> So, I deny the motion. (XII/2172)

All other matters related to the Case shall be presented as they relate to Jones' issues on appeal.

II. FACTS

A. Guilt Phase

Doug McCrae, the victim's husband, testified the last time he saw Lori alive was Monday afternoon, January 30, 1995, before she went to work at the Post Office on 1100 Kings Road (XVI/556-57). She was wearing jewelry, including a St. Christopher's medal, her wedding rings, and a watch (XVI/557-58). Her fingernails were immaculate (XVI/558). She drove a Chevy Blazer, and carried her ATM card in the side pocket of her purse (XVI/558-59). She did not carry her PIN number, as she had it memorized (XVI/55). He spoke

to her 3 times on the phone while she was at work (XVI/560). The last time she indicated she was going to stop at Winn Dixie on her way home (XVI/560-61). At 1:45 a.m. he called the police (XVI/561). He identified, from photographs, her drivers license, jacket, ATM cards, and Blazer (XVI/564-68).

Linda Swagel, Lori's co-worker, testified Lori was wearing black jeans and a white button down shirt the last time she saw her (XVI/572). She saw Lori outside the post office as they were leaving for the night (XVI/573). Lori had on "a forest green jacket with blue and purple colors in the sleeve that came down to the elbow." (XVI/573) Melissa Leopard, Lori's sister, identified her jacket and boots (XVI/574-75). Connie Stott forwarded Lori's dental records to the Medical Examiner's Office (XVI/589-91).

Dr. Floro, Deputy Chief Medical Examiner for District 4, testified he first came in contact with Lori McCrae's remains on February 21, 1995, "in a field somewhere in Baker County." (XVI/599) Her body was decomposed and lying on her back (XVI/599-600) "[T]he degree of decomposition in the head, neck, and upper chest area [were] much more severe than that of the lower part, the abdomen and the lower extremities." (XVI/600) The degree of decomposition was consistent with lying outside for three weeks (XVI/600). At the autopsy he observed her black pants were pulled down, zipper open, exposing her pubic area and buttocks (XVII/609). Her long sleeve shirt was open and rode up into the upper part of

her body (XVII/609). The left strap of her brassiere was pulled down (XVII/609).

Dr. Floro further testified there was a ligature around her neck that was decomposed, and neck bones only were visible owing to decomposition of the flesh (XVII/610). On top of the first ligature, a cord, was another, a black sweater sleeve, around the neck (XVII/610). There was rope around her ankles secured by a square knot (XVII/611). She had a "hole on the left upper chest" (XVII/611).

There were "bruises on the right arm, the elbow area, the wrist area and the mid-part of the forearm" (XVII/611). There were "also bruises in the thigh ... inside ... the front, the right knee, upperleg, [and the] left shin was likewise bruised." (XVII/611). These bruises came before or contemporaneous with her death (XVII/612). The forearm bruises were "inflicted during a struggle." (XVII/612) The bruises on her legs were defensive wounds (XVII/612) Her left middle fingernail was broken, further indicating she struggled (XVII/613)

"[M]aggots inside the body had eaten everything from the neck all the way inside, all the organs were practically gone including the genitalia." (XVII/613-14) Given there was a blood stain on the back of Lori's jacket, Dr. Floro could not rule out that her throat may have been cut (XVII/616) In his expert opinion, Lori "died as a result of ... ligature strangulation." (XVII/618) Dr.

Floro "took a small sample of the muscle of the thigh together with the [femur] bone and submitted it to" FDLE (XVII/618). After a review of the autopsy photographs, Dr. Floro determined Lori had a broken fingernail on each of her hands, as opposed to one as he had testified earlier (XVII/627). He repeated this would indicate a struggle on the part of the victim (XVII/628).

Sgt. Grant testified he was staked out by an ATM machine waiting for a posssible appearance by Jones, late in the afternoon of February 1, 1995, when he spotted Lori's Blazer exiting a Winn Dixie parking lot (XVII/647). He drove up behind the Blazer, called for backup, and ordered Jones out of the vehicle (XVII/649). Sgt. Grant placed Jones on the ground, handcuffed him, and placed him in his patrol car (XVII/649). Jones had "scratch marks down one side of his face with dried blood." (XVII/651-52) In Jones' shirt pocket, among other things, were a crack pipe, two credit cards and a receipt (XVII/650-52). Jones' blue jeans "had off-colored red marks on them." (XVII/653)

Phil Talamo photographed the victim's red Blazer before it was towed to FDLE (XVII/657-60). David Marsh and Leonard Hutchins testified Jones drove into their car wash on January 31, 1995, and wanted them "to wash his car, clean the inside of it, not do nothing to the outside, just inside" for $5 (XVII/664-65, 686-87). When he was told no way, he sped off (XVII/664-65, 691). Both men observed that Jones had acne scars, scratches and a distinctive

spider web tattoo on his arm (XVII/665, 678-79, 688). The Blazer had luggage and clothes in it (XVII/682). This happened sometime between 12:30 and 2:30 p.m., tending more to between 1:00 and 2:00 p.m. (XVII/682).

Johnnie Johnson testified he was getting gas at "White and Sons" sometime between 12:00 and 3:00 p.m. on Tuesday, January 31, 1995, when he saw Jones pumping gas into a red Blazer (XVII/694). Jones asked him if he wanted to buy some cards, and Johnson declined (XVII/694). Jones "had scratch marks all in his face." (XVII/695) Blood was running from the scratch marks (XVII/695). He "had a lot of tattoos." (XVII/695) Jones followed Johnson to a food store and asked him if he wanted to buy his Fairmont (XVII/696). Since his friend was looking for a car he went to look at Jones' car (XVII/696). Jones' car "was old and messed up," so Johnson told him he wasn't interested (XVII/697). Jones again tried to sell him the credit cards (XVII/698).

Peggy Money, Records Custodian for First Union National Bank, testified various ATM transactions were made starting at 3:54 p.m., January 31, 1995, until February 1, 1995, at 1:16 p.m., where Lori's card was used but no money was given (XVII/717-19, 722). Jones tried to use this card at least 15 times (XVII/719).

Cynthia Brown, Fraud and Forgery Specialist for Jacksonville Navy Credit Union, testified that Jones used Lori's ATM card to withdraw $600.00 from her account between January 31, 1995, and

February 1, 1995(XVII/738-45). The first withdrawal came at 3:09 a.m., January 31, 1995, and was for $300.00 (XVII/737-38). Under cross-examination, Ms. Money testified that Jones made 105 attempts with Lori's ATM card, and only 11 were successful (XVII/746). Earlier she explained that once Jones withdrew the $300.00 at 3:09 a.m. in Callahan, he would not have been able to receive money from the ATM machines until after 4 p.m. January 31, 1995 (XVII/735-38). The odds of Jones picking Lori's PIN number were "one in a million" (XVII/735).

Debra Rau, Manager of First Union Branch at Callahan, testified that her branch had "a security camera that goes continuously during non-banking hours at the ATM machine." (XVII/752-55) Non-banking hours were 5 p.m. until 7:30 a.m. (XVII/756). Jones was captured on film at the time he made the first $300.00 cash withdrawal in Callahan (II/758-60).

Amy Hudson, a bartender at the Bikini Club, was working Monday night, January 30, 1995, and testified Jones came in the bar "around 9:00" (XVII/766). He sat at the bar right behind her register for a couple of hours (XVII/766). Jones drank nothing but water and spent no money (XVII/767). He had no scratches on his face while in the bar (XVII/767-68).

Allen Miller, FDLE Senior Crime Lab Analyst, testified as to physical evidence linking Jones to the murder (XVII/774-800; XVIII/807-72). He was able to detect blood several places in the

Blazer through the use of luminal (XVII/776-77, 790-92; XVIII/807-12). He processed Lori's jacket which had blood stains (XVII/787-88). There was a black sweater which was missing its sleeves, and boots, one of which was missing a shoelace (XVII/787-90). He found "buttons underneath the back seat of [Lori's] vehicle," that were missing from her shirt (XVII/790-91). Rope found in the trunk of Jones' Fairmont matched the rope found tied around Lori's ankles (XVIII/823-26). He photographed the scene where Lori's body was found and attended the autopsy where he observed the rope around her ankles, the shoelace ligature, and the sweater ligature (XVIII/839-52).

Clayton Chou, Merchandiser for Walgreens Drug Store, testified that on January 31, 1995, between midnight and 1 a.m., Jones came into his store "with his shirt opened ... rather cold night" so he noticed him (XVIII/874-75). Jones had his sleeves rolled up, exhibiting "his body was full of tattoos," both arms and chest (XVIII/875). Jones was dirty, but there were no scratches on his face (XVIII/876).

Lori McCrae entered the store a few seconds after Jones did (XVIII/876). She was "totally contrast" to Jones (XVIII/877). Normally, store policy was to watch individuals such as Jones (XVIII/877). Jones purchased a very small item at the register (XVIII/878). "They both stopped at the door, and talked to each other, and by the way they talked, looked like they were not happy

... with each other." (XVIII/879). Lori looked upset, but Mr. Chou was unable to hear any of their conversation because they were speaking in very low voices (XVIII/879). They both left, and he never saw either of them again (XVIII/880).

Paula Sauer, FDLE Fiber and Fracture Analyst, testified that both the rope found in Jones' Fairmont and that which bound Lori's ankles were made from a "natural fiber called sisal," which was not a common material (XVIII/891, 896-97). The ends of the rope were so frayed so she was unable physically to fit them together, rendering them unsuitable for fracture analysis (XVIII/895-96). However, the two pieces could have come from the same piece of rope (XVIII/900). Detective Highsmith testified he was a member of Detective Parker's homicide team investigating the disappearance of Lori McCrae (XVIII/901). When Jones was taken into custody on February 2, 1995, he was wearing blue jeans, which were seized and sent to the FDLE lab (XVIII/902-03).

Jackie Doll Jones testified she had been Jones' wife since 1982 (XVIII/910-11). She was not with Jones at the time he committed the murder until his arrest because she, herself, was arrested for shoplifting on Sunday, January 29, 1995, and was in the Duval County Jail (XVIII/915). When she was arrested, Jones was 30 feet away, and the last time she saw him was on the expressway as she was taken to jail, while he went in the opposite direction (XVIII/915-16). When she last saw him, he did not have

scratches on his face (XVIII/918). Jackie had a sweater, which when exhibited at trial, the sleeves had been cut off (XVIII/919-20). When she was released from jail, she entered a drug rehab (XVIII/923). The sleeves found on or near Lori's body matched her sweater (XVIII/923).

Under cross-examination, Jackie testified that when she was arrested for shoplifting, she and Jones were trying to get money to buy crack cocaine (XVIII/924). They had been doing crack every single day for months (XVIII/924). Whatever money they received from stealing, Jones spent on crack (XVIII/924-25). She had to hide money in the hope he would not find it, so they could eat and pay their motel bill (XVIII/924-25). He did not eat regularly and appeared malnourished (XVIII/924-25). Jones' focus was on crack, and when she was arrested he had no money (XVIII/926).

On redirect, Jackie testified she was afraid of Jones' "moods and reactions if he didn't get the crack." (XVIII/934) If Jones did not get crack, "he was always abusive." (XVIII/935) Usually, when Jones wanted crack he acted "violently, cruel" (XVIII/936). When she was arrested at Sears on January 29, 1995, Jones knew she was picking something up to refund it so they could get cash for crack (XVIII/940). Jones could drive a car on crack, and could behave normally (XVIII/941). On recross, she testified her cravings for crack were not as strong as Jones' (XVIII/945). On further redirect, she testified Jones acted like he was proud of

his tattoos and his muscles (XVIII/947).[3]

Officer Gary Powers photographed Jones' scratches at the homicide office, and collected his clothes (XVIII/953-61). Two stipulations were read to the jury:

> Both sides agree and stipulate, one, the body recovered in this case was clothed, among other things, with a blouse that is depicted in some of the photographs that you've seen; two, when the body was recovered the blouse was missing some buttons; three, two buttons were recovered in Lori McRae's vehicle, these two buttons are from the blouse with which the recovered body was clothed.
>
> The second stipulation is numbered stipulation number two, the parties have also stipulated to the following facts: One, that Lori McRae's parents, Russell and Shirley Brenner went to a local laboratory for the purposes of having blood drawn from both of them and; two, the blood was separately and properly drawn from both of them; and that the blood from each of them was properly put in separate vials and then properly shipped to the Genetic Design Laboratory in North Carolina; three, that the paper work, photographs and documentation in the Genetic Design file accurately reflects the facts regarding these events; four, that Lori McRae did not have a twin sister or brother.[4] (XVIII/964-65)

Dr. Beaver testified that based upon "reverse parentage analysis", the odds were 15,543 to 1 that Lori was the biological

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[3]When the defense expressed its desire to use Jackie as a Penalty Phase witness, it requested to know where she was being housed by the State (XVIII/948). Mr. Phillips related: "The witness has received threats from this Defendant and does not wish to let him know her address." (XVIII/948-50)

[4]A mini-Frye hearing was conducted to the second stipulation, in which Dr. Beaver verified the results of the "reverse parentage analysis" done in this cause (XVIII/967-87). The trial court's ruling concerning this DNA evidence remained the same (XVIII/987).

child of Russell and Shirley Brenner (XIX/1049). Diane Hanson, FDLE DNA expert, testified Lori's blood was found on her green jacket and Jones' jeans, with the frequency likelihood that such was her blood of .062% in the white population and .0032% in the black population (XIX/1092-93).

Michael DeGuilliamo, former DNA expert from Genetic Designs Laboratory, testified based on DNA testing of Lori's bone and tissue, the statistical frequency with regard to the blood found on her jacket and Jones' jeans was 1 in 24,251,153 in the North American Caucasian population (XIX/1147). If he calculated the frequency using only the U.S. Caucasian population it "would increase the number 31.25 fold," or "[i]n other words, it would go from 1 in 24 million to approximately one in 757 million." (XIX/1148)

Dr. Chakraborty's testimony was presented via videotape (XX/1181-1243). One of two population geneticists on the National DNA Advisory Board, he validated the FDLE and Genetic Design DNA test results (XX/1185-86, 1207-1224). However, he noted that Genetic Design's reverse parentage determination was "too conservative," in that it had used the ceiling principle, which is not a scientifically valid method (XX/1224). If one applied the "modified product rule," which is scientifically accepted, the odds become 35,000 to 1 that Lori was the Brenners' biological child (XX/1224-26). As concerns Lori's blood found on her green jacket

and Jones' jeans, his tabulations for the U.S. Caucasian population were 1 in 900 million, with a range of 1 in 87 million to 1 in 9 billion (XX/1218-19).

Correctional officer Scott Guest, testified that fellow officer Troy Vonk told him on February 21, 1995, that Jones "wanted to tell where the body was." (XX/1245) They immediately informed their supervisor, Sgt. Beverly Frazier (XX/1245). Jones was crying and kept saying, "I have to tell, I have to tell." (XX/1246)

Sgt. Frazier testified Jones told her he had spoken to his mother on the phone, and she had told him to "get things right, if he knew where the body was." (XX/1251) She advised him of his rights, and waited for Det. Parker, who he had requested to see (XX/1252) She was present when Jones confessed to Detective Parker:

> Q Please tell the jurors what you heard this defendant say.
>
> A Okay. He said he wanted to get everything right with God, he couldn't take it any longer. He said that he met the girl at Winn-Dixie parking lot, she was having car problems, that he approached her, he said that he put his arms around her neck and choked her and he thought she was dead, put her in her car and drove her someplace and set her beside the road somewhere. Thought it was Callahan, I believe he said. (XX/1255)

Troy Vonk testified he was making his rounds when Jones, looking "very distraught," said: "I need to confess and I need to tell where the body is." (XX/1262) Officer Vonk immediately told Sgt. Frazier (XX/1263). Later, under Sgt. Frazier's orders, he

conducted a strip search of Jones in preparation for Det. Parker's arrival (XX/1264) At that time, which was after Sgt. Frazier had read him his rights, Jones said: "Do you think if I tell where the body is, do you think they can get me to have a conference with my mother?" Officer Vonk said that was not up to him, and asked Jones if he killed Lori (XX/1266). Jones responded: "Yes, I did." (XX/1266) Jones told him where the body was and how he choked Lori (XX/1266). He said: "I saw her in the parking lot and I walked up to her and choked her and threw her in the back seat." (XX/1267) Jones said he had to get rid of the body and got lost (XX/1268).

Det. James Parker was the lead homicide investigator on Lori McCrae's disappearance (XX/1276-79). He reported to the scene of Jones' arrest and observed that Jones was "[a] little nervous, unkempt [and] ... scratched up." (XX/1283) Jones denied any involvement in Lori's disappearance and murder during his first interview (XX/1291-1322).

Jones alleged that he stole Lori's Blazer and cards "from a guy named Mark", sometime Monday morning (XX/1291). "Mark," was a white or half [meaning half-Hispanic], asked him if he wanted to make some money, and showed him an ATM card (XX/1295). Jones alleged Mark drove up in a "sports car" (XX/1295). Jones slipped up for the first time when he said he got in the Blazer he was arrested in (XX/1296) Jones said he received the scratches in a fight with 2 or 3 black guys at Moncrief and U.S. 1, when he was

robbed of $160.00 (XX/1300-02). Jones said the altercation occurred around 3:30 a.m. (XX/1301-02).

At the first interview, Jones twice related he was glad he had been caught (XX/1293, 1302-03). He said he was "a little tired" (XX/1303). He further said crack made him "paranoid," but he knew what he was doing (XX/1304). Det. Parker repeatedly attacked Jones story, and ultimately Jones said: "I don't give a fuck about this woman." (XX/1318) When Jones was again accused of receiving the scratches when he abducted Lori, he replied: "I had the scratches on my face in Callahan." (XX/1319) However, Parker had said nothing about Callahan when he mentioned the scratches (XX/1319). Jones claimed he would not kill a woman to get her truck and ATM card (XX/1320-22). The first interview was terminated when Jones indicated he did not want to answer any more questions and that he wanted to talk to his lawyer (XX/1321-22).

On February 17, 1995, Jones attempted to contact Det. Parker, but he was out of town (XX/1329). When he returned, his partner Det. Gilbreath informed him of such, and Det. Parker went to see Jones on February 21, 1995, between noon and 2:00 p.m. (XX/1329). Jones said he wanted to talk about the incident and would be willing to help in any way he could (XX/1331). Instead, Jones lied again, saying his friend, Jamie Trout, was involved in Lori's disappearance (XX/1331-32). Jones expressed his belief that Trout murdered Lori, and disposed of her body, although he was not with

Trout when he did it (XX/1322-33). Jones told him to look for the body near a concrete factory (XX/1332-33). Det. Parker went to look for Lori but couldn't find her (XX/1333). He was on his way back to his office when he was told Jones wanted to talk to him again (XX/1333-34). It was sometime after 6 p.m. (XX/1334).

Before speaking with Jones for the third time, Det. Parker was told by Sgt. Frazier that Jones had been advised of his rights (XX/1335). Det. Parker testified:

> A He looked at me and he said, "I killed her and I want to talk [to] you" --I'm sorry -- "I want to tell you where the body is at." I then requested Sgt. Frazier to stay with me because we were right there in the little hallway and we stepped into one of the little interview rooms right by the control room and I said, "Stay with me." We went in there and he then said, "I did it and it was an accident, I didn't mean to do it, and I want to get right with the Lord." (XX/1336)

Jones also said: "She was talking with me at the Win-Dixie by her truck and I grabbed her and choked her and I guess I choked her to death. I put her in the back seat and I have not told anyone else and I want to take you to where the body is." (XX/1337) Jamie Trout was not mentioned (XX/1337).

Before taking Det. Parker to find the body, Jones said he was hungry, so they stopped at a Burger King (XX/1339-40). When they finished eating, Jones directed them to the body (XX/1340). As they drove to the location, Jones said: "She parked by my car and she was trying to get in her truck and I tried to get a hold around her and she then gave me the code number and she tried to resist me

and she passed out or died, I guess." (XX/1340) He further related: "I came out to Callahan to try the card and she was in the car, but she was dead. I ***think*** she was dead." (XX/1340) Lori's body was 50 or 60 miles from downtown Jacksonville, beyond the Duval County line, but Jones directed Det. Parker to its exact location (XX/1341-44). The body could not be seen from the road (XX/1344).

Det. Bolena accompanied Det. Parker and Jones in their search for Lori's body (XX/1379). He testified about the comments Jones made in the car as they drove toward the site of her body, and he was present when she was found (XX/1379-85). After her body was found, he drove Jones back to the jail (XX/1386). Jones made a couple of comments about drug use and that he thought about leaving town (XX/1386).

Bailiff Harry Baker testified he overheard Jones talking to Olie Antonio about a week after Lori's body was discovered (XX/1392). Jones said: "The only reason why I showed them where the body was, was I hoped that they would go easier on me." (XX/1392) The jury found Jones guilty of capital murder, robbery and kidnaping (XX/1516-17).

B. <u>Penalty Phase</u>

John Bradley, private investigator, testified he was the lead detective for the murder of Jasper Highsmith in January of 1986

(XXIV/1647). Jones was arrested for this murder (XXIV/1648-49). On January 26, 1986, Jones escaped from jail in Duval County (XXIV/1650). He was not seen again until February 3, 1986, when he was arrested in Spartanburg, South Carolina (XXIV/1650). Mr. Bradley read Jones' statement made on February 6, 1986 (XXIV/1654-56). Jasper died as a result of "trauma to the head and stab wounds to the chest." (XXIV/1656-57)

Det. Hall of the Spartanburg Police Department testified as to the arrest of Jones for shoplifting on February 3, 1986, and the discovery of Jasper Highsmith's dead body in the trunk of the car Jones was driving (XXIV/1663-65). Jasper died as a result of a stab wound to the left chest area (XXIV/1665). Det. Hall read Jones' statement given that day (XXIV/1669-73). One of the photos taken of the deceased exhibited his hand was deformed (XXIV/1676-77).

The victim impact statements of Melissa Leopard, Lori's sister, and Doug McRae, Lori's husband, were published to the jury by the prosecutor (XXIV/1679-83). Another sister, Jody Brenner-Burney, took the stand, and testified about a drawing Lori's daughter, Amanda, 4-years-old, had made at preschool (XXIV/1684-85). At the bottom, Amanda's teacher, Barbara Bower, had written: "My dream is that mommy came back, I gave her a big hug and I cry." (XXIV/1684-85). Jody read her victim impact statement to the jury (XXIV/1685-88).

Given the length of this brief, the State will refrain from relating Jones' mitigation, as he has presented it in his initial brief at pp.21-31. The State would only observe that neither of Jones' mental health experts had done a complete clinical evaluation of him. Dr. Risch only tested his I.Q., and admitted Jones did not try very hard when he took the standardized tests, actually giving up at one point (XXV/1886-88). The other expert, Drew Edwards, a drug rehabilitation counselor, testified as to the effects of crack cocaine, but admitted there was no evidence Jones was high on crack at the time of the murder, and in fact the evidence showed he was not (XXV/1907-34, 1936-65).

SUMMARY OF THE ARGUMENT

I.

The trial court correctly exercised its wide discretion in matters pertaining to the admission of evidence, where it found Jones' statements were knowingly, freely, and voluntarily given. Jones' confession came after he had reinitiated contact with the police.

II.

Given the fact Jones confessed to the robbery, kidnaping and murder of Lori McCrae subsequent to his invocation of rights in his first interview, Detective Parker's comment was harmless error.

III.

Jones attempted to make his racism an issue at trial but to no avail. He repeatedly used a racial slur during his first interview with Detective Parker, but the word was not used at trial, even though it was his own expression. His spider web tatto was a distinctive identifying mark on Jones person that two witnesses had observed. There was never any evidence produced that the jury was tainted by this tattoo, and it was not used by the State for any purpose other than identification.

IV.

Jones' fourth claim is procedurally barred. The circumstances surrounding the murder of Lori McCrae provide ample evidence in support of either premeditated or felony murder, and the jury was

properly instructed on both theories.

V.

Dr. Eaton desired to identify himself only by his first name, and to testify over the telephone. He had no knowledge of the facts of the case, including whether Jones was using crack at the time of the murder. His testimony was purely about his personal experiences on crack. The trial court correctly exercised its discretion.

VI.

There was no error in allowing testimony regarding Jones' prior conviction for murder, as it was highly relevant to the jury's assessment of his character and the circumstances of the crime.

VII.

Jones attempted to elicit inadmissible hearsay from Jones' lawyer from his first murder conviction. Rather than call the author of the reports, Dr. Miller, he sought to admit them through Michael Edwards. The reason is obvious: Dr. Miller would have testified unfavorably about him. Jones was exmained pretrial for competency to proceed, and Dr. Barnard found he was malingering.

VIII.

Lori was murdered to avoid arrest. She was abducted, tortured until she divulged her PIN number, driven to a remote location and murdered.

IX.

The trial court correctly denied Jones' co-counsels' motion to withdraw. He never expressed he was dissatisfied with them, that there was a conflict of interest, or that he wished them discharged and new counsel appointed.

X.

Victim impact is constitutional as determined by the United States Supreme Court and this Court.

XI.

The trial court's misreading of the HAC instruction was harmless error. The proper written instruction was provided to the jury during deliberations. The current standard HAC instruction has been repeatedly upheld against constitutional attack.

XII.

The jury was properly instructed upon and the trial court properly found Lori's murder occurred during a kidnaping and robbery.

XIII.

Death by electrocution is not cruel and unusual punishment. Although Jones does not argue proportionality, death is proportional in this case.

ARGUMENT

ISSUE I

THE TRIAL COURT CORRECTLY EXERCISED ITS WIDE DISCRETION IN MATTERS PERTAINING TO EVIDENCE WHERE IT RULED JONES' STATEMENTS WERE ADMISSIBLE.

In *Durocher v. State*, 596 So.2d 997 (Fla. 1992), this Court observed:

> In *Edwards v. Arizona*, 451 U.S. 477, 484-85 ... (1981), the Court held that someone who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself ***initiates*** further communication, exchanges, or conversations with the police." Therefore, "*Edwards* does not foreclose finding a waiver of Fifth Amendment protection ... provided the accused has ***initiated*** the conversation or discussions with the authorities." *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 492 ... (1990).

Id., at 1000. In this cause, the facts demonstrate that "[Jones] ***voluntarily initiated*** communication with [Detective Parker]." *Morgan v. State*, 639 So. 2d 6, 11 (Fla. 1994); *See also, Traylor v. State*, 596 So. 2d 957 (Fla. 1992); *Durocher v. State, supra*, at 1000; *Stein v. State*, 632 So. 2d 1361, 1364 (Fla. 1994).

One of the criteria, albeit not the only one, for determining the voluntariness of a defendant-initiated confession is "whether a sufficient period of time elapsed since the termination of police questioning for the defendant to have rationally reflected on the choice before him." *Henderson v. Singletary*, 968 F.2d 1070, 1074 (11th Cir. 1992). Jones' first interview with Detective Parker

occurred on February 1, 1995. He did not speak with Jones again until 20 days later, February 21, 1995, and only at Jones request.

The facts in this cause also demonstrate that Jones statement the afternoon of February 21, 1995, that he wanted to talk to his mom, his attorney, and Detective Parker, did ***not*** constitute "an unambiguous or unequivocal request for counsel," as required by the dictates of *Davis v. United States*, 512 U.S. 452, 461, 114 S.Ct. 2350, 2356, 129 L.Ed.2d 362 (1994); *See also, State v. Owen*, 696 So.2d 715 (Fla. 1997).

This Court has repeatedly opined:

> A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness and the court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. *McNamara v. State*, 357 So. 2d 410, 412 (Fla. 1978).

Rolling v. State, 695 So. 2d 278, 291 (Fla. 1997); *See also, Owen v. State*, 560 So. 2d 207 (Fla. 1990). In this cause the trial court found:

> THE COURT: All right. As to the motion to suppress statements and admissions made by the defendant[,] I deny that. I think that all the contact that was made by the defendant was initiated and the police was initiated by the defendant himself. I don't think there's been any wrong doing on behalf of the Sheriff's Office or the corrections officers. Each time the contact came about it directly resulted from the contact made by the defendant Jones, and each case throughout these proceedings he was advised of his rights in addition to all these other times exhibits one, two and five which has been part of this hearing he acknowledged in writing that he

understood his constitutional rights, so motion to suppress denied. Thank you. (I/37-43; VIII/1426)

The facts as elicited at the suppression hearing conducted August 11, 1995 and September 1, 1995 were as follows (VII/1230-1381; VIII/1386-1426). Detective (henceforth Det.) Parker of the Jacksonville Sheriff's Office (henceforth JSO) testified he became involved with the disappearance of Lori McRae on the last day of January, 1995 (VII/1235). His first face-to-face encounter with Jones was the next day, February 1, 1995, when he was arrested in Lori's car (VII/1236). He later advised Jones of his Miranda rights by form, which Jones executed, and interviewed him concerning Lori's disappearance (I/38; VII/1239).

Initially, at the February 1st interview, Det. Parker observed Jones "had a lot of tattoos," and "was scratched in the face, badly." (VII/1240) Jones did not appear to be under the influence of anything and denied that he was (VII/1240). He was coherent and did not appear deranged (VII/1241). Jones never requested an attorney until the end of a statement he made of some length, at which point he indicated he did not want to answer any more questions, and Det. Parker ended the interview (VII/1242).

Det. Parker did not have contact with Jones again until February 21, 1995 (VII/1244). Earlier, Jones had contacted Det. Gilbreath and indicated he wanted to speak to Detective Parker (VII/1244). Det. Parker testified he would not have gone to see Jones, if the latter had not reinitiated contact (VII/1245). Jones

said he wanted to talk to him; Det. Parker said he could not; Jones insisted (VII/1245). Det. Parker advised him of his *Miranda* rights, Jones indicated he understood them, and still said he wanted to talk (VII/1246).

Jones was taken to the JSO homicide office where he gave a statement implicating someone other himself, and described where Lori's body could be found (VII/1246). He denied murdering her (VII/1246). He did not appear to be under the influence of narcotics, nor was he intoxicated (VII/1247). He did not appear mentally deranged (VII/1247). He spoke in a clear and logical manner (VII/1247). He never said he wanted a lawyer (VII/1248). Det. Parker went in search of Lori's body but could not find it (VII/1248).

Five or six hours later, Det. Parker returned to the jail because he had received several pages, calls and requests to return to the jail to speak with Jones (VII/1249). When Detective Parker arrived, he spoke briefly with Sergeant (henceforth Sgt.) Beverly Frazier, who told him Jones wanted to talk to him, and that he wanted to tell him where the body was (VII/1249). Det. Parker approached Jones, and he immediately started talking (VII/1251). Det. Parker told Jones to hold on and asked him if he had been read his rights. Jones responded that he had by Sgt. Frazier (VII/1251). Jones "was lucid, coherent and logical." (VII/1252) Det. Parker did not coerce, threaten or promise Jones anything in

return for his statements (VII/1253).

Det. Parker testified, "he told me that he wanted to tell me about where the body was at and that he killed her and he needed to get it off his chest and get right with the Lord." (VII/1254) Jones offered to show where Lori's body was, and Det. Parker took him up on the offer (VII/1255). While in the patrol car, on the way to the scene where the body was found, Jones indicated his friends had warned him not to talk, but he "wanted to get right and he directed us right there." (VII/1256) At the scene where Lori's body was found, Jones completed a *Miranda* rights waiver form (I/43; VII/1257-60).[5]

Det. Parker acknowledged that he had received a letter from Jones' counsel, Mr. Buzzell, on 2/8/95 (I/41-42; VII/1262). Once Det. Parker received this letter, he stayed away from Jones, until Jones requested to see him (VII/1262). Under cross-examination, Det. Parker testified the first time he saw Jones on 2/21/95, was around 1:00 p.m., and he talked to him for about 30 minutes (VII/1265-66). The next time he saw Jones was later that day, around 6:45 p.m. (VII/1265-66). Det. Parker did not recall any conversation with Jones about his mother, only about the location of Lori, that he had killed her, and that he was sorry (VII/1269).

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[5]This form was executed at 9 p.m., 2/21/95. It contains Jones' handwritten notations that he was "not drinking or using drugs today;" that he would "like to see the family and I'm sorry;" and finally, that he was "advised of rights in jail earlier when I requested to speak with Detective Jim Parker." (I/43)

He was never advised by Sgt. Frazier, as she placed in her report, that Jones asked to talk to his mother, his attorney, and Detective Parker (VII/1270). Nor did Officer Vonk so advise him (VII/1271).

Det. Gilbreath testified he came in contact with Jones on 2/17/95 (VII/1276). He was present at Jones' initial interview on 2/1/95 and took a lot of notes (VII/1277). Det. Parker did most of the questioning (VII/1277). Jones wasn't mentally deranged (VII/1277). He was coherent and understood Det. Parker's questions (VII/1278). Jones' first interview ended when he expressed he did not want to talk anymore (VII/1278). At this first interview, Jones denied responsibility for the murder, but admitted he stole the victim's vehicle and ATM card (VII/1278).

On 2/17/95, Det. Gilbreath went to see Jones in response to his call "that he wished to speak with Det. Parker." (VII/1279) Jones also expressed that he did not want to talk to Det. Gilbreath (VII/1279). Det. Gilbreath related that Det. Parker was out of town, and Jones told Det. Gilbreath to contact him when Det. Parker returned (VII/1280). Det. Gilbreath left (VII/1280). No information was gathered from Jones on 2/17/95.

Sgt. Chris Parker, no relation to Det. Parker, testified that on 2/17/95 Jones had said he wanted to call the homicide division (VII/1292-93). "He wanted to talk to Det. J. A. Parker." (VII/1293) Sgt. Parker called homicide, spoke with Det. Gilbreath, and Det. Gilbreath showed up at the jail twenty minutes later

(VII/1295). Jones insisted on talking only to Det. Parker (VII/1296). Jones was not crying or upset in any way (VII/1296). He was "calm" (VII/1296). Det. Gilbreath was still forty feet away from Jones when Jones said he didn't want to talk to him (VII/1298).

Sgt. Beverly Frazier testified she was on her rounds on 2/21/95, when Jones indicated it was urgent, he had talked to his mom and his mom told him to confess or to show them where the body was (VII/1307). Jones said, "...he wanted to talk to his mom. He wanted to talk to his attorney. He wanted to talk to Det. Parker." (VII/1308) Jones was crying, saying he couldn't take it any more, and that "he just wanted to show them where the body was." (VII/1308) Sgt. Frazier provided Jones his rights by memory, and Jones never repeated that he wanted to speak with his lawyer (VII/1308-10). She told him he had the right to make a phone call after he expressed his need to speak with his mom, his lawyer, and Det. Parker (VII/1310). Jones asked her to contact Det. Parker, which she did (VII/1310-11). Other than the fact that Jones was upset and crying, he did not appear deranged or crazy (VII/1312).

Sgt. Frazier was present when Det. Parker asked Jones if he had been advised of his rights, and Jones responded that she had done so (VII/1315). Jones further expressed that he understood his rights, "but it didn't matter, he just couldn't handle it any more." (VII/1315) She heard Jones tell Det. Parker he "choked her

and he guessed he killed her." (VII/1315) Jones kept saying "that he had to get all this straight with God." (VII/1316) Jones said "he would have to show them where the body was." (VII/1316) Jones was escorted to the homicide division (VII/1316).

Under cross, Sgt. Frazier testified she was working the 3:00 [p.m.] to 11:00 [p.m.] shift (VII/1317). Jones kept saying he wanted to talk to his mom, his attorney, and Det. Parker (VII/1324). Jones never said: "Sgt. Frazier, I want to talk to my attorney." (VII/1325) Jones had used the phone at 6:05 p.m., prior to his talking to her at 6:19 p.m. (VII/1327). He did not request to use the phone after she advised him of his rights (VII/1327). There were three phones accessible to him, and there was nothing preventing him from using one of them after he had been advised of his rights (VII/1329, 1331-32)

Correctional Officer Guess was making his rounds when Officer Vonk told him Jones "wanted to tell where the body was." (VII/1336-37) They told their supervisor, Sgt. Frazier, who began her rounds (VII/1337).

Correctional Officer Vonk testified when he first made contact with Jones, Jones said he needed to confess, to tell where the body was (VII/1344-45). He immediately told Sgt. Frazier, and he heard her over the intercom in the control pod read Jones his rights (VII/1345-46). Sgt. Frazier returned to the pod and ordered Vonk and Guess to keep an eye on Jones (VII/1346). Jones was distraught

(VII/1346).

Officer Vonk was ordered to strip search Jones in anticipation of Det. Parker's arrival (VII/1347-49). Jones asked Officer Vonk: "If I tell you where the body was now and how to find it, can I speak to my mother?" (VII/1349) As Officer Vonk completed the strip search, Jones began telling him what happened (VII/1350). After he admitted killing the victim, Jones mentioned that he wanted his attorney to arrange for him to see his mother (VII/1351). Jones told him the body was in Callahan (VII/1357-58).

Det. Parker was recalled, and testified that he was not told before he spoke with Jones, the second time he saw him on 2/21/95, that Jones had mentioned his attorney (VII/1390-91). Det. Parker did not find this out until he read Sgt. Frazier's report two weeks or so after Jones showed him where the body was, and was surprised when he read this (VII/1391).

These facts clearly demonstrate that not only is the trial court's ruling on Jones' motion to suppress his statements presumed to be correct; it is in fact correct. There was no wrongdoing by either homicide detectives or correctional officers. On 2/1/95, the day he was arrested, he executed a *Miranda* rights waiver form, before he was interviewed by Det. Parker. Jones gave a lengthy statement and then indicated he did not want to answer any more questions. The interview was terminated.

Initially, Jones reinitiated contact with homicide on 2/17/95.

Det. Gilbreath went to see him, but before he was within 40 feet of him, Jones told him he would only speak with Det. Parker. So, Det. Gilbreath left. On 2/21/95 Det. Gilbreath conveyed Jones' message to Det. Parker, and he went to see him around 1:00 p.m.. Jones said he wanted to talk to him, Det. Parker said he could not, but Jones insisted. Det. Parker advised him of his *Miranda* rights, and Jones provided another bogus statement. While he was out futilely searching for Lori's body, he was contacted several times, and informed that Jones wanted to talk to him again.

Prior to his arrival at the jail for his second encounter with Jones, Sgt. Frazier advised Jones of his *Miranda* rights. Jones had said to her that he wanted to talk to his mom, his attorney, and Det. Parker. However, after he was advised of his rights by her, Jones never asked to speak with his attorney.[6] Prior to his divulging the location of Lori's body, at 9 p.m., 2/21/95, he executed another *Miranda* form.

The trial court correctly exercised its wide discretion in matters pertaining to evidence in allowing all of Jones' statements into evidence. This Court should affirm its denial of Jones' motion to suppress his statements.

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[6]The fact that Jones wanted to talk to his lawyer at some time was not an invocation of his sixth amendment right to counsel prior to his speaking with Detective Parker, particularly in light of the the fact that he was advised of his rights prior to Det. Parker's arrival.

ISSUE II

DETECTIVE PARKER'S INADVERTENT COMMENT WAS HARMLESS ERROR BEYOND A REASONABLE DOUBT BECAUSE JONES CONFESSED TO ROBBING, ABDUCTING, AND MURDERING THE VICTIM.

This Court has opined "that the fact a suspect ceased answering all further questions after answering some is a circumstance not subject to comment." *State v. Rowell*, 476 So. 2d 149 (Fla. 1985). If a comment is found to be "fairly susceptible" of being interpreted as a comment on silence, it is subject to harmless error analysis. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

> The harmless error test, as set forth in *Chapman*[7] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively state, that there is no reasonable possibility that the error contributed to the conviction. *See Chapman*, 386 U.S. at 24, 87 S.Ct. at 828. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

An examination of the entire record in this cause clearly demonstrates Detective Parker's comment did not present "a reasonable possibility that the error affected the verdict," because he later testified as to Jones' confession to robbing,

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[7]*Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.

abducting, and murdering Lori McRae. *Id.*, at 1139; *See Dolinsky v. State*, 576 So. 2d 271, 273 (Fla. 1991)(Murder defendant was not prejudiced by police detective's remark that he had read defendant his *Miranda* rights and defendant had refused to answer any questions; subsequent police witness testified that defendant had in fact answered a question concerning his identity.); *See also, Jackson v. State*, 522 So. 2d 802 (Fla. 1988)(Police detective's statement was fairly susceptible of being interpreted as a comment on defendant's failure to offer any plausible alibi at the time of his arrest, but was harmless error where record showed evidence discrediting the testimony of each of the defendant's alibi witnesses.).

The comment below was as follows:

> Q Were those his words, "I would never a woman"?
>
> A Yes.
>
> Q Now --
>
> A I then asked --
>
> Q Go ahead. Did you ask him to clarify that?
>
> A Yes. I asked him, "You wouldn't kill a woman to get the truck and the card because somebody scratched you?" He replied, "I wouldn't do it." He further replied, "***I want to stop talking and I want a lawyer.***"
>
> Q All right. Now, at that point did you --
>
> MR. BUZZELL: Your Honor, I object. I move for a mistrial. That's a comment on the exercise to his right to remain silent and his right to counsel.

THE COURT: Thank you. Overruled. (XX/1322)

Later, at a sidebar, when the State suggested providing the jury with a curative instruction regarding the comment, Mr. Buzzell argued:

> Your Honor, we would object to a curative instruction. It's like five or ten minutes after the event. I think the Court even telling them to disregard it now would just further emphasize it to the jury. I think the error has been done. You've heard this whole thing before, but I can't say it any better. Your can't unring the bell. (XX/1327-28)

Since Mr. Buzzell did not request a curative instruction at the time he objected to the comment, it is safe to assume that he did not want to emphasize the comment. The trial court, who had already entertained and conducted a hearing on Jones' motion to suppress his statements, knew Jones subsequently confessed to the robbery, abduction and murder on February 21, 1995, and led Detective Parker to Lori's body in an isolated, wooded area. *See Dolinsky v. State, supra*. Given Jones subsequent confession, there is not "a reasonable possibility that the error affected the verdict." *State v. DiGuilio, supra*, at 1139. The error was harmless beyond a reasonable doubt.

ISSUE III

A RACIAL SLUR USED BY JONES, HIMSELF, DURING HIS FIRST STATEMENT TO POLICE WAS NOT USED BEFORE THE JURY AT HIS REQUEST, AND HE NEVER PRESENTED ANY EVIDENCE THAT HIS SPIDER WEB TATTOO WAS EXHIBITED FOR ANY PURPOSE OTHER THAN IDENTIFICATION.

This Court has opined:

> Finally, we reject as meritless Robinson's contentions that his ***own statement*** to the police officers ***should have been edited.*** In giving ***his version of the events,*** Robinson told police investigators that he had to shoot St. George a second time, and explained: "How do you tell someone I accidentally shot a white woman." Robinson now suggests that the word "white" should have been excluded to avoid the risk of racial prejudice. We find no error.

Robinson v. State, 574 So. 2d 108, 113 (Fla. 1991). Jones attempted throughout his trial to create a racial issue that simply was not present.

In his first interview with Detective Parker on February 1, 1995, he claimed the scratches on his face came from a fight he had with African-Americans (XX/1273).[8] However, Jones used a racial slur several times while describing the altercation. Jones' ***own word*** for African-Americans was never used before the jury, pursuant to his request. The spider web tattoo he had on his elbow

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[8]At that same interview, Jones would slip up and say he got the scratches on his face before his wife was arrested in an altercation with a dude at the Spindrifter in Orange Park (XX/1319). Jones also slipped up when he told Detective Parker: "I had the scratches on my face in Callahan." (XX/1319) Detective Parker never asked Jones anything about the scratches in relation to Callahan (XX/1319).

was highly relevant because of its distinctiveness, as two witnesses identified him by it.

First, prior to Detective Parker testifying at trial, the State raised the following matter in the jury's absence:

> MS. COREY-LEE: Your Honor, it's my understanding that the defendant made at least an oral motion in limine in regard to some of these defendant's statements, specifically with regard to the use of the word, and I'm quoting, "nigger". I don't like that word, none of us like that word. Detective Parker doesn't like that word, but I think in order for this jury to understand this defendant's attitude, his comments, his demeanor throughout the statements he made to Detective Parker that he has to use that word. (XX/1270).

The defense argued the Jones' slur was irrelevant, "a charged word" and, therefore, prejudicial (XX/1272). The trial court ordered the State to limit the use of the word, and when the defense requested clarification as to the meaning of "limit it", stated:

> THE COURT: I think it's pretty clear. What I mean to say is he uses the word one time, there's no need to constantly refer to it after that. He can refer to black or however you want to describe. Okay. (XX/1274)

In fact, despite the trial court's ruling that the word could be used one time, it was never used:

> Q Did he tell you where he went after that?
>
> A Yes. He said that he got back in the vehicle and drove to U.S. 1 and Moncrief and stopped at U.S. 1 and Moncrief Road.
>
> Q Let me stop you here and just ask you, at that point did the defendant use a derogatory term to describe some men that he had run into?

A Yes.

Q All right. Can you just explain that term to the jury and then we won't use it again.

A Well, he was talking about black guys. He was using a racial term.

Q And he used a racial slur?

A Yes, he did.

Q All right. Now, other than the actual slur itself, can you tell us exactly what he told you, and we will just say --

A Okay.

Q Why don't you just use the term black males and the jury will understand every time this defendant uses black males--

MR. BUZZELL: I object to her characterization of this again. She's commenting on the evidence. I renew my objection, I move for a mistrial again. This is totally unnecessary. The only reason for it is to prejudice the jury against my client. It's not probative of anything.

THE COURT: Thank you. Overruled.

BY MS. COREY-LEE:

Q Can you give us the quote without using the word?

A "I got in a fight with some black guys at Moncrief and U.S. 1." Two to three of the black guys had told him to get out and he was acting like he was going to use the phone. They robbed him of a hundred and 60 dollars. (XX/1301)

In light of *Robinson v. State, supra*, at 113, Jones' ***own*** expression for African-Americans could have been used when Detective Parker was testifying as to Jones' ***version of events***.

However, unlike *McBride v. State*, 338 So. 2d 567 (Fla. 1st DCA 1976), cited as authority by Jones' in his brief, it was never spoken. Further, Detective Parker's testimony was brief on this matter, and not a deliberate appeal to racial prejudice as was the cross-examination of Dr. Krop in *Robinson v. State*, 520 So. 2d 1 (Fla. 1988), in which the prosecutor deliberately insinuated before an all-white jury that the black defendant preyed on white women.

If deemed error, Detective Parker's discrete reference to a "racial term" which Jones in fact used several times during his first interview, was most certainly harmless beyond a reasonable doubt. *See Hill v. State,* 515 So.2d 176, 178 (Fla. 1987), *cert. denied*, 485 U.S. 993 (1988). Further, as the State argued below, Jones could have screened potential jurors as to their sensitivity to this word during jury selection.

The matter of the Jones' ***spider web tattoo*** arose by his motion prior to the testimony of David Marsh on that subject:[9]

> MR. CHIPPERFIELD: Your Honor, that's enough of a proffer unless the State has any further questions.
>
> Our objection to that testimony is that it is ***certainly relevant***, there's no question about that because ***it goes to identification, and I don't question that at all;*** but our issue is under 90.403 of the evidence code.
>
> The evidence can be outweighed by the danger of

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[9]David Marsh and Leonard Hutchins were co-owners of a car detailing business, which Jones entered January 31, 1995, driving Lori McRae's red Blazer. He asked them to detail the inside of the vehicle for $5.00. When they refused, he sped off. (XVII/662-91)

> prejudice, confusion of the issues; and that's the problem here.
>
> Very recently in the news there's been a lot of news about spider web tattoos on elbows, there was a trial of this fellow named James Bernmister (phonetically) up in the Carolinas that received an awful lot of publicity. He was the military guy who was charged with murder, and the publicity included the fact that he was racist, that he was white supremacist and he was out to do a murder in order to get a spider web tattoo which would prove he had killed a black person.
>
> I have just as part of this objection --
>
> THE COURT: Are you suggesting that all spider web tattoos stand for that proposition?
>
> MR. CHIPPERFIELD: That is what this publicity that was generated during that case suggests. (XVII/666-67)

Mr. Chipperfield placed three articles from local newspapers related to the matter in the record. The Court observed: "This case ... in North Carolina [was] racially motivated, we don't have that issue in this case." (XVII/669) Mr. Chipperfield agreed: "No, not at all but the danger is the significance of the tattoo is that the wearer of the tattoo has killed a black person and can prove it." (XVII/669)

The Court asked Mr. Chipperfield what proof he had to support his contention:

> THE COURT: I understand where you're coming from on this argument here in North Carolina but ***is there something that you have to present to me that shows that anyone with that kind of tattoo only earns it by way of killing a black person***?
>
> MR. CHIPPERFIELD: That's the ***suggestion*** that was

made in this publicity. (XVII/669-70)

Later, Mr. Chipperfield again conceded that "it's clearly relevant evidence we don't dispute that... ." (XVII/670) The Court observed as to Mr. Marsh, "part of his recall of this defendant as far as identification goes is that the tattoos stood out in his mind."[10] (XVII/670)

The State's argument was as follows:

> MR. PHILLIPS: Well, I have a couple of problems with his analysis. First of all, there's no showing whatsoever that anybody with a spider web tattoo is therefore in this club of people who have murdered black people.
>
> Secondly, I've never heard that suggested that would be the case by anybody.[11]
>
> Thirdly, if they were worried about it as much as they say they are, they could have raised it in jury selection and dealt with it then, we could have excluded from the jury anybody who knew anything about this, we could have addressed that with individual voir dire on the publicity about web tattoos.
>
> Finally, this is a very relevant piece of evidence, it's not -- this is not a question of marginal relevance versus a lot of prejudice. I mean, ***a spider web tattoo is a distinctive tattoo and it corroborates his identification.***
>
> We've got a photo spread identification, true, but the spider web tattoo is not in the picture that was used in the photo spread, and therefore, you know, we're open to the suggestion later that

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[10]Earlier, Mr. Marsh had testified that Jones had tattoos on his arms, and bad acne scars or scratches on his face.

[11]This was the first time undersigned counsel ever heard such a thing.

his identification is mistaken because, you know, all he's got is a face. And now that he's -- if I'm not mistaken he's already said that the man had tattoos at this point is, I think, going to have somewhat of a prejudicial effect for us. So this is a very relevant piece of evidence and we do need to put this in.

I don't have any plans whatsoever to suggest that the spider web tattoo is in anyway aggravation later and I'm not going to suggest that there is a racist organization that he belongs to. I just don't see that this objection is well founded.

And while we're out here and the jury is not here, I did plan to ask the defendant to display his arms at this point or in the near future. We have pictures of him with tattoos from the front but we do not have any pictures of him that show this particular spider web tattoo. (XVII/671-72)

Naturally, Jones objected to the exhibition of his tattoos, but Mr. Buzzell candidly conceded that *Gorby v. State*, 630 So. 2d 544 (Fla. 1995) "says that directing the defendant to display his tattoos for several witnesses did not amount to impermissibly compelled testimony." (XVII/675)

Mr. Marsh subsequently testified:

BY MR. PHILLIPS:

Q Mr. Marsh, I think I just asked you if there was anything distinctive about any of the tattoos that you noticed.

A Sir?

Q Did you notice anything about any one of the defendant's tattoos?

A Yes, sir, he had a spider web tattoo on his arm. (XVII/678)

Q And could you describe the tattoo a little bit

more?

> A It was a dark colored spider web tattoo, it was on like part of his elbow and his forearm right here, the webs on it was sort of thick, they weren't real thin like you see a spider web on the wall, it's a little thicker. (XVII/678-79)

After Mr. Marsh's cross-examination, Jones displayed his tattoos, including the spider web, to the jury (XVII/684-85) Leonard Hutchins, Mr. Marsh's partner, testified similarly as to the spider web (XVII/688).

The next time the spider web tattoo issue came up was the morning of March 20, 1997, before the testimony of Jones' wife, Jackie Doll Jones (XVIII/908). Mr. Chipperfield added something to his proffer the day before, a transcript of a National Public Radio broadcast on the "Burmeister story about the North Carolina sailor." (XVIII/908) He noted that there was another "reference to spider web tattoo." (XVIII/908) Mr. Phillips commented that he did not know whether the broadcast was on or not, or whether any of the jurors heard it (XVIII/909). He repeated that the jurors could have been asked about this matter during jury selection (XVIII/909).

The matter was raised for the final time on April 8, 1997, after Jones had been convicted of Lori's murder, but before the penalty phase had begun:

> MR. BUZZELL: Judge, just real quickly on publicity issue, I heard again, as you recall we introduced a Court exhibit of some documents relating to the spider web tattoo issue, and then on March 31st,

> which was a Monday as I was driving into work at 7:02 in the morning, I heard again on national public radio a broadcast about Mr. Burmeister's co-defendant going to trial that week up in North Carolina, and I tried to get the transcript for that to introduce as part of the court record like we have done, but because it was an AP wire story they couldn't give us a copy of it because it was copyrighted and we weren't able to obtain it. . . .
>
> ***Of course I don't know whether the jurors heard it or not, and I can't show you the like, for instance, I don't remember seeing anything in the Times Union, I don't know that day,*** but I just heard it on the radio. (XXIV/1621)

Mr. Phillips rejoined:

> MR. PHILLIPS: And if that's the case I just point out in addition to the fact that he can't show that they are aware of it or that it would prejudice them if they were, that they could have asked you to instruct them not to listen to any stories about a particular trial or trials in North Carolina or whatever and did not do so.
>
> THE COURT: ***Well, I can't deal with that question, there's nothing to deal with, we have no evidence of it.*** I can inquire as to whether or not they read anything or watched anything between the verdict of guilty and today. Can we get the jury in? (XXIV/1622)

The trial court did in fact inquire of the jury if it had "seen or read anything about this case since you were here last for the guilt [phase]?" The jury unanimously responded, "No." (XXIV/1622)

These facts demonstrate that Jones' argument as to the spider web tattoo is sheer conjecture, unsupported by any evidence that the State attempted to racially prejudice the jury by either testimony concerning the tattoo or by having him exhibit his arms for the jury. In fact, the record clearly demonstrates the State

had no intention of using the spider web tattoo for any other purpose than as a distinctive identifying mark on Jones that two witnesses observed. Jones point here is, in short, a complete nonsequitur. Error if any, as to the tattoo, was most certainly invited, in that he clearly knew about the alleged significance of such a marking before jury selection, and he failed to inquire if anyone knew about such a significance. However, in the absence of proof of any taint to the jury, there was no error, and even if there was, it would most certainly be harmless beyond a reasonable doubt, given the fact that Jones, pursuant to *Gorby v. State, supra*, exhibited the spider web tattoo to the jury. *State v. DiGuilio, supra*.

ISSUE IV

> THE CIRCUMSTANCES SURROUNDING THE MURDER OF LORI MCCRAE PROVIDE AMPLE EVIDENCE IN SUPPORT OF EITHER PREMEDITATED OR FELONY MURDER; THE JURY WAS INSTRUCTED UPON BOTH THEORIES; AND THE TRIAL COURT, IF JONES HAD OBJECTED, WOULD HAVE SPECIFICALLY RULED SUCH WAS THE CASE.

First, Jones' fourth claim is procedurally barred. See *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). Jones motion for judgment of acquittal at the close of the State's case-in-chief during the guilt phase was as follows:

> MR. BUZZELL: Your Honor, in terms of a motion for judgment of acquittal, we would so move as to each and every count of the Indictment, all three of the counts, and the basis for that is, Your Honor, as a matter of law, the State has not adduced sufficient direct evidence in order to -- even when viewed in the light most favorable to the State, in order to

> establish these charges beyond and to the exclusion of a reasonable doubt.
>
> Your Honor, I understand you have to view it in the light most favorable to the State at this time, but we would still argue that there's insufficient evidence and that the motion for judgment of acquittal should be granted on that basis.
>
> MS. COREY-LEE: We'd rely on that standard.
>
> THE COURT: The motion for judgment of acquittal is denied. (XXI/1408-09)

He did not argue his current claim when he renewed his motion for judgment of acquittal, during the guilt phase charge conference, in his motion for new trial, or list it in his Statement of Judicial Acts to be Reviewed (IV/767-777; VI/1161-62; XXI/1410-29). Therefore, Jones' never provided the trial court an opportunity to rule on the matter, because he failed to raise a specific objection below that "the evidence was insufficient to establish a premeditated murder." As this Court is aware, capital murder may be proven by either a theory of premeditation or felony murder. *See Mungin v. State*, 689 So. 2d 1026, 1029-30 (Fla. 1995), *cert. denied*, 118 S.Ct. 102 (1997). Thus, Jones' fourth claim is waived.[12]

On the merits, this Court has opined:

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[12]Jones did file a "Motion to Dismiss Indictment Returned February 13, 1997, hearing on which was conducted on February 28, 1997 (IV/621-23; XIII/2318-31). In essence, Jones objected to the manner in which the State alleged felony murder and premeditated murder, and attempted to get the State to elect which theory it would proceed under (XIII/2318-31). The motion to dismiss was denied (XIII/2331).

> Kimbrough also argues that there was insufficient evidence of premeditation. The jury was instructed on both premeditated and felony murder. Also, the judge specifically ruled that the allegations were sufficient to support either charge. The circumstances surrounding this killing provide ample evidence in support of either theory upon which the jury could have based its verdict. We find no merit to this argument.

Kimbrough v. State, 700 So. 2d 634, 637 (Fla. 1997), *cert. denied*, 118 S.Ct. 1316 (1998). In this cause, the jury was instructed on both premeditated and felony murder (XXI/1489-94). In that the matter was never raised before the trial court, it was never afforded the opportunity to specifically rule the allegations were sufficient to support either charge. However, a review of the trial court's sentencing order demonstrates that it would have so ruled if provided such an opportunity (VI/1135-39). The circumstances surrounding Lori's heinous murder provide ample evidence in support of either theory upon which the jury could have based its verdict.

Jones argues in his brief at p.55: "In his statement to the police, Jones said he did not intend to kill the victim." However, Jones provided ***three*** different statements to the police. Initially, on February 1, 1995, he lied about how he ended up with Lori's Blazer and her ATM card, how he got the scratches on his face, and denied any knowledge of the victim or that he would ever

murder a woman (XX/1291-1322).[13] In his second statement, on February 21, 1995, after he reinitiated contact with Detective Parker, he lied and said, "James Trout was involved in the disappearance of Lori McCrae and that James Trout possibly got rid of the body." (XX/1329-32) Jones further lied, expressed his belief James Trout was involved in the murder of Lori McRae and that he was not with Trout when he possibly disposed of the body (XX/1332). Five hours later, he confessed, and after all these lies some truth was discerned when he took Detectives Parker and Bolena to the location of Lori's decomposed body (XX/1335-67).[14]

However, given Jones lack of credibility, the State respectfully submits his assertion in his brief at p.55 that he "unintentionally killed the victim during a struggle during the course of the robbery" is suspect when viewed in light of the evidence and his own admissions. *Smith v. State*, 424 So. 2d 726, 730 (Fla. 1983)(false exculpatory statements evidence of guilt). Although it is true he claimed, "I guess I choked her to death," and that the victim struggled, he later admitted, "I came out to Callahan to try the card and she was in the car, but she was dead. I ***think*** she was dead." (XX/1337, 1340, 1380).

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[13]Jones also said: "I don't give a fuck about this woman." (XX/1318)

[14]An example of Jones' manipulativeness came from Harry Baker, a bailiff, who overheard Jones telling Olie Antonio: "The only reason why I showed them where the body was, was I hoped that they would go easier on me." (XXI/1392)

As the trial court found in its sentencing order regarding HAC, "he claims to have choked the victim to death in the parking lot. However, the evidence is quite clear to the contrary." (VI/1137) Lori was abducted around 1 a.m. January 31, 1995, and Jones did not use her ATM card until around 3 a.m. (XVI/560-61, 573-74; XVII/737-38). The trial court's further findings for HAC clearly demonstrate that Jones was convicted under either theory:

> In addition, there is evidence to indicate that the death of the victim did not occur immediately, but over a period of time as the Defendant was attempting to obtain from the victim her PIN number, in order to obtain money from the ATM machine. The ATM machine was first used two hours after the victim had been abducted from the parking lot. The victim did not use her ATM card at the grocery store[15] which she exited prior to her abduction. During the long period of time between her abduction and the use of the ATM machine in Callahan, Nassau County, Florida, the victim would have experienced much fear and foreknowledge of her possible impending death. The Defendant could not have obtained the PIN number any way other than threatening and beating her. He surely would not have killed her before obtaining her PIN number. This partially explains the reason for the two ligatures which had her feet bound together, and the sweater sleeves which had been removed and were found near her body. Although her hands were not bound when she was discovered, the sleeves were only a few feet from her shoulders. It is very clear that she was alive for some period of time after her abduction and equally clear that she struggled much later. (VI/1138)

There was ample evidence that Jones committed both first degree premeditated and felony murder. *Kimbrough v. State, supra.*

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[15]Lori first encountered Jones in Walgreens, not a grocery store, although it was next door to a Winn Dixie (874-80).

However, even if this Court were to find premeditated first degree murder did not occur, which the State does not concede, felony murder for robbery and kidnaping still applies. Therefore, error, if any, would most certainly be harmless beyond a reasonable doubt. *Mungin v. State, supra.* Besides being procedurally barred, Jones' fourth claim is devoid of merit.

ISSUE V

THE TRIAL COURT CORRECTLY EXERCISED ITS BROAD DISCRETION CONCERNING THE ADMISSIBILITY OF DR. EATON'S TESTIMONY REGARDING CRACK COCAINE ADDICTION, WHERE HE HAD NO KNOWLEDGE OF THE FACTS OF THE CASE, INCLUDING WHETHER JONES WAS USING CRACK AT THE TIME OF THE MURDER, AND COULD ONLY TESTIFY ABOUT HIS PERSONAL EXPERIENCES ON CRACK, RENDERING IT IRRELEVANT.

"The determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error. *Ramirez v. State*, 542 So. 2d 352, 355 (Fla. 1989)." *Geralds v. State*, 674 so. 2d 96, 100 (Fla. 1996). "It is well established that a trial court has broad discretion concerning the admissibility of expert testimony, and a court's determination will not be disturbed absent a clear showing of error." (citations omitted) *Hall v. State*, 568 So.2d 882, 884 (Fla. 1990); *See also McMullen v. State*, 23 Fla. L. Weekly S207 (Fla. April 9, 1998)("The trial court was in a far superior position to that of an appellate court to consider whether the testimony would have aided the jury in reaching its decision.").

This Court has further opined:

> An expert is permitted to express an opinion on matters in which the witness has expertise when the opinion is in response to facts disclosed to the expert at or before the trial. § 90.704, Fla. Stat. (1993); *see Capehart v. State*, 583 So. 2d 1009 (Fla. 1991).

Geralds v. State, supra, at 100. "An expert witness may testify only in his or area of expertise. An expert opinion must not be based on speculation, but on reliable scientific principles." *Gilliam v. State*, 514 So. 2d 1098 (Fla. 1987); *See also, Jordan v. State*, 694 So.2d 708 (Fla. 1997). Finally, this Court has delineated:

> A general rule of law concerning the admissibility of expert witness testimony is that the expert, once qualified by the trial court as such, normally decides for himself whether he has sufficient facts on which to base an opinion. The exception to this rule is when the factual predicate submitted to the expert ***omits facts which are obviously necessary to the formation of an opinion.*** When the factual predicate is so lacking, the trial court may properly refuse to allow the testimony. (citations omitted)

Huff v. State, 495 So. 2d 145, 148 (Fla. 1986).

Jones has not provided this Court with an accurate accounting of what transpired below concerning Dr. Eaton. On March 24, 1997, the trial court had to order the defense "to give [the State] the names and addresses of all those witnesses that they intend to rely on in the penalty phase." (XXII/1532) On March 27, 1997, the defense had disclosed their experts, pursuant to Fla. R. Crim. P. 3.202(1), who had examined Jones and intended to give mental

mitigation evidence (XXIII/1537). However, the defense expressed its opinion that Jones had other experts who had not examined or evaluated him, and it did not intend to divulge to the State who they were (XXIII/1539). The trial court observed that if an expert was going to testify at the penalty phase, she had to be divulged for, "if nothing else, a sense of fairness." (XXIII/1540)

Dr. Eaton's deposition was taken on April 3, 1997 (V/783-849; VI/1051-1115). Dr. Eaton divulged that he had "no knowledge whatsoever of what the actual particulars of the case are." (V/819-29) He did not know if Jones was using crack at the time of the murder (V/819-20). He was not asked to interview Jones, and he had "never met him" (V/826). He had not made a clinical assessment of Jones (V/826). He had never been qualified to render an opinion on legal sanity or insanity in criminal case (V/827-28). Of far more crucial significance was this admission:

> Q So you would not consider yourself to have the requisite expertise, at this point, to render an opinion on sanity in a criminal case in Florida?
>
> A No.
>
> Q ***And I assume that you would give the same answer with regard to whether or not somebody meets statutory mitigating criteria in the death penalty context***?
>
> A I would.
>
> Q You would --
>
> A ***I would agree with that statement.***
>
> Q That --

A ***I am not qualified to give expert opinion.*** (V/829-30)

On April 8, 1997, before the Penalty Phase began, the record exhibits the following discourse transpired:

> MR. CHIPPERFIELD: We just learned of it when we recessed. I went back to the office, there was a message from ***Doug Eaton,*** one of our expert witnesses, that works at the University of Florida, and he said he had an emergency problem. We called him and he says the problem is that the University, and I don't know exactly who that is, his supervisor in the University, will not let him come up here and testify.
>
> He has already given a discovery deposition. Something about University policy concerning the testimony of their employees in court. Rather than going into a whole lot of detail and asked to speak to his supervisor, we thought we would come back here and speak with Mr. Phillips about coming in the possibility at first.
>
> MS. COREY: I'm not going to mention it in my opening if that helps.
>
> MR. CHIPPERFIELD: I can give an opening without mentioning it, but --
>
> THE COURT: Well, since I'm not familiar with that aspect of it, what are they telling you down there? That you've got a choice, you can take a deposition or you can have him to testify live but can't do both?
>
> MR. CHIPPERFIELD: Apparently the supervisors didn't know he had given a deposition and now they won't allow him to come up here, we don't have him under subpoena because he agreed to come. He appeared for the deposition and he agreed to come because he was going to be in town anyway, so we're kind of caught in a bind on it.
>
> The State has now said they don't want to put in the discovery deposition so we can go back to him

and try and figure out what we can do including the issuance of a subpoena, but I mean, I don't know the consequences of that for him.

MR. PHILLIPS: The other reason I bring it up is because Mr. Chipperfield indicated to me that he thinks we may run short today because of it since he would have been probably two hours or close to it.

THE COURT: You mean through too early?

MR. PHILLIPS: Yes, sir.

THE COURT: When has that ever been a problem?

MR. PHILLIPS: Obviously that's a subsidiary concern. My concern is just prior to the deposition I did not have the man's CV, I did not have any articles that he had ever written, all I was doing was finding out what he was going to say which I had no inkling about until I showed up at the deposition, so we had a long and fairly free wheeling discussion which did not even resemble what my cross examination would have been had we had this trial. And so and so, although I would like to accommodate them, I really can't agree that my discovery deposition go in evidence as is, because it just does not have anything like the flavor that his courtroom testimony would have had, it's not anywhere near what I'm comfortable with.

THE COURT: What is his position down there at the University?

MR. CHIPPERFIELD: He's a psychiatrist.

THE COURT: Is he on staff teaching institution?

MR. CHIPPERFIELD: I'm not sure if it's on the faculty, but it's on staff and counsel --

THE COURT: At Shands or medical school?

MR. CHIPPERFIELD: Down there and he does some expert work up here in Jacksonville one day a week, too. He treats patients, I don't know that he does any teaching.

Judge, we just didn't go very far with it over the phone because I figured the easiest way would be if the State would agree, and I respect their right with disagreeing with putting it on but ***now we're going to have to take some other steps***, he's a witness we desperately wanted.

THE COURT: ***You subpoena him, he'll be here.***

MR. CHIPPERFIELD: ***Well, there are other problems with that we're concerned about, just because he's been very cooperative and he's in a little different position than a lot of people on their staff because of his background and we'll have to work through that, figure out what we can do, but he won't be here today as expected.***[16]

THE COURT: You can have him first thing in the morning, though, can't you? Or some explanation by then, it's not going to delay what goes on this afternoon?

MR. CHIPPERFIELD: It changes the opening statement a bit, but as I said, we can do that.

THE COURT: You don't have to make an opening statement, that's just something --

MR. CHIPPERFIELD: I'll just leave it out of the opening, that's all.

MR. PHILLIPS: The only point that I would just make is just, you know, my position is not going to

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[16]Eaton's background as seen from his April 3, 1997, deposition included the fact that in "the last year of [his] residency and training in psychiatry, [he] became addicted to crack cocaine." That addiction lasted 8 years, "characterized by periods of remission and relapse up until 3 years and 3 months ago." Eaton was arrested and experienced legal problems. He was sent into treatment in Miami when he didn't show up for work at his New York clinic. Long-term treatment was recommended, which he ignored, and he relapsed in 6 weeks. He stole money from friends and relatives to support his habit, but never robbed anyone. (V/794-801, 815-16)

change overnight. Although as I said, I would like to accommodate them, ***this is not anywhere near legal unavailability***, and the fact that his supervisors tell him they prefer he didn't testify --

THE COURT: That's what I'm saying, if you put the ***subpoena*** on him.

MR. PHILLIPS: -- does not override a subpoena.

THE COURT: As a matter of fact, ***you can make it a Court subpoena if you'd like and I'll just bet you he'll be here.***

MR. CHIPPERFIELD: ***Well, before I ask the Court to do that, we'd like the chance to just investigate a little further and find out what the problem is, it could be there's another way we can resolve the problem.***

I also don't know without having done the research, I'm not sure what the law is on reading a deposition at a penalty phase where hearsay is admissible, it could be there's law that says we can do that, we can introduce police reports and all kind of other things and maybe it would be appropriate to just read the testimony from the deposition.

MR. PHILLIPS: Actually there is a case on point adverse to Mr. Chipperfield's position.

MR. CHIPPERFIELD: There could be, I haven't done--

MR. PHILLIPS: Prior transcripts of witness' testimony, you have to show they are unavailable. (XXIV/1589-95)

The following day, April 9, 1997, Dr. Eaton had become "the witness from Gainesville":

MR. PHILLIPS: Yes, sir, the question is -- the witness from Gainesville problem is essentially two fold, whether you can permit the witness to not give his name and tell us where he works or

anything, which essentially I would suggest would hamstring effective cross examination. But more to the point I can find no case that suggests this type of evidence is admissible. And there are --

THE COURT: Find any said that it wasn't admissible?

MR. PHILLIPS: Well, I cannot find a case that says it's definitely not admissible, what I did find was two cases, I actually found one and someone else found the other, but *Cardona v. State*, 641 So. 2d 361, which talks about the Court not committing an error by allowing a guardian ad litem report dealing with surviving children in. And the reason for it was, and then they cite *Thompson v. State*, 619 So. 2d 261, that says it's [abuse of] discretion to express their opinion concerning the appropriateness of the death penalty, and it goes on to say the reason why this evidence should not be admitted is because it sheds no light on Cardona's character, record, or the circumstances of the offense.

Then it says *see Rogers v. State*, evidence that sentencer must not be precluded from considering as a mitigating factor must be relevant to defense, its character, record or the circumstances of the offense.

Then there's *Jackson v. State*, 498 So. 2d 406, that says sentencing jury need not consider in mitigation evidence that is not relevant to the defendant's character, record or the circumstances of the offense.

Now, there is the *Hill* case, 515 So. 2d 176, that specifically indicated the Judge refused to permit appellant's mother to testify that she cared for appellant's cousins as well as her own children.

Similarly, the judge declined to allow defense counsel to question appellant's father regarding his own ill health and pas[t] job responsibilities.

In our view, ***the excluded evidence focused substantially more on the witness' character*** than on appellant's. There has been no showing that the

trial judge abused his discretion in excluding the testimony.

And I think the principles in these two cases apply here because he is specifically limiting the presentation of this evidence and his proffer is which I guess is not a matter of record, but just ***so now that it's clear, he is saying that he's not calling this psychiatrist who is an admitted crack head to testify as an expert, he is merely calling him to establish one thing and one thing only and that is the effects of cocaine addiction on the witness. That's not relevant to the defendant's character, circumstances of the offense or his record. It's not relevant to anything. It's only relevant to show what effects crack had on the witness.*** (XXV/1830-32)

The following discourse by the defense demonstrates that the trial court did not exclude Dr. Eaton as a witness, rather the defense chose not to subpoena him, in an attempt to conceal his identity from the jury:

MR. CHIPPERFIELD: And I just want to summarize briefly, we have a witness who is unwilling to give a complete name and an occupation because it would identify him and would threaten his occupation.

We propose by telephone to contact the witness and to have him testify by speaker phone to give his first name only when he's introduced to be sworn over the phone or we could have a court reporter go to where he is and swear him at that location, and not to be asked where he is employed.

This witness is a medical professional but we intend to offer him only because he has experience as a crack addict.

We think that his testimony limited to his experience as a crack addict is relevant because it is information that will help the jury understand the power of this drug.

> Our other expert will testify that cocaine has a physical effect on the brain. The physical effect, the chemistry that's involved is the same in every brain, we all have neuropsychology transmitters and neurons that act primarily the same way, the expression or ***the behavior that it causes differs among individuals***, but it fits a pattern. And the behaviors of a crack addict fit a pattern that is even, it's recognized so well that it can -- recognize this person is a crack addict, this one is not, this one is drug dependent, this one is not, because the behaviors and the symptoms come in clusters that are recognizable. (XXV/1833-34)

The trial court observed that Eaton's testimony would be "no more than what the first witness you called yesterday, meaning the former wife, Miss Jackie Doll Jones, she testified as to what the effects of cocaine was, how it affected her when she took it shortly thereafter." (XXV/1834) Mr. Chipperfield acknowledged such was the case, but argued Eaton was "much more credible than Jackie Doll Jones, he's not a street person" (XXV/1834-35). The trial court observed:

> All he's going to testify to, the one you're talking about now, is the fact that he was addicted or once addicted and ***how it affected him, doesn't have anything to do with the defendant, does it***? (XXV/1835)

Mr. Chipperfield provided a convoluted response, which never answered the trial court's simple question (XXV/1835-37).

Mr. Phillips' rejoinder provides a clear picture of what the defense was attempting to do, which is relevant not only to this claim, but Jones' seventh claim, concerning Dr. Miller's reports, as well:

> MR. PHILLIPS: What they're trying to do is just to give you an example is to have the witness say, "well, gosh, when I was on crack cocaine I didn't really feel like I knew the difference between right and wrong." And then they want to argue that, "well, therefore, the defendant must have been feeling the same way when he committed this offense." ***When there's no evidence at all that he was on crack cocaine to begin with when he committed this offense. In fact, all the evidence suggests that he was out of cocaine and had been out of cocaine for hours.***
>
> Now, they can establish -- the reason for this testimony is only one thing, ***what was the defendant's mental state at the time of the offense? They can establish this through expert testimony, they could have tried to do that if they had wanted to,*** they've hired Harry Krop in this case, not calling him, ***hired Ernie Miller, not calling him,*** they want to put on an expert who didn't do a full competent evaluation, and now they want to put another person who could be an expert if they wanted him to be, they just want him to testify that, "well, when I smoked crack I really wanted some after I ran out. And I wanted it so bad I don't feel like I knew what I was doing."
>
> Well, that's not relevant to any consideration here, it's cumulative. If they want to establish his mental state they need to do that through expert testimony and not through the back door by calling some other person just like, I mean, I can't imagine the Court permitting somebody to get on the stand and say when -- this is how I feel when I get drunk. You know, it makes no sense. There's no reason for this testimony to the extent that there is any reason for it, it's just ***cumulative*** anyway. (XXV/1837-39)

Mr. Chipperfield admitted: "Well, if the witness is just unable because of his situation and his fear of consequences to appear here in court and that's why we're asking the Court for it to be done this way." (XXV/1839) The trial court ruled:

> And I find this witness may not testi[fy], the one that's unwilling to give his last name because [his] job requires all this but not for that reason but for the fact that I don't think he's testifying to anything to except his personal problems and he's not giving an expert opinion as to how it relates to this defendant. (XXV/1839-40)

These facts demonstrate Jones' fifth claim is without merit. First, the trial court did not exclude Eaton, rather, Jones elected not to subpoena him, as had been suggested by the trial court, so as to protect Eaton's identity and his job, hoping a phone interview would suffice. If the trial court had allowed such a presentation of Eaton's alleged testimony, both the jury and itself would not have been afforded the opportunity to observe his demeanor during his examination.

Second, Eaton's testimony was ***irrelevant*** because it was only for the purpose of explaining the effects of crack cocaine on himself, not Jones, who he knew nothing about other than the fact he was purportedly a crack addict. *See, Hill v. State, supra,* at 177-78 (No error in excluding mitigation from mother and father because "the excluded evidence focused substantially more on the witnesses' character than on appellant's.").

Third, even if the exclusion of Eaton's irrelevant testimony was somehow error, which the State does not concede, it was ***cumulative*** to the testimony of Jones' wife, Jackie Doll, an admitted crack addict, and Drew Edwards, a drug rehabilitation counselor (XXIV/1691-1720; XXV/1894-1934). Additionally, family

members testified as to Jones' altered behavior when on drugs (XXIV/1740-45; XXV/1780-93). Error, if any, as to Eaton was most assuredly harmless beyond a reasonable doubt. *Johnson v. State*, 660 So. 2d 637, 645 (Fla. 1995)(photograph of defendant's daughter, who died by miscarriage, "cumulative of other evidence to the degree it had actual relevance), *cert. denied*, 517 U.S. 1159 (1996); *Stone v. State*, 481 So. 2d 478 (Fla. 1985)("...since Stone himself testified about his mental problems at the sentencing hearing, this evidence was merely cumulative and not new.").

ISSUE VI

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN ALLOWING DETAILS OF JONES PRIOR MURDER OF JASPER HIGHSMITH IN ORDER TO ASSIST THE JURY IN EVALUATING THE CHARACTER OF THE DEFENDANT AND THE CIRCUMSTANCES OF THE CRIME.

Recently, this Court has averred:

> We find no merit in Hudson's argument as to the prior felony evidence because we have held that it is appropriate during penalty proceedings to introduce details of a prior violent felony conviction rather than the bare admission of the conviction in order to assist the jury in evaluating the character of the defendant and circumstances of the crime. *Rhodes v. State*, 547 So. 2d 1201, 1204 (Fla. 1989). In such circumstances, hearsay testimony is admissible, provided the defendant has a fair opportunity to rebut it. § 921.141(1), Fla. Stat. (1985). In *Waterhouse v. State*, 596 So. 2d 1008 (Fla. 1992), we found no error in the trial court's allowing a police officer to testify about details of a prior murder for which Waterhouse had been convicted. Id. at 1016. Similarly, we find no error by the trial court in connection with the testimony of Officer Bush, who described the circumstances of the sexual assault for which Hudson had previously

> been convicted. Furthermore, any confrontation error is harmless in this case because introduction of the certified copy of the judgment reflecting Hudson's guilty plea to the prior felony established beyond a reasonable doubt the aggravating circumstance of prior conviction for a felony involving the use or threat of violence. *Tompkins v. State*, 502 So. 2d 415, 420 (Fla. 1986).

Hudson v. State, 708 So. 2d 256, 261 (Fla. 1998); See also, *Whitfield v. State*, 706 So. 2d 1, 4 n.6 (Fla. 1997). *Hudson* is directly on point to Jones' sixth claim. The evidence adduced regarding the murder of Jasper Highsmith assisted the jury in evaluating Jones' character and the circumstances of the crime.

First, Jones alleges in his brief at p.61 that the State "introduced Jones' entire confession through the testimony of Detective John Bradley." In fact, the State introduced two statements given by Jones after he had been advised of his constitutional rights.

The first statement was given to Detective J. H. Hall on February 3, 1986 (XXIV/1669-73). The second statement was given to Detective Bradley on February 6, 1986 (XXIV/1653-56). Juxtaposition of these two statements demonstrates that Jones provided varying accounts of the alleged fight that culminated in Jasper's murder, which reflects on Jones' character, and causes one to question his account of Lori McCrae's demise.[17] The statements

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[17]Dr. Barnard, who evaluated Jones to determine if he was competent to stand trial, found he was malingering and observed: "One of the problems for the attorney will be whether the defendant is truthful or not. For example, in the past the defendant has not

further comment upon Jones' character, because they reveal Jones drove around with Jasper's body in the trunk of his car for several days until he was finally arrested. He learned his lesson; in this cause he disposed of the body.

The photographs of Jasper's body in the trunk of his car were relevant to Jones' character, as previously discussed, since he drove around with it for several days. It was also relevant because Jones cross-examined both Mr. Bradley and Det. Hall as to his claim that "the fight started as an effort of self-defense on his part, that it was a mutual fight." (XXIV/1658, 1675-76) One of the photographs showed that Jasper's "fingers and hands are deformed." (XXIV/1676-77) As in this cause, Jones chose a weaker, more vulnerable victim than himself to murder.

Jones is a two-time murderer, and the jury had the right to know about his prior murder in evaluating his character and the circumstances of the crime. *Hudson v. State, supra*, at 261; *Rhodes v. State, supra*, at 1204; *Waterhouse v. State, supra*, at 1016.

> Furthermore, any confrontation error is harmless in this case because introduction of the certified copy of the judgment reflecting [Jones'] guilty plea to the prior felony established beyond a reasonable doubt the aggravating circumstance of prior conviction for a felony involving the use or threat of violence. *Tompkins v. State*, 502 So. 2d 415, 420 (Fla. 1986).

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been truthful on a number of issues including where he got the credit cards or where he got the automobile that belonged to the victim." (I/62)

Hudson, at 261. Jones' plea, State Exhibit 4, as well as his Judgment and Sentence, State Exhibit 5, for the murder of Jasper Highsmith, were introduced into evidence (XXIV 1677-78).

ISSUE VII

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN NOT ALLOWING INTO EVIDENCE THE REPORTS OF DR. MILLER THROUGH JONES' COUNSEL IN THE HIGHSMITH MURDER, WHERE HE NEVER CALLED DR. MILLER MOST LIKELY BECAUSE HE WOULD HAVE TESTIFIED UNFAVORABLY TO HIS CLIENT, AND THE REPORTS REQUIRED INTERPRETATION TO BE UNDERSTOOD BY THE JURY.

The trial court found Dr. Miller's reports inadmissible "based on the *Johnson* case, 660 So. 2d 637." *Johnson v. State*, 660 So. 2d 637 (Fla. 1995), is directly on point to Jones' seventh claim:

> Johnson further contends that the trial court improperly refused to admit medical records about various psychological problems he had over many years, including suicide attempts and indicates that Johnson's counsel attempted to introduce these records without authenticating them, which is required under the evidence code. Sec. 90.901-902, Fla. Stat. (1987). The rules of evidence may be relaxed during the penalty phase of a capital trial, but they emphatically are not to be completely ignored. Moreover, the trial court found that the records were not complete in themselves and required interpretation to be understood by the jury. The judge even offered to admit them if defense counsel laid the proper predicate, which counsel did not do. Accordingly, there was no error in declining the request in light of counsel's actions.

Id., at 645.

As previously delineated in the State's argument to Jones' fifth claim, he hired Dr. Miller, but decided not to use him (II/349-351; XXV/1838). When Jones attempted to introduce Dr.

Miller's reports through his former counsel Michael Edwards, and the State objected, Jones likened what he was attempting to do to the State's using detectives to relate the cause of death for Jasper Highsmith from the autopsy report (XXV/1811-12). Mr. Phillips argued why that was not so:

> MR. PHILLIPS: Well, there's a couple of issues that he's raising, one is that I have a perfect opportunity to rebut it. That's obviously not true because the author of this report was hired by the defense to do a confidential examination, and now they are not offering that person to testify. ***Probably because, I would assume, the results or the testimony that witness would offer would not be favorable to the defendant.*** And so my ability to rebut that is very limited.
>
> This is, you know, this is not the way to put in mental mitigation through a lawyer, you put in mental mitigation through a health professional, and this is their whole strategy here is to put in preliminary impression from years ago that are no longer operative, probably would not be supported. They are going to call mental health professionals here today, one of who -- two of whom of the three did not do a clinical interview, and the other of whom, although attempted to do a clinical interview, didn't ask about the facts of the case.
>
> And now they're trying to put in additional evidence from the previous case that is merely a report from a witness that they've hired who they won't produce and will not allow me to call and question so that I can attack the substance of this psychiatric report.
>
> And they are trying to use this lawyer as a conduit for the rankest sort of hearsay.
>
> And furthermore, this evidence is not relevant. The fact that the defendant may have been diagnosed subsequent to the previous murder as incompetent to stand trial has nothing to do with this case or any-- it's not mitigating. It would be mitigating

if it were somehow relevant to this case.

> There's not going to be any shred of evidence that they can offer as far as I know to suggest that this defendant was mentally ill at the time of the offense. (XXV/1812-13)

Mr. Phillips' argument succinctly addresses Jones' argument presented in his brief at pp.64-66, and the State herein adopts the same as its own. The State would note that Dr. Harry Krop was also hired but not used, and that Jones was neurologically tested by Dr. Andrew Hodson, who also did not testify (II/321-22, 352-53). Further, Dr. Barnard, one of two experts appointed at Jones' request prior to trial to determine his competency to stand trial, opined:

> **Opinions:** In my opinion the defendant does not have a severe mental disorder but rather presents indications of having traits of an ***antisocial personality disorder.*** He does present a pattern of ***malingering*** a mental disorder. My reasoning for malingering is that he has an understandable motive to escape criminal responsibility. There is a non-psychotic alternative motive for his behavior - to commit grand theft and then to murder in order to have no witnesses. There are inconsistencies and contradictions in his history. He is eager to share bizarre beliefs with the examiner. ***His current MMPI, as well as one in 1986, are consistent with a pattern of exaggeration of psychopathology.*** There are no objective signs of psychosis. (I/62)

In light of Dr. Barnard's report, and Jones' failure to call competent mental health professionals to testify on his behalf, most likely because their testimony would be damaging to him, Dr. Miller's reports are ***hearsay***, ***irrelevant***, and therefore,

inadmissible. *Johnson v. State, supra,* at 645; *See also, Robinson v. State,* 574 So. 2d 108 (Fla. 1991)(Robinson's hearsay statement to Dr. Krop during a medical interview, that he was intoxicated, in the absence of any evidence of impairment at trial, was insufficient to establish the existence of this mitigating circumstance.") *Johnson v. State,* 608 So. 2d 4 (Fla. 1992)("A defendant ... cannot use the attorney-client privilege to elicit favorable testimony and to block unfavorable testimony."); *Jackson v. State,* 648 So. 2d 85 (Fla. 1994)(Defendant's videotaped statements could not be used as mitigating evidence without providing state opportunity to cross-examine defendant. "If we were to rule otherwise, defendants in capital cases could present as mitigating evidence videotaped statements to mental health experts, and thereby preclude cross-examination by the State.").

The trial court correctly exercised its wide discretion in finding Dr. Miller's 1986 reports were inadmissible. However, if this Court should deem such was error, which the State does not concede, it was harmless beyond a reasonable doubt. *Stone v. State, supra.*

ISSUE VIII

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN FINDING THE MURDER WAS COMMITTED TO AVOID ARREST.

At the outset, the State would note that the trial court found four aggravating circumstances, two of which Jones does not

challenge in this appeal: Jones' prior murder of Jasper Highsmith and HAC.[18] This Court has opined, regarding the "avoid arrest" aggravating circumstance, as follows:

> Preston argues that the evidence does not support that the murder was committed for the purpose of avoiding arrest (witness elimination). We disagree. We have long held that in order to establish this aggravating factor where the victim is not a law enforcement officer, the State must show that the sole or dominant motive for the murder was the elimination of the witness. *Perry v. State*, 522 So. 2d 817, 820 (Fla. 1988); *Bates v. State*, 465 So. 2d 490, 492 (Fla. 1985). However, this factor may be proved by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender's thought processes. *Swafford v. State*, 533 So. 2d 270, 276 n. 6 (Fla. 1988), *cert. denied*, 489 U.S. 1100, ... (1989)
>
> We have upheld the application of this aggravating circumstance in cases similar to this one, where a robbery victim was abducted from the scene of the crime and transported to a different location where he or she was then killed. *See, e.g. Swafford*, 533 So. 2d 270 (defendant robbed gas station then took attendant to remote area where he raped and shot her); *Cave v. State*, 476 So. 2d 180, 188 (Fla. 1985) (victim was kidnaped from store and taken thirteen miles to a rural area and killed after robbery), *cert. denied*, 476 U.S. 180, ... (1986); *Martin v. State*, 420 So. 2d 583 (Fla. 1982)(defendant robbed convenience store, abducted store employee, sexually battered and then stabbed her), *cert. denied*, 460 U.S. 1056, ... (1983). The only reasonable inference to be drawn from this case is that Preston kidnaped Walker from the store and transported her to a more remote location in order to eliminate the sole witness to the crime.

Preston v. State, 607 So. 2d 404, 409 (Fla. 1992), *cert. denied*,

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[18]Jones challenges the HAC instruction in his eleventh claim but not the finding of the aggravator.

507 U.S. 999 (1993); *See also, Hall v. State*, 614 So. 2d 473 (Fla.)(Aggravator established by evidence that defendant transported his victim to another location and then killed her; evidence left no reasonable inference except that defendant killed victim to eliminate only witness to his having kidnaped her, raped her, and stolen her car.), *cert. denied*, 510 U.S. 834 (1993); *Thompson v. State*, 648 So. 2d 692, 695-96 (Fla. 1994)(Evidence was sufficient to establish avoid arrest aggravator: "Once Thompson had obtained the $1,500 check from Swack and Walker, there was little reason to kill them other than to eliminate the sole witnesses to his actions." Also, victims were taken to an isolated area.), *cert. denied*, 515 U.S. 1125 (1995);

The trial court in this cause found:

> 4. The Murder was committed to avoid a lawful arrest.
>
> This aggravating circumstance requires clear proof that the Defendant's domina[nt] motive was the elimination of a witness. Although it is clear that this aggravator was proven b[y] circumstantial evidence, the facts are clear that the Defendant selected Lori McRae as [a] victim in order to rob her and obtain money to purchase crack cocaine. Evidence was clear that the Defendant had been using cocaine on a regular basis for a number of months prior to the commission of these crimes. However, there was no reason for the Defendant to kill the victim after he had obtained her money to buy crack cocaine. The Defendant had abducted the victim from the parking lot in Duval county and had used the victim's ATM card approximately two hours later in Nassau County, where he extracted $300.00 from the ATM machine. He could not have used this card any other way other than obtaining the PIN number from the victim. Once the money had been

> obtained from the machine the Defendant had no reason to kill the victim, yet he transported her to Baker County where her body was left in a wooded area. The only reasons he killed Lori McRae was to prevent her from identifying him, to continue the use of her vehicle and to continue to obtain money by way of her ATM card. The defendant attempted to use the ATM card in excess of 100 times prior to his arrest two days later. By transporting Lori McRae to the remote location in Baker County where he killed her, the only reasonable inference that the Court can glean from the evidence was that he intended to eliminate her as a witness to crime. The Court finds that this aggravator was proven beyond a reasonable doubt. (VI/1138-39)

"The court applied the right rule of law, (footnote omitted) and competent substantial evidence supports its finding." *Raleigh v. State*, 705 So. 2d 1324, 1329 (Fla. 1997).

Jones argues at p.68 of his brief that the trial court mistakenly concluded that the homicide occurred when the victim was transported to the remote area in Baker County where she was found. However, Jones used Lori's ATM card in Callahan, Nassau County, two hours after she was abducted. She was not dead yet, because he had to ensure that the PIN number he had tortured out of her was correct. Only then could he eliminate her, which he did, when he drove her in her Blazer to a remote, wooded area in Baker County. As regards his story that he unintentionally strangled the victim earlier, he repeatedly lied in three different statements to police, but he did admit: "I came out to Callahan to try the card and she was in the car, but she was dead. I ***think*** she was dead." XX/1337, 1340, 1380) Again, it would make no sense for Jones to

kill Lori until he was sure he had the correct PIN number, and by then he was already in Callahan.

Jones reliance on *Geralds v. State, supra*, at 1164, is misplaced, because the victim in that case was murdered in her own home. In this cause, Lori was abducted and killed in a remote location, after Jones was sure he could get cash with her PIN number, more in keeping with the cases previously cited by the State. In any event, even if this Court were to find the avoid arrest aggravator inapplicable, which the State does not concede, it would be harmless error beyond a reasonable doubt in view of three remaining strong aggravating circumstances: capital murder during a kidnaping and robbery; prior murder; and HAC. *See Armstrong v. State*, 642 So. 2d 730 (Fla. 1994), *cert. denied*, 514 U.S. 1129 (1995) ; *Peterka v. State*, 640 So. 2d 59, *cert. denied*, 513 U.S. 1129 (1995); *Kennedy v. State*, 455 So. 2d 351 (Fla. 1984), *cert. denied*, 469 U.S. 1197 (1985).

ISSUE IX

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN DENYING DEFENSE COUNSEL'S MOTION TO WITHDRAW, WHERE JONES NEVER EXPRESSED HE WAS DISSATISFIED WITH COUNSEL OR THAT HE WANTED NEW COUNSEL.

The District Court of Appeal of Florida, Fifth District, opined:

> The ***defendant did not advise the trial court as to the nature of the perceived conflict of interest or how it may have impacted the quality of legal representation he was receiving.*** While a conflict

> of interest may adversely effect an attorney's representation, ***the mere allegation of a conflict does not give rise to the necessity of conducting a Nelson inquiry.*** *See Johnson v. State*, 560 So. 2d 1239 (Fla. 1st DCA 1990).

Gaines v. State, 706 So. 2d 47, 49 (Fla. 5th DCA 1998); *See also, Davis v. State*, 703 So. 2d 1055, 1058-1059 (Fla. 1997), *cert. denied*, 118 S.Ct. 2327 (1998). The Fifth District further observed:

> Under *Nelson*, ***once a defendant requests*** the trial court to discharge his court-appointed attorney because the attorney's representation is allegedly ineffective [i.e. conflict of interest], the trial court is required to make an independent inquiry into whether there is reasonable cause to believe that the attorney is not providing effective assistance to the defendant. *Nelson v. State*, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973).

Id., at 49.

In Jones' ninth claim, found at pp. 71-74 of his brief, he alleges the following comments made by him in a PSI report created a conflict of interest for his counsel:[19]

> Finally, Jones stated that he wanted to plead guilty from the very beginning no matter what the sentence option would have been. "It wasn't my idea to put the family through this (the trial). It was my attorney's idea." Finally, Jones stated, "I am truly sorry that I got involved in this and

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[19]Jones factual representation that the PSI was prepared without his counsel's knowledge is not well taken. In fact, the record reflects that p.18 of the PSI indicates Lewis Buzzell was contacted by the Department of Corrections, but reserved comment until the time of sentencing (XXIV/1562-63). Mr. Buzzell acknowledged he had in fact expressed as much to Ms. Hall (XXIV/1566-67) What Jones should have said was that Mr. Buzzell did not know DOC talked to him (XXIV/1567).

that I had to put the girl's family through this." (Jones' Appendix E)

However, all his counsel made was an allegation there was a conflict. Jones never sought to discharge his counsel because of such a conflict. In fact, Jones stood **mute** during the entire discussion of the matter. Mr. Phillips, on behalf of the State, argued:

> MR. PHILLIPS: Now, with regard to their motion to withdraw, just preliminarily, the defendant hadn't indicated that he felt there's a conflict. He hadn't indicated that he wants them replaced, and so the question then is in the absence of that should they be permitted to withdraw because of this alleged statement that's in the PSI.
>
> Now, basically I think you have to look at it from one of two perspectives, in either perspective this is not an actual conflict that would require them to withdraw. If the statement that the defendant makes in the PSI is true, then their asserted basis for conflict would be, I don't know what, I mean, if it is true, and they want to put that on as mitigation, there's nothing to stop them from doing that.
>
> There really isn't a conflict there. If they make the decision not to put that on as mitigat[ion] as a tactical choice, then that's their decision. If the defendant wants to put that on, he doesn't have to have their help to do that, he's entitled to say whatever he wants. So, if it is true, there's nothing to stop them from putting it on. And if it is true also there's no -- since there's nothing to stop them from putting it on, their performance couldn't be deficient and therefore they can't be ineffective.
>
> If it's deficient in any way, which it isn't, I see no prejudice in any event, this is an after the fact expression of remorse that's self-serving in

> any event, and it's questionably admissible.[20] And I'm not too sure it is admissible and, frankly, I probably would object to the presentation of it. And there is a case that suggests that it's not admissible, but the conflict -- then so that's one perspective.
>
> The other perspective is if it isn't true, then they're saying that there's a conflict because a new lawyer could put that on and whereas they could not. Well, the new lawyer would never put that on if it isn't true. If it can't be corroborated and they're not going to corroborate it because it isn't true, the new lawyer would not put that on. It would backfire, it would clearly -- ***there is no way they would use that if it isn't true. And they have to show an actual conflict adversely affected their performance.***
>
> Now, if it isn't true that wouldn't be the case, because if it isn't true then their performance isn't deficient by not putting it on. So either way I see no conflict, there's nothing stopping them from putting it on if it is true and if it isn't true then there's no deficiency. A lawyer can't be deficient for not putting on something that's not true. (1579-82)

Jones comments that he wanted to plead guilty so as not "to put the family through this," and that he was "truly sorry that [he] had to put the girl's family through this," are belied by his trial demeanor. Mr. Phillips observed for the record:

> However, [Jones'] behavior during pretrial hearings and, I guess, also immediately after such things as pretrial motion hearings he has not demonstrated good behavior in my opinion at all. I have personally observed Mr. Jones trying to stare me down, I've seen him try to stare Angela Corey down. ***I've seen him smirking and talking to the victim's husband in this case.***

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[20]As this Court is well aware, self-serving hearsay statements by a defendant offered by him are inadmissible.

> As a matter of fact, on a prior incident in this court ***after a pretrial hearing the defendant was smirking at Mr. McRae and Mr. McRae asked him what he was gawking at and the defendant's response was that I'm going to kill you.*** I've seen him make lewd comments to women in the hall on a number of occasions as he was being transported back to jail and I totally disagree that he has demonstrated good behavior in this courthouse during this action.
>
> And if the Court wants me to put on a witness with regard to the threat that I just mentioned, will be happy to do that right now. (XIII/2367-68)

In addition, when the trial court attempted to determine whether Jones' statement was true, and whether he perceived a conflict, it received the following evasive response from his counsel:

> THE COURT: Well, certainly between the three of you, you must know, correct, whether it's true or not?
>
> MR. CHIPPERFIELD: Well, Judge, I am sure there are opinions as in any case, you know, what is the absolute truth, well, we have system for getting at that, I don't really know that that's the issue here. The issue here is the conflict that has come up between client and counsel.
>
> THE COURT: ***Well, you phrased it as a conflict I haven't heard anywhere else, haven't heard it from him [Jones] yet.***
>
> MR. CHIPPERFIELD: Well, I believe that's in the PSI clearly.
>
> MR. PHILLIPS: Even if it is a conflict, which I don't agree that it is, he has the ability to waive it, he ha[s]n't said anything.
>
> MR. CHIPPERFIELD: And he has the right to have the assistance of counsel in making the decision whether to do that, and as counsel who has a conflict how do we advise him is we can't because

> we have an interest in that now.
>
> MR. PHILLIPS: I don't see the interest, you know, this could be put on without any conflict if it's true, there's nothing to stop them from putting on that I really wanted to plead guilty. I mean, assuming it's admissible, I really wanted to plead guilty but my lawyers advised me, no, no, we need to go to trial so we can re-preserve our appellate issue or whatever, you know.
>
> THE COURT: What's to preclude that, Mr. Chipperfield?
>
> MR. CHIPPERFIELD: I can't answer your question. It invades the privilege.
>
> THE COURT: Motion to withdraw is denied. (XXIV/1584-85)

The bottom line is, all Jones did below is ***allege*** that a conflict arose out of his hearsay statement in his PSI. He never demonstrated that one in fact did exist. First, he never even asserted whether the statement was in fact true, which it most likely wasn't in view of his behavior pretrial. Second, he never expressed that a conflict existed or that he desired to discharge his counsel, which distinguishes this case from those cited by Jones at pp.73-74 of his brief, where the defendants asserted a conflict with their counsel on the record.

All of the cases cited by Jones were plea withdrawal cases, where the defendants expressed their dissatisfaction with their attorneys and their desire to discharge them. In *Roberts v. State*, 670 So. 2d 1042 (Fla. 4th DCA 1996), the defendant ***expressed*** his reasons for withdrawing his plea at his sentencing hearing:

> When the trial court asked if there were additional grounds, ***defense counsel turned to defendant for the response. Defendant, not his counsel, cited a case to the court*** for the proposition that a plea of guilty should not be induced by fear or misapprehension.

Id., at 1045. Similarly, in *Hope v. State*, 682 So. 2d 1173 (Fla. 4th DCA 1996), another plea withdrawal case, the defendant expressed their was a conflict:

> On the day of the sentencing, prior to the court's imposing the sentence, ***appellant made a pro se, ore tenus motion to change his plea to not guilty and to discharge his counsel*** on the grounds that counsel failed to investigate all of the allegations against him and did not interview all witnesses. ...

Id., at 1173. Jones miscited his third authority, *Brye v. State*, 702 So. 2d 256 (Fla. 1st DCA 1997); regardless, the defendant was again on the record:

> ***After listening to the lawyer and appellant***, who recounted vastly different versions of what had transpired before appellant had entered his pleas, the trial court denied appellant's motion to withdraw his pleas.

In this cause, Jones said nothing.

The trial court correctly exercised its discretion in denying defense counsel's motion to withdraw. No conflict of interest was ever demonstrated, and Jones never moved to discharge his counsel, or even expressed that he was dissatisfied with them. As the trial court observed:

> THE COURT: Well, where's the conflict of interest at this stage that the defense has? ***You're going***

to proceed on just like you intended to proceed on the penalty phase with the hopes that the jury will recommend life, that's your whole goal here and that ha[s]n't changed one bit.

MR. CHIPPERFIELD: ***No, sir.***

THE COURT: ***By this statement here.***

MR. CHIPPERFIELD: ***That's true.*** (XXIV/1571)

Error, if any, which the State does not concede, was harmless beyond a reasonable doubt because the trial court ordered the PSI sealed, and the jury was never allowed to view its contents. *State v.DiGuilio, supra.* The fact that the trial court viewed the comment is within its role as sentencer as concerns mitigation. *See Hauser v. State*, 701 So. 2d 329, 331 (Fla. 1997)

ISSUE X

VICTIM IMPACT EVIDENCE IS CONSTITUTIONAL AS DETERMINED BY THE UNITED STATES SUPREME COURT AND THIS COURT.

The United States Supreme Court has held:

> We thus hold that if the State chooses to permit the admission of victim evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that ***evidence about the victim and about the impact of the murder on the victim's family*** is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720, 736 (1991). "[T]his Court has held victim impact testimony to be admissible as long as it comes within the parameters of the *Payne* decision." (citations omitted) *Windom v. State*, 656 So. 2d 432, 438 (Fla.), *cert. denied*, 116 S.Ct. 571 (1995).

As Jones concedes in his brief at p.76, since *Windom*, this Court has acknowledged and upheld the state's right to present victim impact evidence numerous times. *See e.g., Davis v. State*, 703 So. 2d 1055, 1060 (Fla. 1997); *Burns v. State*, 699 So. 2d 646, 653 (Fla. 1997); *Branch v. State*, 685 So. 2d 1250 (Fla. 1996), *cert. denied*, 117 S.Ct. 1709 (Fla. 1997); *Bonifay v. State*, 680 So. 2d 413, 419 (Fla. 1996); *Allen v. State*, 662 So. 2d 323 (Fla. 1995). The statements of Melissa Leopard, Lori McRae's sister, Lori's husband, Doug McCrae, and Jodi Brenner-Burney, Lori's other

sister, were "clearly the type of evidence contemplated by the decisions of this Court and the United States Supreme Court." *Davis v. State, supra*, at 1060. (XXIV/1679-90)

Before addressing Jones' subclaims, the State would correct Jones' inaccurate factual representations made at p.75 of his brief. First, he alleges: "Defense counsel objected to the victim impact evidence, specifically noting the witnesses' ***emotional outburst*** during the testimony and the inflammatory nature of the evidence." The witness he is referring to was Jody Brenner-Burney, and his objection, given during the jury's absence, was as follows:

> MR. CHIPPERFIELD: Your Honor, to preserve the issues we raised about victim impact. I believe the Court took a break because the witness was having trouble reading her own statement, there was ***not an outburst*** or sobbing or anything, she was just having trouble controlling her voice, and that makes our point this is very emotional evidence that has no part in front of the jury. (XXIV/1686-87)

The State would note that the jury also had to be excused during the testimony of Jo Ann Sealey, Jones' mother, so that she could compose herself (XXV/1797-98). In fact, the trial court's observation of what had transpired and Mr. Chipperfield's apology, seems to indicate that Mrs. Sealey had an emotional outburst:

> THE COURT: We don't allow this to happen on the victim's side, we certainly can't allow it to happen on the defendant's side. Let me know that and we'll stop the proceeding, all right.
>
> MR. CHIPPERFIELD: Yes, sir, I'm sorry, I know it's not intentional. (XXV/1798)

Second, Jones alleges that the prosecutor told the jury during his closing argument at the penalty phase that victim impact evidence "could be used by the jury in reaching its sentencing decision." In fact, Mr. Phillips argued:

> I do want to mention one word that always crops up and it's sympathy. I'm not asking you to recommend a death penalty for this defendant on the basis of sympathy for Lori McRae. You should recommend the death penalty because it's your duty to do so because the aggravating circumstances outweigh the mitigation in this case and for no other reason.
>
> And the victim impact evidence that you heard was not for the purpose of serving as some kind of surreptitious aggravating factor. The purpose of it is just to remind you that the victim in this case is a human being who can't speak for herself in this courtroom and whose death is mourned.
>
> And the reason for that is because in these types of cases the defendant is entitled to, if he wants, to bring in his family members and have them get on the stand and tell you how wonderful he was and have them cry and all that. And I don't criticize his mother for getting up here and saying that she loves him, I don't blame her for it at all. You know, if you want to feel sympathy for his mother, I think that would be appropriate, you know, anybody would. But it would be improper, I suggest to you, to base a life sentence recommendation on the basis of sympathy.
>
> First of all, I can't -- I cannot imagine any reason in the world why you should have one scintilla of sympathy for this murdering, robbing, kidnapper, but if you want to have sympathy for his mom, that's fine. But the problem with that is -- is that even though she doesn't deserve the grief that he's inflicted on her, every person who's ever been sentenced to death has a mom. You know, if that would outweigh an aggravating circumstance, then no one would ever get the death penalty. And

> that's where the victim impact evidence comes in, to remind you that although there are people that care about the defendant, that isn't the only consideration that you should be taking into consideration. (XXVI/2057-58)

These comments were proper in light of Justice Souter's insightful reasoning in *Payne*, 115 L.Ed.2d 744:

> Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, "survivors," who will suffer harms and deprivations from the victim's death. Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles; and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents. Thus, when a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt. The fact that the defendant may not know the details of a victim's life and characteristics, or the exact identities and needs of those who may survive, should not in any way obscure the further facts that death is always to a "unique" individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable.
>
> That foreseeability of the killing's consequences imbues them with direct moral relevance (citation omitted), and evidence of the specific harm caused when a homicidal risk is realized is nothing more than evidence of the risk that the defendant originally chose to run despite the kinds of consequences that were obviously foreseeable. ***It is morally both defensible and appropriate to consider such evidence when penalizing a murderer, like other criminals, in light of common knowledge and the moral responsibility that such knowledge***

> ***entails.*** Any failure to take account of a victim's individuality and the effects of his death upon close survivors would thus more appropriately be called an act of lenity than their consideration an invitation to arbitrary sentencing. ***Indeed, given a defendant's option to introduce relevant evidence in mitigation,*** (citation omitted), ***sentencing without such evidence of victim impact may be seen as a significantly imbalanced process.*** (citation omitted)

Finally, Jones does not divulge to this Court that the jury was instructed, at his request, as follows:

> You have heard evidence about the victim in this case from her relatives, the law does not allow you to weigh that evidence as an aggravating circumstance. Your recommendation to the Court must be based on the statutory aggravating circumstances I have told you about in these proceedings. (XXVI/2117)

A. <u>§ 921.141(7) Does not Violate the Eighth Amendment</u>.

The United State Supreme Court held that "if the State chooses to permit the admission of victim evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." Jones' argument that victim impact evidence is irrelevant to aggravating factors, thereby becoming a nonstatutory aggravator, was specifically rejected in *Windom v. State, supra,* at 438 and *Bonifay v. State, supra,* at 419. *See also, Burns v. State, supra,* at 653.

> Certainly there is no strong societal consensus that a jury may not take into account the loss suffered by a victim's family or that a murder victim must remain a faceless stranger at the penalty phase of a capital trial. Just the opposite is true. Most States have enacted

> legislation enabling judges and juries to consider victim impact evidence. (citation omitted)

Payne, Justice O'Connor *concurring*, 115 L.Ed.2d at 739.

B. § 921.141(7) Is not Vague and Overbroad.

This Court in *Windom* opined:

> Rather, we believe that section 921.141(7) indicates clearly that victim impact evidence is admitted only after there is present in the record evidence of one or more aggravating circumstances. The evidence is not admitted as an aggravator but, instead, as set forth in section 921.141(7), allows the jury to consider "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." Sec. 921.141(7). Victim impact evidence must be limited to that which is relevant as specified in section 921.141(7).

Id., at 438. Therefore, § 921.141(7) is not overbroad.

Jones' vagueness argument that "[v]ictim impact evidence asks a jury to compare the value of a victim's life to the value of other victim's lives and to the value of a defendant's life," was rejected by this Court in *Burns v. State, supra*, as follows:

> In *Payne v. Tennessee*, 501 U.S. 808, 823, ... (1991), the United States Supreme Court expressly rejected a similar argument, finding that victim impact evidence is not offered to encourage a comparison of victims but to "show instead each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be."

Id., at 680. § 921.141(7) is not vague.

C. The Florida Constitution Allows for Victim Impact Evidence.

Again, this Court in *Windom* delineated:

> Both ***the Florida Constitution in Article I, Section 16,*** and the Florida Legislature in section 921.141(7), Florida Statutes (1993), ***instruct that in our state, victim impact evidence is to be heard in considering capital felony sentences.*** We do not believe that the procedure for addressing victim impact evidence, as set forth in the statute, impermissibly affects the weighing of the aggravators and mitigators which we approved in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, ... (1974), or other wise interferes with the constitutional rights of the defendant.

Id., at 438.

D. <u>§ 921.141(7) Does not Improperly Regulate Practice and Procedure</u>.

In *Burns v. State, supra*, this Court rejected Jones' fourth argument as follows:

> We have also repeatedly upheld section 921.141 against claims that the capital sentencing statute improperly regulates practice and procedure. *See Vaught v. State*, 410 So. 2d 147, 149 (Fla. 1982); *Booker v. State*, 397 So. 2d 910 (Fla.), *cert. denied*, 454 U.S. 957, ... (1981); *see also Maxwell v. State*, 657 So. 2d 1157 (Fla. 1995)(approving on basis of *Windom* district court decision which recognizes that section 921.141 does not intrude upon this Court's rule-making authority).

Id., at 653.

Jones' tenth claim is without merit. *See, Davis v. State, supra*, at 1060. If this Court should determine there was error as to victim impact evidence for any of Jones' arguments, which the State does not concede, it was harmless beyond a reasonable doubt, particularly in light of his requested instruction on victim impact evidence. *Windom v. State, supra*, at 438.

ISSUE XI

THAT THE JUDGE ERRONEOUSLY USED AN "OR" WHERE AN "AND" WAS REQUIRED IN THE HAC INSTRUCTION CONSTITUTES HARMLESS ERROR WHERE THE JURY WAS PROVIDED WITH A WRITTEN COPY OF THE INSTRUCTIONS.

A. The Misread HAC Instruction.

First, Jones eleventh claim is procedurally barred for failing to raise the specific claim he now raises. *Sochor v. Florida*, 504 U.S. 159 (1992). At the conclusion of the penalty phase jury instructions the following matters transpired:

> THE COURT: Y'all looked at these copies to be sure?
>
> MR. CHIPPERFIELD: May I just say on the record we renew our objections to the jury instructions we requested yesterday that the Court did not read, ***but the instructions as read were expected based on your rulings.***
>
> THE COURT: Okay.
>
> MS. COREY: They were fine with the State. (XXVI/2118-19)

Jones' did not object that the HAC instruction was misread. Rather, he expressed that "the instructions as read were expected based on your rulings."

On the merits, *Wike v. State*, 698 So. 2d 817 (Fla. 1997), is directly on point to Jones' eleventh claim.[21]

The HAC instruction given was the instruction we

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[21]The State proceeds on the assumption made by Jones that the trial court misspoke. However, it could as easily have been a scrivener's error. A thorough reading of the transcript does reveal such errors on the part of the court reporter.

> approved in *Hall v. State*, 614 So. 2d 473 (Fla. 1993). That the judge erroneously used an "or" where an "and" was required does not constitute fundamental error in a case such as this where the jury was provided with a written copy of the instructions. *Rhodes v. State*, 638 So. 2d 920. (Fla. 1994).

In this cause, the trial court orally charged the jury as follows:

> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless ***or*** unnecessarily tortuous to the victim. (XXVI/2113)

However, the record exhibits the trial court also instructed the jury:

> At this time you will retire to the jury room to consider your recommendation, ***a copy of these jury instructions I read to you will be sent back to you.*** (XXVI/2118)

The written penalty phase HAC instruction correctly read:

> 1. The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless ***and*** was unnecessarily torturous to the victim. (V/852)

Given these facts, in light of *Wike* and *Rhodes*, the trial court's misreading of the HAC instruction was harmless error beyond a reasonable doubt.

B. The Standard HAC Instruction is Constitutional.

The HAC instruction given in this cause was the instruction this Court approved in *Hall v. State*, 614 So. 2d 473 (Fla. 1993). Jones concedes, at p.83 of his brief, that "this Court has approved as constitutional the current aggravating circumstance" in that opinion. As to Jones' claim that the standard HAC instruction is constitutionally deficient, *see Henyard v. State*, 689 So. 2d 239, 255 n.6 (Fla. 1996), *cert. denied*, 118 S.Ct. 130 (1997). Even if the standard HAC instruction were deficient in some regard, the error would be harmless beyond a reasonable doubt because Lori's murder was heinous, atrocious, or cruel under any definition. *See, e.g., Henderson v. Singletary*, 617 So. 2d 313, 315 (Fla. 1995).

ISSUE XII

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY UPON AND FOUND THAT LORI'S MURDER OCCURRED DURING A KIDNAPING AND ROBBERY.

First, Jones did not object to the trial court's finding regarding this aggravating circumstance, and his claim in this regard is, therefore, procedurally barred. Second, on the merits, Jones concedes, at p.87 of his brief, that this Court has rejected his argument that: "Since the jury may have based its verdict for first degree murder on a felony murder theory, the use of the underlying felonies as aggravating circumstances violates the United States and Florida Constitutions." This Court recently opined:

> Blanco next argues that Florida's capital felony sentencing statute is unconstitutional because every person who is convicted of first-degree felony murder automatically qualifies for the aggravating enumerated felony. We disagree. Eligibility for this aggravating circumstance is not automatic: The list of enumerated felonies in the provision defining felony murder[22] is larger than the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony.[23] A person can commit felony murder via trafficking, carjacking, aggravated stalking, or unlawful distribution, and yet be ineligible for this particular aggravating circumstance. This scheme thus narrows the class of death-eligible defendants. *See Zant v. Stephens*, 462 U.S. 862, ... (1983). *See generally White v. State*, 403 So. 2d 331 (Fla. 1981). We find no error.

Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997).

Jones urges this Court to reconsider its position in light of Justice Anstead's special concurrence in *Blanco*. *Id.* at 12-15. The State respectfully submits this Court adhere to Justice Wells concurrence in that same opinion:

> If the doctrine of stare decisis has any efficacy under our law, death penalty jurisprudence cries out for its application. Destabilizing the law in these cases has overwhelming consequences and clearly should not be done in respect to law which has been as fundamental as this and which has been previously given repeatedly thoughtful consideration by this Court.

Id., at 11-12. Finally, even if it were error to find this aggravating circumstance, which the State does not concede, it

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[22]This Court's FN17 is: *See* § 782.04, Fla. Stat. (1993).

[23]FN18 is: *See* § 921.141(5)(d).

would be harmless given the remaining three aggravating circumstances, including prior murder, HAC, and witness elimination, ensuring Jones' sentence of death. *Peterka v. State, supra*, at 71.

ISSUE XIII

> *JONES V. STATE*, 701 SO. 2D 76 (FLA. 1997), IS CONTROLLING, AND DEATH WAS PROPORTIONAL IN THIS CASE.

Jones concedes his last claim is controlled by *Jones v. State*, 701 So. 2d 76 (Fla. 1997). The State will argue proportionality despite Jones' failure to argue the same in his brief.

Proportionality

The trial court found four aggravating circumstances were proven beyond a reasonable doubt:

> 1. The Defendant, in committing the crime for which he is to be sentenced, was engaged in the commission of or an attempt to commit the crimes of Kidnaping and Robbery.
>
> 2. The Capital Felony was committed by a person previously convicted of a felony Murder at the time that this crime was committed. (Second Degree Murder of Jasper Highsmith, an elderly man in Duval County, Florida, in 1986).
>
> 3. The Murder was committed in a heinous, atrocious or cruel manner.
>
> 4. The Murder was committed to avoid a lawful arrest. (VI/1136-39; Ex.A)

The trial court's findings for HAC go far in explaining why death is proportional in this case:

> 3. HAC

The evidence was clear that the Defendant abducted the victim from the parking lot of the Walgreens Store in Duval County, Florida, and by the Defendant's own statement, he claims to have choked the victim to death in the parking lot. However, the evidence is quite clear to the contrary. The Defendant admits that the assault began in the parking lot when he choked the victim outside her vehicle as she was getting in. Scientific tests performed indicated that there were blood stains found in the middle of the automobile, indicating that the victim's body had been there for some period of time. Two buttons were found in the back seat of the automobile that matched the shirt that the victim was wearing, which would indicate that the struggle occurred at a place other than the parking lot, as the Defendant claimed. In addition, the victim's pants were unbuttoned and unzipped when found in the woods in Nassau County, Florida. The Defendant had numerous scratches upon his face, which he admits were inflicted by the victim. The scratches included his neck, face and back. The victim had numerous bruises on her legs and forearms. The bruises on her legs were consistent with a person being kicked numerous times. Evidence further showed that [the] face of the victim was badly decomposed which indicated that the Defendant had beaten the victim about the face very severely. In addition, there is evidence to indicate that the death of the victim did not occur immediately, but over a period of time as the Defendant was attempting to obtain from the victim her PIN number, in order to obtain money from the ATM machine. The ATM machine was first used two hours after the victim had been abducted from the parking lot. The victim did not use her ATM card at the grocery store which she had exited prior to her abduction. During the long period of time between her abduction and the use of the ATM machine in Callahan, Nassau County, Florida, the victim would have experienced much fear and foreknowledge of her possible impending death. The Defendant could not have obtained the PIN number any way other than threatening and beating her. He surely would not have killed her before obtaining her PIN number. This partially explains the reason for the two

> ligatures which had her feet bound together, and the sweater sleeves which had been removed and were found near her body. Although her hands were not bound when she was discovered, the sleeves were only a few feet from her shoulders. It is very clear that she was alive for some period of time after her abduction and equally clear that she struggled much later. This aggravator was proven beyond a reasonable doubt. (VI/1137-38)

As to mitigation, the trial court found "some weight" for both statutory mental mitigators (VI/1141). For "substantially impaired" the trial court found: "The record is very clear that the Defendant was addicted to crack cocaine." (VI/1140) For "extreme mental or emotional disturbance" it found: Jones "had an I.Q. of 78, which placed him between the fifth and ninth percentile.[24] However, there was no evidence that the Defendant was incompetent, nor was he insane at the time of the commission of the crime." (VI/1141)

As to nonstatutory mitigation, the trial court found: a. Jones was "a crack addict and had been for a substantial period of time." (Some weight) b. He was a father of a teenage son and worked on occasion in the past, and when he was not using drugs, he was a good provider. (Some weight) c. He furnished information which prevented escapes. d. Jail record indicated he may have had a psychotic episode, but there was no evidence he was incompetent to proceed or that he was insane when he murdered Lori (VI/1141-

[24]Dr. Risch also testified under cross-examination that Jones did not try very hard, and that could have influenced the I.Q. score (XXV/1886-88).

42).[25]

Ultimately, the trial court concluded:

> The court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, mindful that human life is at stake in the balance. The court has given the recommendation of the jury great weight and finds, as did the jury, that the aggravating circumstances were proved beyond a reasonable doubt, and outweigh the mitigating circumstances reasonably established by the evidence. (VI/1142-43)

Before commencement of the penalty phase, Jones argued HAC did not apply to Lori's murder (XXIV/1597-98). The trial court responded:

> THE COURT: Have you looked at the case of, I think, *Sochor ... v. State*, 580 So. 2d 595, '91 case, and it's also reported at 112 Supreme Court, 2142, 1992, both [the] Florida Supreme Court, as well as the United States Supreme Court, agree that strangulation of a conscious victim involves foreknowledge of death, extreme anxiety and fear and this method of killing is one to which the fact where heinous is applicable. (XXIV/1600)

Later, Mr. Phillips added:

> There is a case after Sochor that you mentioned called *Orme*, ... 677 So.2d 258 that says strangulation creates a prima facie case for aggravating factor for heinous, atrocious and cruel. (XXIV/1602).

Both *Sochor v. State, after remand,* 619 So. 2d 285, 292 (Fla.), *cert. denied*, 510 U.S. 1025 (1993), and *Orme v. State*, 677 So. 2d 258 (Fla. 1996), *cert. denied*, 117 S.Ct. 742 (1997), demonstrate death is proportional in this case. In *Sochor*, this

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[25]Dr. Barnard opined that Jones was malingering. (I/62)

Court related the following facts:

> Gary testified that the victim screamed for help after she was dragged from the truck and ***scratches on Sochor's face*** indicated that a ***struggle*** took place. The evidence supports the conclusion of ***horror and contemplation*** of serious injury or death by the victim. Moreover, ***Sochor confessed that he choked the victim to death.*** It can be inferred that "strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." (citations omitted)

Id., at 292. Death was warranted even after removing CCP, where three aggravators-- prior violent felony, while engaged in a felony, HAC -- remained to be weighed against no mitigating circumstances. *Id.*

Orme is even more on point to the instant cause, in that the defendant "had an extensive history of substance abuse," and when he was arrested, his "blood tested positive for cocaine and he was showing signs of acute cocaine withdrawal." *Orme v. State, supra,* at 260. The facts as to her murder were as follows:

> The cause of death was ***strangulation.*** There were extensive ***bruising and hemorrhaging on the face,*** skull, chest, ***arms, left leg,*** and abdomen, indicating a ***severe beating.*** The abdominal hemorrhaging extended completely through the body to the back and involved the right kidney. Jewelry the victim always wore was missing and was never found. Police later identified the body as that of Lisa Redd, a nurse.

Id. In aggravation, the trial court found murder during a sexual battery, HAC, and pecuniary gain. In mitigation, "the trial court

found both statutory mental mitigators and gave them 'some weight', but concluded they did not outweigh the case for aggravation." *Id.*, at 261. *See also, Whitfield v. State, supra*, at 6 (Whitfield suffered from chronic crack cocaine addiction).

Other cases which demonstrate that death is proportionate in this cause are as follows: *Hall v. State, supra* (The trial court found 7 aggravators: 1) prior violent felony -- assault with intent to commit rape, ***second degree murder***, shooting at or into an occupied vehicle; 2) under sentence of imprisonment; 3) murder during ***kidnaping*** and sexual battery; 4) pecuniary gain -- ***stole victim's car***; 5) ***HAC***; 6) CCP; 7) ***avoid arrest***); *Preston v. State, supra* (Victim, a night clerk at a convenience store, abducted and murdered. Trial court found 4 aggravators -- prior violent felony, HAC, during a felony, and CCP -- and no mitigation. Preston claimed he murdered the victim during a "PCP-induced frenzy."); *Swafford v. State, supra* (Defendant abducted female victim from a FINA gas station parking lot, raped, and murdered her. Aggravators were ***witness elimination***, ***HAC***, CCP, and ***murder during a felony***.) Death is proportionate in this cause.

CONCLUSION

Based on the foregoing facts, authorities and reasoning, the State respectfully requests this Honorable Court to affirm Jones' conviction and sentence of death.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Mr. W.C. McClain, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 30th day of December, 1998.

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