IN THE SUPREME COURT OF FLORIDA

DAVID WYATT JONES,

Appellant,

v. CASE NO. 90,~~544~~ 664

STATE OF FLORIDA,

Appellee.
_____/

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

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

References to the clerk's record will be designated with the prefix "R" followed by the volume and page number. The transcript will be similarly designated with the prefix "T." An appendix is attached to this brief containing excerpts from the record and transcripts. The appendix items are designated with a letter which also appears on the tab on the item in the appendix.

STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

On February 16, 1995, Duval County Grand Jury returned an indictment charging David Wyatt Jones with first degree murder, robbery and kidnaping. (R1:3-5) On February 13, 1997, the Duval County Grand Jury returned a new indictment. (R4:596-598) This new indictment changed count one to allege venue in Duval, Nassau, and Baker counties as well as "a county unknown." (R4:596) Jones pleaded not guilty and proceeded to a jury trial. On March 21, 1997, the jury returned verdicts finding Jones guilty as charged of first degree murder, robbery, and kidnaping. (R4:679-681)

The penalty phase of the trial commenced on April 8, 1997. (T24:1548) On April 10, 1997, the jury recommended a death sentence

for the murder by a vote of nine to three. (R5:858)

On April 16, 1997, a sentencing hearing was held before Circuit Judge William A. Wilkes. (R13:2365-2371) On April 25, 1997, Judge Wilkes sentenced Jones to death. (R13:2372-2392; R6:1128-1144) The court found four aggravating circumstances: (1) Jones committed the murder during a kidnaping and robbery; (2) Jones had been previously convicted of felony murder; (3) the murder was committed in a heinous, atrocious or cruel manner; (4) the murder was committed to avoid a lawful arrest. (R6:1135-1139) In mitigation, the court found some evidence to support to statutory mitigating factors: (1) Jones' capacity to conform his conduct to the requirements of the law was impaired due to his crack cocaine addiction; (2) Jones was under the influence of extreme mental or emotional disturbance at the time of the crime. (R6:1139-1141) The court gave some weight to this mitigation. (R6:1140-1141) The court also considered four non-statutory mitigating factors: (1) Jones had been a crack addict for a substantial period of time, the court gave this factor some weight; (2) Jones was the father of teenage son and when not on cocaine had been a good provider for his family and an outstanding worker; (3) when imprisoned or incarcerated pending trial Jones had on more than one occasion provided information to the institutions which prevented the escapes of some violent felons; and (4) jail records indicated that after his arrest for the murder, he showed some signs of a psychotic episode even though he was found competent to proceed and was not insane at the time of the crime. (R6:1141-1142) (The trial court's sentencing order is attached as Appendix A to

this brief.)

Jones filed his notice of appeal to this Court on May 16, 1997. (R6:1160)

Facts--Guilt Phase

David Wyatt Jones and his wife Jackie Doll Jones were both addicted to crack cocaine. (T18:924-928, 934-945) For several months preceding David's arrest he and Jackie had been smoking crack cocaine daily. (T18:924) Almost all of the money they were able to obtain went to buying crack. (T18:924-925) Jackie explained that she would try to set aside some money for food or to pay the motel bill where they lived. (T18:925) Their daily routine was to shoplift items to sell for money or exchange for crack. (T18:924, 926-928) David did not eat regularly and had lost a lot of weight. (T18:925) David's personal hygiene deteriorated. (T18:925) David's entire focus was obtaining and smoking crack. (T18:926) Although Jackie was also addicted to crack cocaine, she was more responsible for daily living activities than David. (T18:925) She was responsible for saving enough money for food and to pay the daily motel bill. (T18:925-926) On January 29, 1995, Jackie was arrested for shoplifting at Sears. (T18:915-916) David was about 30 feet away from her at the time of her arrest, and she saw him leave in the blue Ford Fairmont automobile which was their only means of transportation. (T18:916-917) The car had a blue tarp over the back window since the glass was missing. (T18:917) At the time of her arrest, they had no money, although David had a small amount of property he could sell. (T18:926) Jackie realized that the property David had available was not enough to last for more than

two days worth of crack.(T18:927)

An employee of the Bikini Club in Jacksonville testified to seeing David Jones in the club between 9:00 and 11:00 p.m. on January 30, 1995.(T17:763-774) Hudson was the bartender, and the man, she identified as Jones, sat at the bar near her cash register for approximately two hours.(T17:764-766) Hudson said the man acted nervous and was not acting the way men normally do in the club. (T17:771) She noticed him because he was drinking only water; he was not spending any money; he was not tipping the girls who were dancing on the aisles on either side of the bar; moreover, he was not even paying attention to the girls who were dancing. (T17:767, 770-772) The man looked rough. Hudson did not recall any tattoos, but he was wearing a long sleeve shirt.(T17:772-773) She did not recall any scratches on his face at that time.(T17:767). Hudson was uncomfortable because he was acting jittery as if he needed drugs at that moment. (T17:772)

Lori McRae worked a 4:00 p.m. until midnight shift at the post office on Kings Road in Jacksonville.(T16:556-557) Before she left work on January 30, 1995, Lori McRae telephoned her husband, Douglas McRae, and told him that she intended to stop at the Winn-Dixie store on the way home.(T16:560-561) Linda Swagel, a co-worker, saw Lori McRae leave the post office parking lot at 12:35 a.m.(T16:571-574) McRae was wearing jeans, a white button-down shirt and a forest green jacket with blue and purple colors in its sleeve.(T16:571-573) Lori McRae drove a Chevy Blazer. (T16:558) Douglas McRae anticipated that his wife would be home by 1:00 a.m., and when she had not arrived by 1:45 a.m., he telephoned the

police.(T16:561)

Clayton Chou worked for the Walgreen's Drugstore which was adjacent to the Winn-Dixie in the Cedar Hills shopping center. (T18:873-874) He worked the midnight until 7:00 a.m. shift. (T18:874) Around 1:00 a.m. on the morning of January 31, 1995, Chou noticed a man who came into the store.(T18:875) Chou thought the man appeared unusual because he wore an open shirt with the sleeves rolled up which exposed his body which was covered with tattoos.(T18:875) The man wore this shirt despite the fact that it was a rather cold night.(T:875) Chou could not determine what the tattoos were so as to figure out a pattern. (T18:876) The man's face was rather boney, Chou did not notice any scratches.(T18:876) The man appeared to be a laborer and was dirty.(T18:877) A woman entered the store shortly after the man, and at first, Chou thought that the two were together which caused him to notice because of the contrast since the woman appeared well dressed and polished in her appearance.(T18:877-878) The man bought a small item and went to the door. The woman reappeared at the door at the same time.(T18:878-879) They both stopped at the door and spoke to each other.(T18:879) Chou was of the impression that the woman looked upset or angry. (T18:879) He never saw the two people again, but he later identified photographs of David Jones and Lori McRae as the man and woman he saw that night.(T18:880-883) At trial, Chou identified David Jones in court as the man.(T18:880-881)

Dennis Marsh and Leonard Hutchins operated an automobile detailing business in Baker County in January and February of 1995.(T17:662, 685-686) On January 31, 1995, a man drove to their

business in a red and gray Blazer and asked to have the inside of the vehicle cleaned. (T17:663-664, 686) When Marsh told the man he could not clean the inside of the vehicle for five dollars, the man drove away. (T17:664) Marsh and Hutchins remembered that the man had numerous tattoos, some of them distinctive, as well as scratches on his face. (T17:665-679, 687-688) Marsh also noted that the man looked pale and acted hyper, as if he was on drugs. (T17:682-683) Hutchins described the man as acting weird--he was jumping around inside the truck with the radio on extremely loud and behaved fidgety. (T17:690-691) Later, Marsh saw a picture of the red Blazer on television as being connected with the disappearance of Lori McRae. (T17:664-665, 686-687) Marsh telephoned the police and he and Hutchins picked out the photograph of David Jones from a photographic line-up. (T17:664-682, 688-689) The two men also identified Jones in court. (T17:679, 687) Over defense objections, Marsh and Hutchins were permitted to describe a spider web tattoo Jones had on his arm. (T17:678-679, 688) The defense was concerned the jury might perceive the spider web as a racist tattoo since it is sometimes used by white supremists to indicate the wearer has killed a black person. (T17:665-678) After the testimony, Jones was required to exhibit the tattoo to the jury. (T17:684-685)

Johnnie Johnson spoke with a man at a gas station convenience store on January 31, 1995, between 12:00 p.m. and 3:00 p.m. (T17:692-693) The man drove a red Chevrolet Blazer. (T17:694) The man asked Johnson if he wanted to buy some credit cards. (T17:694) After Johnson declined, the man asked if he wanted

to buy a Fairmont automobile.(T17:696) Since Johnson was looking for a car for a friend, he said he would look at the automobile.(T17:696-697) The man took him to an old blue Fairmont which was missing a back window.(T17:697) Johnson advised the man that he did not want the car.(T17:697) He remembered the man had some scratches on his face that appeared to be bleeding and his body was covered with a number of tattoos.(T17:695) Johnson later saw the man on the news and called the police. (T17:698) He selected the picture of David Jones from a photo line-up.(T17:699) Johnson admitted that one particular thing that caused him to remember this man -- when he first saw him at the gas station, the man was smoking a crack pipe. (T17:704) Johnson thought it was peculiar to see someone in the middle of the afternoon smoking a crack pipe in a public place. (T17:705)

The custodian of records for two branches of the First Union Bank and the Navy Credit Union testified about ATM activity on accounts belonging to Lori McRae.(T17:707, 724, 751) Debra Rau of the First Union Bank, Callahan office, stated that the bank has a security camera that continuously runs during non-banking hours at the ATM machine. (T17:751-755) The State introduced photographs taken of persons standing at the machine on January 31, 1995, between 3:05 and 3:10 a.m. (T17:756-761) Peggy Money, the custodian of the records for First Union National Bank, produced account records for ATM usage for Lori McRae's account. (T17:707-721) Her records show seventeen different attempts to draw money with an ATM card in less than a twenty-four hour period. (T17:716-723) These attempts started at 3:54 p.m. on January 31, 1995 and

ended at 1:16 a.m. on February 1, 1995, with the transactions occurring in the daylight hours through the early morning hours, ending at 4:00 a.m. (T17:723)

Cynthia Brown was a fraud and forgery specialist with the Jacksonville Navy Federal Credit Union. (T17:724-726) She reviewed the ATM records of the account of Douglas and Lori McRae. (T17:726-732) Brown testified to the various transactions occurring on the account between January 31 and February 1, 1995. (T17:735-748) Over a 35 hour period, 105 transactions were attempted at twelve different ATM machines. (T17:746-748) A total of $600 was obtained. (T17:746) Of the 105 attempted uses of the ATM card, only 11 were successful in obtaining money. (T17:746) The locations of the ATM machines were Callahan, Yulee, Macclenny and several places in Jacksonville. (T17:746) Brown stated this was an extremely unusual pattern of activity because of the number of attempts at usage of the machine. (T17:749) On the basis of her experience as a fraud and forgery specialist, Brown testified that this continuous pattern of attempted uses of the ATM machine was consistent with a crack cocaine addict's behavior. (T17:750)

Officer George Grant arrested David Jones on February 1, 1995, between 4:00 and 5:00 p.m.(T17:647-655) Jones drove a red Blazer matching the description and with the tag number associated with a missing persons investigation. (T17:647-649) The officer had Jones get out of the vehicle, and Grant handcuffed and searched him. (T17:649-651) Grant said that Jones was slow to respond to his commands and had a slightly glassy-eyed look. (T17:651) Jones had scratch marks with dried blood on the side of his face. (17:651-

652) Upon searching Jones, Grant found two credit cards or ATM cards, a green cigarette lighter, an ATM receipt and a crack pipe, which fell out of Jones shirt pocket. (T17:651-653) Grant noted that Jones wore blue jeans that had red marks on them. (T17:653-654) The Blazer was towed to the FDLE lab in Jacksonville to be processed for evidence. (T17:653-654, 656-660) Laboratory analyst Allen Miller took charge of processing the Blazer at the lab. (T17:774-T18:822) Jones was transported to the police building homicide department where Detective James Parker and Detective Gilbreath questioned him. (T20:1275-1327)

Allen Miller, a senior laboratory analyst with the FDLE crime lab, searched and processed the Chevy Blazer. (T17:774-822) After photographing the vehicle, he removed several items from the interior. (T17:778-822) He found an earring on the dash of the vehicle and also an assortment of loose jewelry in one of the travel bags found inside the vehicle. (T17:782-784) He found a driver's license and registration papers from the vehicle. (T17:785) A multi-colored pullover shirt was found. (T17:785) Also, Miller found a black sweater behind the driver's seat which had a Styrofoam cup wrapped inside of it. (T17:785-786, 788-790) The sweater was missing both sleeves and neither was found inside the vehicle. (T17:789-790) A green jacket with a shoe inside the sleeve was recovered. (T17:787-788) Miller also found stains on the jacket that tested presumptively for blood. (T17:787) Other items found included a pair of boots, some buttons underneath the back seat, and some miscellaneous items in the console--playing cards, cologne, a knife and a hair brush. (T17:790-798) Miller

processed the entire vehicle with Luminal and obtained some positive reactions for trace amounts of blood. (T17:799-800, T18:807) After using a second presumptive test for blood in the vehicle he obtained a positive indication for trace amounts in various places. (T18:808-812)

Detective James A. Parker questioned Jones at the police station after his arrest. (T20:1276-1322) The interview began on February 1, 1995 at 8:20. (T20:1284-1287) Detective Gilbreath also participated. (T20:1287) Parker advised Jones of his rights prior to the questioning. (T20:1287-1291)

Jones told Parker that he and a man named James bought crack earlier on the day of his arrest and they were riding around partying. (T20:1291) Jones said that he obtained the ATM cards that he was using from a guy named Mark sometime on Monday morning. (T20:1291-1292) He had obtained the cards after his wife was arrested. (T20:1292) Jones and his wife had been shoplifting at the time. (T20:1292) Jones told Parker that he was glad he was caught because he wanted to get off the crack cocaine. (T20:1292) Jones said around 10:00 p.m. that Monday night, he purchased drugs and went to the Duck Pond, which is a fishcamp bar. (T20:1293-1294) The Duck Pond is just across the bridge from the Cedar Hills Shopping Center Winn-Dixie store. (T20:1294) According to Jones account, a man walked up to him and asked him if he wanted to make some money. (T20:1294-1295) The man handed Jones an ATM card and the number to use with it. (T20:1295) Jones did not want to use it at first because he had a suspended driver's license. (T20:1295) Jones said the man had driven up in a sports car and later, he

mentions a red Blazer. (T20:1295-1296) Parker noted the reference to different vehicles in the two statements. (T20:1296) According to Jones, the man told him there was no problem in using the card, he just needed to get the money off of his wife's card and the man wrote down the PIN number of 1815. (T20:1299) Jones said he and the man pulled up in front of the Walgreen's, the man got out of the Blazer, and at that point, Jones moved to the driver's seat and pulled away in the Blazer. (T20:1298-1299) Jones went to a automatic teller in Callahan and the machine gave him the money. (T20:1298-1299) He obtained a total of $600.(T20:1299) Jones parked on some property belonging to his mother and smoked crack cocaine. (T20:1299) Jones explained the scratches on his face as having occurred when he fought with two men who robbed him of a $160.(T20:1300-1301,1308-1309, 1314-1319) Over defense objections, the prosecutor was allowed to ellicit from the detective that Jones used a racial slur in referring to the two men who robbed him. (T20:1300-1301) Jones explained he had two sets of scratches on his face, one was from the fight with the two men in Callahan, and earlier scratches occurred, before his wife was arrested, in an altercation with someone else in Orange Park. (T20:1315-1319) Jones denied that a woman made the scratches. (T20:1314-1321) Jones said after the altercation with the two black men, he jumped in his truck and drove down Moncrief Road, bought more dope, and smoked and shot up at Dinnsmore at the boat landing near Jamie Trout's house off Kings Road. (T20:1301-1302) Jones tried to sell his Ford Fairmont for money for drugs and put his things from the Fairmont into the Blazer. (T20:1305-1306) He found some jewelry in the

Blazer which he for drugs. (T20:1306-1307) Jones stated that Jamie Trout was with him during the use of some of the cards at ATM machines. (T20:1310) When Parker confronted Jones about the scratches, he said that you need to find the woman because you will find that she did not make the scratches because his skin would be on her. (T20:1321) Jones went on to say "I would never a woman." Parker asked Jones to clarify by asking Jones if he meant he wouldn't kill a woman to get her truck or because someone scratched him. (T20:1321) Jones replied, "I wouldn't do it." (T20:1321) Jones further said "I want to stop talking and I want a lawyer." (T20:1321-1322) Defense counsel objected to the statement as a comment on Jones' right to remain to remain silent and right to counsel. (T20:1322) The court overruled the objection and subsequently denied a motion for mistrial. (T20:1322,1327-1328)

On February 21, 1995, Parker obtained a second statement from Jones. (T20:1329) Jones had been indicted for first degree murder the day before and arrested on the murder charge. (R1:1-5) Detective Gilbreath advised Parker that Jones wanted to speak to him. (T20:1329) Parker met with Jones in a small room at the jail and verbally advised him of his constitutional rights. Jones said he wanted to talk to Parker about the incident. (T20:1330-1331) Parker took Jones to the homicide office where he conducted the interview. (T20:1331) Jones said that Jamie Trout was involved in the disappearance of Lori McRae and that Trout possibly got rid of the body. (T20:1331-1332) Jones visited Trout, and Trout left in the Blazer. (T20:1331-1332) Trout lives near a concrete plant, and Jones thought that Parker could find McRae's body in the area

across from the concrete plant. (T20:1332) Parker and some other officers went to the area to search for the body. (T20:1332-1334) After they had searched for about two or three hours, Parker received a page advising him that Jones wanted to speak to him again. (T20:1333-1334) This page occurred around 6:00 p.m. (T20:1334) Parker returned to talk to Jones. (T20:1334-1335)

Three correctional officers testified about circumstances leading to Jones' request to see Detective Parker. (T20:1243, 1249, 1260) On February 21, 1995, correctional officer Troy Vonk was performing a routine cell check when Jones called him over to his cell. (T20:1260-1262) Jones appeard distraught and had been crying. (T20:1262) He said to Vonk "I need to confess and I need to tell where the body is." (T20:1262-1263) Vonk told another correctional officer, Scott Guest, and the two of them talked to their superior, Sergeant Beverly Frazier. (T20:1245, 1263) Sergeant Frazier approached Jones' cell and Jones told her that he had spoken to his mother, and she told him to get things right and to tell where the body was if he knew. (T20:1251) Sergeant Frazier advised Jones of his constitutional rights. (T20:1251) Frazier testified that Jones made three requests--he said, "I want to talk to my attorney, I want to talk to my mother, I want to talk to Detective Parker." (T20:1257) Jones was emotional and crying for several minutes during this time. (T20:1258) Jones said that he wanted to make things right with God, and he wanted to show them the location of the body. (T20:1254)

Correctional Officer Vonk had Jones under observation and conducted a strip search. (T20:1264-1265) Vonk said that Jones was

very distraught during this time and was crying. (T20:1265) Jones asked him "Do you think if I tell where the body is, do you think they can get me to have a conference with my mother?" (T20:1266) Vonk advised him that that was up to his superiors. (T20:1266) Vonk then asked "Well, did you kill her?" Jones responded, "Yes, I did." (T20:1266) Jones continued to talk about places where the body was and how he had choked her. (T20:1266) Vonk then asked how did you do it? (T20:1266) Jones said "I just--I saw her in the parking lot and I walked up to her and choked her and threw her in the backseat." (T20:1266) Vonk was also present when Detective Parker arrived, but did not stay while Jones talked to Parker. (T20:1267-1268)

Detective Parker arrived at the jail on February 21st, at approximately 6:00 p.m. (T20:1335-1336) Parker asked Jones if he had been advised of his rights and Jones said that he had. (T20:1336) Jones told Parker that he wanted to make everything right with the lord and talk about Lori McRae. (T20:1336) Jones said "I killed her and I want to talk to you -- I'm sorry -- I want to tell you where the body is at." (T20:1336) Jones told Parker it was an accident and that he didn't mean to do it and he wanted to get right with the Lord. (T20:1336) Jones advised Parker that McRae was talking to him in the Winn-Dixie parking lot by her truck, he grabbed her, choked her and "I guess I choked her to death." (T20:1337) Jones said he put her in the back seat and that he now wanted to show Parker where the body was located. (T20:1337) Parker said that Jones never mentioned the involvement of Jamie Trout again. (T20:1337) Parker called for other officers to assist him

and Detective Bolena rode in the car with Parker and Jones. (T20:1337-1339) Jones told the detectives that the victim's body was in Baker County. (T20:1340) He also said that the victim parked her car by his car, and as she was trying to get into her truck, he tried to grab her. When she gave him the code number, she tried to resist him and she passed out or died. (T20:1340) Jones directed the detectives into Baker County. They traveled 50 or 60 miles past MacClenny and past Glenn St. Mary. (T20:1340-1341) Jones had them turn on Arnold Rhoden Road, which is a dirt road through the woods. (T20:1341) There were no homes in the area. (T20:1342) Jones gave directions to Parker, who was walking out through the woods, on where to walk to find the body. (T20:1342-1344) Parker stepped where directed and found Lori McRae's body.(T20:1344) The body could not be seen from the road. (T20:1344) Parker called the Medical Examiner's Office and FDLE to the scene. (T20:1345)

Dr. Bonifacio Floro, the Deputy Chief Medical Examiner, went to the scene where the body was located on February 21, 1995. (T16:592-600) Floro found Lori McRae's decomposing body about 50 feet into the woods off of a dirt road in Baker County. (T16:599-600) Floro noticed that the decomposition of the head, neck and chest area were much more severe that the lower part of the body. He estimated the time of death to be about three weeks earlier. (T16:600-T17:607) Floro identified the body using x-rays from dental records. (T17:607) The clothing on the body consisted of a long sleeved shirt which was open and pulled up to the upper part of the body; a brassiere which was in place except for the left strap; black pants which were pulled down and unzipped exposing the

pubic area and buttocks; a ligature around the neck which was tied with a single knot; on top of the cord was another ligature -- the sleeve of a black sweater, which was tied around the neck. (T17:608-611) The lower extremities were tied together with a heavy knot. (T17:608-611) She had on black socks with no shoes. (T17:611)

Due to decomposition, Floro found a hole in the upper left chest and no neck organs, only the backbone remained. (T17:611) The upper and lower jaws were exposed due to decomposition. (T17:611) Floro found bruising on the elbow, the wrist, the thigh, the upper leg and the left shin. (T17:611) Floro concluded these bruises were acquired prior to death or contemporaneous with the time of death. (T17:611-612) The injuries to the forearm and legs could have been inflicted during a struggle and were consistent with defensive wounds. (T17612-614) Floro found that the middle left fingernail broken which was consistent with a person scratching an attacker. (T17:613-614) There was no genitalia due to decomposition. (T17:614) Floro could not determine if the ropes around the victim's legs were placed there before or after death since he did not see any abrasion of the skin due to the ropes. (T17:614-615) However, it was possible she simply did not struggle against the ropes or that her jeans served as a protector of the skin. (T17:615) Floro indicated that bloodstaining on the jacket was inconsistent with being produced from strangulation. (T17:616) Floro was of the opinion that the cause of death was a result of ligature strangulation. (T17:618) Floro did remove a muscle portion of the thigh complete with bone to send to the FDLE Crime Lab for testing. (T17:618-619) Floro stated that in the autopsy room they

do not sterilize the saws in between autopsies.(T17:619)

Diane Hanson, an FDLE crime laboratory serology specialist, analyzed various items of evidence and performed DNA testing. (T19:1061-1107) Hanson examined a jacket, Exhibit 59, a pair of blue jeans, Exhibit 83, and a sun shade. (T19:1075-1083) Hanson tested a bloodstain on the green jacket on three different areas of the jacket. (T19:1085-1086) She tested several areas on the blue jeans. (T19:1086-1089) She concluded that tests from five areas on the blue jeans and from the jacket demonstrated that the bloodstain could not have originated from David Jones. (T19:1089-1090) One stain on the blue jeans could be the result of a mixture of blood consistent with that of David Wyatt Jones and the person who donated the bloodstain to the green jacket. (T19:1092) A number of other items submitted to Hanson for examination did not test positive for blood. (T19:1095-1099)

Michael De Guilliamo, the director of forensic analysis for Micro Diagnostic, a private genetic testing laboratory, also examined items of evidence that had been previously examined by FDLE. (T19:1108-1115) His testing on the sun shade produced no conclusive results. (T19:1119-1120) De Guilliamo tested the blue jeans making his own cuts from the jeans as well as reexamining the cuts made by FDLE. (T19:1120-1121, 1122) He also tested the green jacket. (T19:1122-1124) De Guilliamo tested the bone and tissue samples from the victim and obtained a genetic profile. (T19:1135-1142) His testing of the jeans and the jacket produced the same results that the FDLE testing did. (T19:1124-1143) He concluded that the genetic profile of the stains on the green jacket and of

the blood mixture on the jeans was consistent with the genetic profile of the muscle and bone taken from the victim.(T19:1143-1148) Regarding the mixture on the jeans he could not exclude the defendant from contributing to that mixture, but he could not definitely say the mixture was a combination of the victim's and David Jones' blood. (T19:1157)

Ranajit G. Chakraborty, an expert in population genetics and DNA, also examined the results of the testing done on the jeans and the jacket. (T20:1180-1243) He concluded that the stains on the green jacket were inconsistent with the blood from David Jones. (T20:1213) The stain was not inconsistent with the DNA sample from the victim, and the victim could not be excluded from having produced the stain on the jacket. (T20:1214) The stain on the jeans was also not inconsistent with the DNA sample from the victim and she could not be excluded as a donor of that stain. (T20:1214) The stain of mixed origin could have been a combination of the blood from David Jones and from the victim. (T20:1214-1215)

Penalty Phase and Sentencing

The State presented additional evidence concerning David Jones' previous conviction for second degree murder and victim impact testimony. (T24:1623-1690) Jones objected to any evidence regarding the second degree murder conviction beyond the judgment and sentence as creating a feature of the penalty phase. (T24:1623-1628) Jones also objected to the victim impact evidence on various constitutional and as applied grounds.(T24:1628-1632, 1596-1597)

John Bradley, who is a homicide detective in Jacksonville was the lead detective investigating the murder of Jasper Highsmith

which occurred in January of 1986. (T24:1647) He arrested Jones for the homicide. (T24:1648-1649) Jones had escaped from the Jacksonville jail and the homicide occurred while he was on escape status. (T24:1649-1650) Jones was taken into custody in Spartanburg, South Carolina, and Bradley interviewed Jones after he was returned from South Carolina. (T24:1650-1651) He arrested Jones for the murder of Jasper Highsmith. (T24:1651-1652)

Bradley obtained a confession which was introduced into evidence and read to the jury. (T24:1652-1656) According to Jones' confession a friend took him to Highsmith's trailer where he was permitted to stay for a while. (T24:1655) Jones had taken quaaludes, smoked marijuana and drank beer before arriving at the trailer. (T24:1655) Jones and Highsmith got into an argument, and Highsmith hit him with an umbrella. (T24:1655) Highsmith threw things at Jones, grabbed him and hit him with the hook part of the umbrella several times. (T24:1655) Jones kicked Highsmith in the face and head several times, Highsmith fell back against the counter, but he in turn grabbed Jones. (T24:1655) Jones got a pot from the counter and hit Highsmith several times. (T24:1655-1656) Jones tried to get away from Highsmith, but Highsmith pursued him with a knife. (T24:1656) Jones obtained his knife from his clothes basket and threw it at Highsmith, sticking him in the chest. (T24:1656) Jones blacked out and woke up between 3:30 and 4:30 a.m., finding Highsmith dead. (T24:1656) Jones placed Highsmith in the trunk of a car and drove to South Carolina where he was arrested. (T24:1656) Bradley testified to the contents of the coroner's report which indicated that Highsmith died from trauma to

the head and a stab wound to the chest. (T24:1656-1657)

J. J. Hall, a crime scene investigator with the Spartanburg Police Department in South Carolina, testified about the photographs and physical evidence collected from Jasper Highsmith's car after Jones' arrest. (T24:1661-1666) Defense counsel objected to the introduction of the various photographs including the photograph of Highsmith's body found in the trunk of the car. (T24:1664-1666) The State also published the plea form to the jury where Jones plead guilty to second degree murder for the death of Jasper Highsmith. (T24:1666-1678)

Over defense objections, the State was allowed to read a statement by Melissa Leopard, Lori McRae's sister, dealing with the impact of the victim's death. (T24:1679) The prosecutor also read a statement by Lori McRae's husband, Doug McRae, regarding the impact of his wife's death. (T24:1681) The defense made a cumulative evidence objection to this material. (T24:1683)

Jodi Brenner-Burney, another sister of Lori McRae, testified. (T24:1683-1690) She told the jury about a picture that Lori McRae's daughter drew at school after her mother's death. (T24:1684-1685) Brenner-Burney also read her own statement about the impact of her sister's death. (T24:1685-1686) Defense counsel again objected to the victim impact evidence, specifically noting the witness's emotional outburst during the testimony. (T24:1686-1687) Counsel objected to the publishing of the picture drawn by Amanda McRae regarding her mother which included comments written by the girl's teacher on the bottom of the drawing. (T24:1689)

The defense presented several witnesses in mitigation. David Jones' wife, Jackie Doll Jones, testified about their life together and the impact of crack addiction on their lives. (T24:1691) Jones' sister, Cynthia Bryant, testified about her brother, his character and their relationship in the family. (T24:1740) A former employer, Wayne Pierce, testified about Jones' work history with him. (T24:1747) Jones' mother, JoAnn Sealey, testified about her son's life. (T25:1769) Jones' defense lawyer in the Highsmith case, Michael Edwards, also testified. (T25:1807) Sherry Risch, a clinical psychologist testified about testing she did on Jones. (T25:1848) Drew Edwards, director of the drug and alcohol treatment center for Methodist Hospital, testified about crack addiction. (T25:1894) Tara Wilde, of the Jacksonville Sheriff's Office, testified about assistance Jones provided in thwarting an escape attempt. (T26:1966) Finally, the testimony of Ronald Jones, an assistant superintendent at Taylor Correctional Institution, related assistance Jones gave in preventing an escape attempt at that institution. (T26:1980)

Jackie Jones testified that she and David had been married since 1982. (T24:1691) She described the impact that drug addiction had on their lives. For the five months prior to the disappearance of Lori McRae, Jackie said that David was literally using almost every dollar they could find for crack cocaine. (T24:1692-1693) Jackie tried to hide enough money to pay for the motel room and some money for food, but David would often tear the room apart and find where she hid the money. (T24:1692-1694) He tore apart smoke alarms, draperies, anywhere she could think of to hide it.

(T24:1693) The two of them would steal during the day to get money to pay the motel room for the next night and whatever was left was used to buy cocaine. (T24:1694) There was no other interest in their lives. (T24:1694)

The amount of crack cocaine David used during the day depended only on how much money they obtained stealing. (T24:1694) This amount was never under $100 a day and it could be up to a few hundred dollars. (T24:1694) David would begin smoking the crack just as soon as he obtained it from the dealer, since he could not wait until he got back to the motel room. (T24:1695) Frequently, he smoked crack from a pipe made with a car antennae and a Brillo pad. (T24:1696-1697) Jackie said the cocaine made her feel paranoid. (T24:1697) She said the high feeling from the cocaine lasts only a couple of minutes. (T24:1697) She had to wait several hours to take another hit of cocaine because taking another too quickly increased the paranoid feelings. (T24:1698) David, however, did not wait between taking the next hit of crack. (T24:1698) He would go into the bathroom of the motel room alone and smoke until the crack was gone. (T24:1698-1699) Afterwards, he would come out of the bathroom and start pacing -- wanting another hit of cocaine. (T24:1699) During these months, David's physical appearance changed; he lost weight because he did not eat properly and his personal hygiene was poor. (T24:1700) David did not even like the smell of food. (T24:1700) Additionally, when David was high on cocaine, he had no sexual drive or interest. (T24:1701) David was sometimes "on the train" which meant that he had taken a hit so intense that it blocked out all noises except something that

sounded like a train. (T24:1701) David's cocaine addiction was much worse than Jackie's. (T24:1701-1702) He would use other drugs--marijuana, dilaudid. (T24:1701) At times, David had outbursts of anger and would hit Jackie or tear-up something. (T24:1702-1703) Jackie had never seen David as strung out on cocaine or have worse cravings for cocaine than he was experiencing the few months before the offense. (T24:1703-1704) She was concerned when she got arrested because she had been the one to maintain some stability by making sure they had money for the room and clean clothes. (T24:1704-1705) She felt more like a babysitter than a wife. (T24:1705)

Jackie related a time when David was working for the Pepsi-Cola Company as a route salesperson and doing a honest hard-working job for them. (T24:1706) Drugs and alcohol came, and David began stealing money from the company. (T24:1705-1706) He was placed in jail, but he escaped. (T24:1706-1707) Jackie made a telephone call to a friend in South Carolina to arrange somewhere for him to go. (T24:1707) During this time, David was not using crack, but he was injecting dilaudid. (T24:1707-1708) He was addicted, but Jackie said it was nothing like the addiction he had with the crack cocaine. (T24:1708) David's cravings were not as strong on the dilaudid as they were when he was on cocaine, and his behavior was not affected as much. (T24:1709) During 1986, he was using dilaudid once or twice a day. (T24:1708-1709) David was also smoking marijuana and injecting cocaine. (T24:1710)

David's crack addiction was much worse before the disappearance of Lori McRae than it was in 1986, prior to the killing of Jasper Highsmith. (T24:1711) Jackie was afraid of him at

times because of his behavior on drugs. (T24:1711-1713) When not using drugs, David was a hard-working, courteous, decent man. (T24:1713) However, on drugs, his behavior changed. (T24:1712-1713) When David worked at different jobs, he usually worked outdoors; he was an energetic person and worked long hours. (T24:1713-1714) He drove a delivery truck driver for various companies--Krispy Kreme Doughnuts, Pepsi-Cola and Flavor Rich. (T24:1714) David also worked in Callahan for a man named Wayne Ferguson. (T24:1715)

Jackie said their relationship was an on and off affair, usually depending upon David's drug use and drinking. (T24:1715-1716) David had a good relationship with his mother. (T24:1717-1718) His mother takes care of David and Jackie's son, Davey, who was 13-years-old. (T24:1717-1718) For a period of time after David got out of prison, he did not drink or use drugs. (T24:1718-1719) David was a different person during this time. (T24:1719-1721) On drugs, he could be vicious and strike out. (T24:11721-1722) Jackie became scared of him because of his behavior as a result of the drug usage. (T24:1729-1730)

David's sister, Cynthia Bryant, testified that David acts totally different when he is on drugs. (T24:1740-1745) When not on drugs, David was an affectionate, compassionate person whose family was important to him. (T24:1742-1743) He had a good relationship with his mother. (T24:1743) David was a good employee when not on drugs. (T24:1744) The defense introduced some cards David sent to his sister while he was in jail (Exhibit H, I and J), and she testified these were typical of the sentiments David had when not

on drugs. (T24:1744-1745)

Wayne Pierce was a former employer of David's in a house painting business. (T25:1747-1758) Pierce's business specialty was painting and repainting expensive homes. (T25:1757-1758) He was introduced to David through a family member shortly after David had separated from Jackie. (T25:1757-1758) Pierce hired David to work for about three or four months. (T25:1758-1759) David's work was good; he was a good employee. (T25:1759-1760) In fact, Pierce allowed David to stay for a time in his home. (T25:1760) David never complained about the hard work or the long hours. (T25:1760-1761) Toward the end of the period that David lived in the house with Pierce, David started seeing Jackie again. (T25:1761-1762) When David was arrested, Pierce saw his picture on television and was surprised at the change in David's physical appearance. (T25:1762)

David's mother, JoAnn Sealey, testified about her son. (T25:1769) She and David's father divorced when David was about four-months-old. (T25:1770) David was born in 1958. (T25:1771) David's father was an alcoholic, who has since stopped drinking, and the two of them are good friends now. (T25:1771-1772) Ms. Sealey was married to David's father for seven years, and they had three children, David being the youngest. (T25:1772) She kept all three of her children together which sometimes required her to work three jobs. (T25:1773-1775) David went to high school in Cocoa where Ms. Sealey worked for a time. (T25:1774-1775) David never liked school, and he eventually dropped out in ninth or tenth grade. (T25:1775) He later earned his G.E.D. (T25:1776) David always got along with his brothers and sisters and played well with other

children. (T25:1776) He joined the military at age 19, and he later worked in the Jacksonville area. (T25:1777)

Ms. Sealey was not aware that David had a drinking or drug problem before he went into the service. (T25:1778) However, while in the service, David got into trouble with alcohol and was discharged from the Army. (T25:1779-1780) David obtained a job with Flavor Rich in milk delivery, and he later worked for Krispy Kreme and the Pepsi-Cola Company driving a truck. (T25:1781-1782) David met Jackie Doll during this time, and in the beginning, their relationship was good. (T25:1782) They became involved in drugs and problems arose. (T25:1782-1783) Ms. Sealey took control of raising David's and Jackie's son, Davey. (T25:1783) Jackie had two other children, one living in Gainesville with Jackie's mother and the second living with the child's father. (T25:1784) David and Jackie would separate and get back together, and David started stealing money to support their drug habit. (T25:1785-1786) Jackie did not have contact with David while he was in prison. (T25:1788) David got his tattoos while in prison. (T25:1787) When David and Jackie were together they were in their own world and nothing else mattered. (T25:1790)

David worked with a trailer moving company and was injured in South Florida. (T25:1789-1790) The injuries were severe requiring a metal plate in his head and a time with his mouth wired closed. (T25:1791) These injuries markedly changed David's appearance. (T25:1791) Ms. Sealey did not know where her son was for two and a half months prior to David's arrest for the Lori McRae murder. (T25:1791-1792) This was particularly unusual, since it

included the Thanksgiving, Christmas, and New Years' holidays.(T25:1792))

The attorney who represented David on the second degree murder charge, Michael L. Edwards, testified.(T25:1807) He was appointed to represent Jones in 1986, and Jones ultimately pled guilty to that charge.(T25:1808-1809) Edwards had Jones examined by a psychiatrist prior to the plea. (T25:1809) The Defendant's Exhibit P and Q was the report made by the psychiatrist. (T25:1810) The prosecutor objected to allowing Edwards to relate the content of the report on the grounds that it was hearsay. (T25:1810-1812) Defense counsel was allowed to proffer the testimony about the report Dr. Miller prepared to determine David's competency to stand trial.(T25:1844-1848) Miller found Jones incompetent to proceed, and the court ordered Jones committed to Florida State Hospital where he remained for about six months. (T25:1844-1846)

Sherry Risch, a clinical psychologist, performed psychological testing on David. (T25:1848) Risch did not do a full scale clinical psychological assessment or interview of Jones.(T25:1852) She performed an intelligence test and some neurological testing.(T25:1852-1853) David Jones has a full scale I.Q. 78, which places him in the fifth to ninth percentile, meaning 90 to 95 percent of the population would score above his score. (T25:1853-1854) There is a plus or minus five point margin of error, making the score range from a low of 73 to a high of 83.(T25:1854-1855) Risch stated that Jones is not retarded, and he would be able to read, drive a car, hold a job or earn a GED.(T25:1825) One aspect of his testing showed that he was unusually low in the ability to

analyze a situation and think of consequences.(T25:1856) He tended to be impulsive and scored very low in his ability to foresee consequences of actions. He is weaker in that area when compared to his other abilities. (T25:1856) Risch agreed that he would be able to conform his behavior to the requirements of law.(T25:1856) She did not find evidence of Jones' malingering during the testing.(T25:1857-1858)

Drew Edwards, who had been the executive director of an alcohol and drug treatment center for Methodist Hospital for eleven and a half years, testified as an expert on drug addiction.(T25:1894-1902) His responsibilities had included directing three or four full-time counselors as well as doing direct counseling.(T25:1895-1896) He has counseled more than a thousand drug addicts since the 1980's. (T25:1896-1901)

Edwards first testified about the effects of cocaine on the brain.(T25:1907-1915) He explained that cocaine is a central nervous system stimulant which easily crosses the blood brain barrier.(T25:1907) Snorting cocaine through the nostrils is the slowest way for the cocaine to be absorbed, injecting cocaine intravenously gets the cocaine to the brain much faster, however, smoking the cocaine, inhaled through the lungs, is the most efficient way to get the highest dose of the drug to the brain.(T25:1907-1908) Cocaine effects the reward pleasure center of the brain.(T25:1908-1909) Cocaine, especially in high dosages such as the intensity of smoking crack, causes dopamine molecules to accumulate on the receptor and the person receives a pleasure sensation 50 to 100 times beyond the normal experience.(T25:1909-

1910) As a result, users want to repeat this experience and will attempt to repeat it by using more cocaine. (T25:1910) However, the dopamine is blocked from being recycled so the person's ability to feel pleasure and achieve a chemical balance is impaired. (T25:1910) Serotonin, the chemical which keeps a person calm, is complicated by the taking of the cocaine. (T25:1909-1910) Cocaine leaves the receptors for serotonin and dopamine depleted, and the user interprets this depletion of this chemical as a craving or compulsion to smoke more cocaine. (T25:1910) When these chemicals are out of balance, the person experiences serious depression, anxiety, suicidal ideation, psychomotor agitation, hyper vigilance and paranoia. (T25:1910-1911) Since a person has very low lows and very high highs, he is constantly seeking to repeat the highs by taking more cocaine. (T25:1912) Patients Edwards has seen coming off of cocaine require three to six months of abstinence before their normal chemical balance is restored. (T25:1912-1915)

Edwards reviewed the records concerning David Jones along with police reports and depositions. (T25:1916-1917) Based upon a review of that information, Edwards concluded that David was suffering from cocaine addiction. (T25:1917-1920) David's behavior was consistent with a cocaine addict. (T25:1918-1924) His sole interest was in acquiring more cocaine, and he lost interest in all other aspects of life. (T25:1920-1924) David's wife also being a cocaine addict worsened the situation for David. (T25:1929-1930) Stealing is very common among cocaine addicts. (T25:1933-1934) Most of David's energies were directed to getting money to buy drugs. (T25:1943) The ATM records where over 105 attempts were made to

get money was consistent with the kind of behavior an addict would exhibit.(T25:1924-1925) Edwards testified there was no way of knowing if David was high on crack at the time of the crime, since in his opinion David was getting about 20 minutes of high a day and the rest of the time feeling miserable and having a compulsion to get more cocaine.(T25:1942-1943) Edwards also testified that whether a person is in an acute intoxication phase of cocaine use or not, he is still under the influence of the cocaine because the addiction has a tremendous influence on the brain and behavior.(T25:1943)

In Edwards' opinion David was as severe a cocaine addict as he has ever seen.(T25: 1924-1925, 1943-1944) Edwards noted that cocaine addiction is a recognized disease, and a person suffering from cocaine addiction would also suffer from some impairment of his ability to conform his conduct to the requirements of law.(T25:1931) He concluded that a person such as David who had the degree of cocaine addiction that he exhibited would have a substantial impairment of his ability to conform his conduct to the requirements of law.(T25:1931-1932)

Tara Wilde was the assistant chief of the Jacksonville Jail.(T26:1966-1968) She testified that on November 7, 1995, she received information from Jones advising that one of the inmates had obtained a wrench and planned to dismantle the windows inside their cell in an escape attempt.(T26:1968-1970) A search of that cell revealed a window partially dismantled. (T26:1970-1972) The inmate was a Nicholas Holland, along with a second, Eric Stevens, who was there on a murder charge.(T26:1972-1973) As a result of

this, they replaced the window framings inside the facility. (T26:1973) Wilde testified that on at least one other occasion Jones gave useful information regarding contraband in the facility, a weapon. (T26:1974-1975)

Ronald Jones, the assistant superintendent at Taylor Correctional Institution, also related an incident that occurred when he was employed at Baker Correctional Institution in which Jones advised that two inmates were trying to escape. Jones was subsequently transferred to another institution. (T26:1980-1982) Jones had requested protection for the information. (T26:1983-1985) The assistant superintendent said the information was very valuable and may have prevented an escape. (T26:1985-1986)

SUMMARY OF ARGUMENT

1. Jones moved to suppress oral statements he made to correctional officers and sheriff's detectives. These statements were obtained after Jones, on two occasions, requested to talk to his lawyer. The motion alleged violations of Jones' privilege against self-incrimination and right to counsel. Since the officers involved failed to honor Jones' request to talk to his lawyer, the subsequent statements Jones made to the officers were obtained in violation Jones constitutional rights. Art. I, Sec. 9,16 Fla. Const.; Amends. V, VI, XIV U.S. Const.

2. The trial court committed reversible error when it failed to grant Jones' request for a mistrial after Detective Parker commented on Jones' exercise of his right to remain silent and right to counsel during custodial interrogation. Parker testified that, after he confronted Jones about a matter during questioning,

Jones replied, "I want to stop talking and I want a lawyer." Defense counsel immediately objected and moved for a mistrial. The court overruled the objection, denied the motion for mistrial and violated Jones' constitutional right to remain silent.

3. Although race was not an issue in any way in this case, the State was permitted to produce evidence suggesting that Jones might have prejudices against blacks. The prosecutor was allowed to elicit that in one statement Jones gave to the detective, Jones referenced black males using a racial slur. Additionally, the State was allowed to introduce the specific description of a spider web tattoo Jones had on his arm which is sometimes used by white supremists to indicate the wearer has killed a black person. Neither of these two facts was relevant to any issue in the case. The sole purpose for the evidence was to inject race into the trial to inflame the jury against Jones. Using irrelevant appeals to racial issues was an improper character attack which destroyed Jones' right to due process and a fair trial.

4. The trial court improperly submitted the murder charge to the jury under the premeditation theory. Evidence failed to exclude the reasonable hypothesis that the homicide was an unintentional killing during the commission of a robbery.

5. Jones sought to introduce the testimony of Dr. Harold Eaton on the effects of crack cocaine addiction. Eaton's experience as a psychiatrist and a former crack cocaine addict provided an usual background from which to explain to the jury the power of crack cocaine and its impact on those who become addicted. Eaton would have testified about the characteristics, behaviors and

cravings of crack addicts based on both his background as a former addict and his professional experience treating other crack addicts. The trial court improperly excluded Eaton's testimony on the ground that Eaton was not testifying to anything except his personal problems and was not giving an expert opinion relating to the defendant. Exclusion of this testimony violated Jones' rights to due process and a fair presentation of mitigation in the penalty phase of his trial.

6. David Jones was previously convicted of second degree murder in 1986. He pleaded guilty to the offense. In addition to establishing the conviction for the crime as relevant to prove the aggravating circumstance, the State also introduced Jones' entire confession through the testimony of Detective John Bradley; the corner's report indicating cause of death; photographs of the crime scene and physical evidence; and photographs of Highsmith's body as it was found in the trunk of the car. The State's evidence of this collateral crime beyond the judgment created an unnecessary, impermissible, and inflammatory feature of the penalty phase.

7. Attorney Michael Edwards represented Jones on the 1986 second degree murder charge. Edwards had Jones examined by a psychiatrist prior to the plea in that case. Dr. Miller found Jones incompetent to stand trial, and the trial court ordered Jones to the state hospital where he remained for six months. During penalty phase, Jones attempted to have Edwards testify about Dr. Miller's report and the trial court's ordering Jones hospitalized. The State objected to testimony about the content of the report on the grounds that it was hearsay. The trial court excluded Edward's

testimony. This ruling violated Jones rights to due process and a fair sentencing proceeding.

8. The trial judge found as an aggravating circumstance that the homicide was committed to avoid a lawful arrest. This Court has held that for this aggravating circumstance to apply for the homicide of a victim who is not a law enforcement officer perfecting an arrest, the evidence must demonstrate that preventing an arrest via witness elimination was the dominate motive for the murder. Proof that witness elimination was one of several motives is insufficient. Evidence in this case fails to prove that witness elimination was the dominate motive for the homicide. Jones death sentence has been unconstitutionally imposed.

9. Without notice to the court or counsel, a PSI was prepared between the guilt and penalty phases of the trial. A remark attributed to Jones appeared in the report indicating that Jones wanted to plead guilty and did not want to put the victim's family through a trial. The trial had been Jones' lawyer's idea. Jones said he was sorry he became involved in the trial. This remark placed Jones and his counsel in an adversarial position creating a conflict of interest. The trial court improperly denied counsel's motion to withdraw even though counsel indicated that due to the conflict, he could not place this mitigating fact before the jury.

10. The defense moved the trial court to prohibit the introduction of any penalty phase evidence which is designed to invoke sympathy for the victim or victim's family. Over defense counsel's continued objections, the trial court admitted testimony of victim impact witnesses under the authority of Section

921.141(7) Florida Statutes. The admission of this irrelevant and emotionally inflammatory evidence violated appellant's right to a fair penalty proceeding under the state and federal constitutions.

11. The trial court gave an unconstitutional instruction when defining the heinous, atrocious or cruel aggravating circumstance. In reading the standard instruction, the court substituted an "or" for an "and" and mislead the jury as to an essential limitation on the application of the aggravating circumstance. Moreover, the standard instruction, even if properly read, is unconstitutionally vague.

12. The trial court erred in allowing the consideration and finding of the robbery and kidnapping convictions as a basis for the aggravating circumstance under Section 921.141(5)(d) Florida Statutes, since these offenses were also the underlying felonies for the felony murder theory of the prosecution. Although this Court has ruled adversely to the position here presented, Jones asks this Court to reconsider its prior holding in light of Justice Anstead's concurring opinion in Blanco v. State, Case No. 85,118 (Fla. Sept. 18, 1997).

13. Sections 921.141 and 922.10 Florida Statutes which provides for a death sentence to be carried out by electrocution violate the cruel and ungual punishment provisions of the state and federal constitutions.

ARGUMENT

ISSUE I
THE TRIAL COURT ERRED IN DENYING JONES' MOTION TO SUPPRESS STATEMENTS SINCE JONES HAD REASSERTED HIS RIGHT TO COUNSEL AND THE STATEMENTS WERE OBTAINED IN VIOLATION OF HIS RIGHTS UNDER EDWARDS V. ARIZONA.

Before trial, Jones moved to suppress all oral statements he made on February 21, 1995 and continuing through the morning of February 22, 1995, to correctional officers and sheriff's detectives. These statements were obtained after Jones, on two occasions, requested to talk to his lawyer. The motion alleged violations of Jones' privilege against self-incrimination and right to counsel.(T1:35-36) Since the officers involved failed to honor Jones' request to talk to his lawyer, the subsequent statements Jones made to the officers were obtained in violation of the Constitution of Florida and the United States. Art. I, Sec. 9,16 Fla. Const.; Amends. V, VI, XIV U.S. Const. The United States and Florida Constitutions require that all questioning of an in custody defendant cease when he asserts his right to counsel. Miranda v. Arizona, 384 U.S. 436 (1966); Edwards v. Arizona, 451 U.S. 477 (1981); Smith v. Illinois, 469 U.S. 91(1984); Traylor v. State, 596 So.2d 957, 964-966 (Fla. 1992); Smith v. State, 492 So.2d 1063 (Fla. 1986). The trial court denied Jones' motion after a hearing. (T1:37) The motion to suppress the statements should have been granted, and Jones now asks this Court to reverse his convictions and order a new trial.

Facts Developed at the Motion Hearing

Detective James Parker first interviewed David Jones on February 1, 1995, immediately after his arrest.(T7:1234-1238)

Parker and Detective Gilbreath were present during this interview, the defendant executed a waiver of rights form and spoke to the detectives.(T7:1237-1241) At the end of this interview, Jones indicated he did not want to answer anymore questions and he wanted to speak to a lawyer.(T7:1243) Parker terminated the interview as soon as the request was made.(T7:1243)

On February 17, 1995, Jones made a request of Correctional Officer Christopher Parker to make a telephone call to the homicide detective division to speak to Detective Parker. (T7:1292-1293) Correctional Officer Parker attempted to call Detective Parker at the homicide office, but he was not available. (T7:1294) Correctional Officer Parker advised the homicide division that he needed Detective Parker to call back because an inmate wanted to speak to him.(T7:1294) Correctional Officer Parker had spoken to Detective Gilbreath.(T7:1294-1295) Gilbreath came to the jail within twenty minutes after the request.(T7:1295) Correctional Officer Parker advised Jones that someone from homicide was coming to talk to him, but Detective Parker was unavailable.(T7:1295-1296) Jones told him that he wanted to talk to Detective Parker.(T7:1296) Correctional Officer Parker said that Jones appeared calm, he was not upset, he did not appear to be under the influence of any alcohol, drugs or medication.(T7:1296-1297) Gilbreath arrived at the jail, Jones saw Gilbreath and said that he did not want to talk to him, he wanted to talk to Detective Parker.(T7:1297) Correctional Officer Parker told Jones that this was the detective from homicide and Parker left Gilbreath with Jones.(T7:1298) Gilbreath's contact with Jones lasted perhaps 20 seconds. (T7:1298-

1299) Gilbreath testified that when he spoke to Jones at the jail on this date, Jones told him that he wanted to talk only to Detective Parker. (T7:1279-1280)

On February 21, 1995, Detective Parker went to the jail to speak to Jones, pursuant to the request made to Detective Gilbreath. (T7:1244-1245) Jones indicated he wanted to talk to the detective, and Parker advised him of his constitutional rights. (T7:1245-1246) Jones gave him a statement denying murdering Lori McRae. (T7:1246) Jones did not appear intoxicated, and he appeared to understand his rights. (T7:1247-1248) Jones suggested an area where Parker might find the body. (T7:1248-1249) Parker's attempts to find the body were unsuccessful. (T7:1248) While searching for the body, Parker received a number of calls and requests to come back to the jail to talk to Jones. (T7:1249)

After the first statement Jones gave Detective Parker on February 21, 1995, Jones later told a correctional officer, Troy Vonk, that he wanted to confess and tell where the body was located. (T7:1344-1345) Correctional Officer Vonk, along with Correctional Officer Scott Guess, went to their supervisor, Sergeant Beverly Frazier, and advised her of Jones' request. (T7:1307, 1336-1337, 1344-1345)

Sergeant Frazier approached Jones' cell. (T7:1307) Jones stated he had talked to his mom and his mom told him he needed to confess or to show them where the body was located. (T7:1307) Jones told Frazier he wanted to talk to three people--his mother, his attorney, and Detective Parker. (T7:1307-1308) Jones was crying and said he couldn't take it anymore. (T7:1308) Jones told Frazier he

talked to his mother on the phone and she told him to "get it all out." (T7:1308) Jones continued to cry for several minutes. (T7:1308) Frazier advised Jones of his constitutional rights. (T7:1308-1310) Frazier told Jones he had the right to make a telephone call. (T7:1309) Jones said he understood, and he said he just could not handle it anymore and he had to get things straight with God. (T7:1309) Frazier never told Jones he could not use the phone to call his mother or his lawyer. (T7:1310) After clarifying that Jones had said Detective Parker, since Frazier at first thought he was saying Detective Barker, Frazier called Detective Parker. (T7:1310-1311)

Frazier advised Detective Parker of the situation and pulled Jones from his cell to meet with Parker, who said he was coming to speak with Jones. (T7:1311-1312) Frazier had Correctional Officers Guess and Vonk watch Jones because he was distraught and crying, and she though Jones might hurt himself. (T7:1338) Correctional Officer Vonk also stated that Jones was distraught when he talked to Frazier, and Frazier asked him, along with Guess, to watch Jones. (T7:1346) Frazier also asked Vonk to conduct a strip search of Jones to be sure he did not have anything on him with which he could harm himself. (T7:1347)

Toward the end of the strip search, Jones asked Vonk if he told where the body was could he speak to his mother. (T7:1349) Vonk advised Jones that he could not make those decisions. (T7:1349-1350) Jones told Vonk that he saw the lady in the Winn-Dixie parking lot with apparent car trouble. (T7:1350) He walked up to her, choked her and put her in the back seat. (T7:1350) Vonk also said that Jones

said something about wanting to speak to an attorney.(T7:1350) He wanted to know if he could get his attorney to see his mother before he said anything.(T7:1350) Vonk could not remember exactly when he made the statement about wanting to speak to an attorney.(T7:1350) Jones did not say he wanted his attorney present at that time.(T7:1351) He told Vonk that he would like his attorney to arrange to see his mother or for him to see his mother.(T7:1351) This request about a lawyer occurred after Jones had made statements about how the crime occurred.(T7:1351) Vonk clarified that the comment about the attorney was after Jones had talked about the killing.(T7:1354-1356) After Jones told Vonk he had choked the woman, Vonk asked Jones if he killed her.(T7:1356) Jones responded "I guess I did."(T7:1356) Vonk also asked Jones how he choked her.(T7:1356-1357) Vonk said that Jones' request for his attorney happened either just before or just after he asked those two questions.(T7:1357) Jones also started describing where in the woods the body was located.(T7:1357) After the strip search Vonk continued to monitor Jones until Detective Parker arrived.(T7:1358) When Detective Parker arrived, Jones as still very distraught. Jones said he had to come clean and get right with the Lord. Jones said he wanted to tell Detective Parker where the body was located.(T7:1359) Parker had not said anything to Jones at this time.(T7:1359) Sergeant Frazier was present with Parker.(T7:1359)

When Parker arrived at the jail, Sergeant Frazier told him that Jones wanted to speak to his attorney, his mother and to him, Detective Parker.(T7:1329) She testified she told him exactly what Jones had stated prior to her reading him his constitutional

rights. (T7:1326-1327, 1239)

Parker testified that he did not remember Sergeant Frazier stating that Jones wanted to speak to his lawyer. (T7:1268-1270) He acknowledged that Sergeant Frazier's report stated that she advised Jones of his constitutional rights because he had asked to talk to his mother and asked to talk to his lawyer and asked to talk to Detective Parker. (T7:1270) Parker said he did remember some statement about Jones' mother to the effect that he may have talked to her earlier. (T7:1270-1271) Parker also said that Correctional Officer Vonk did not tell him that Jones said he wanted to speak to his mother and to his attorney. (T7:1271)

Parker said that Jones told him that he had been read his constitutional rights by Sergeant Frazier. (T7:1251-1252) Parker said Jones did not exhibit any reluctance to talk. (T7:1253) To a large extent, Jones was telling Parker things rather than Parker questioning. (T7:1253) Jones told Parker he wanted to tell him where the body was located and also said that he killed her and that he needed to get it off his chest to get right with the Lord. (T7:1254) Jones offered to show Parker where the body was located. (T7:1255) Parker took Jones out of the jail in a patrol car, and Jones directed them to the location of the body. (T7:1255-1257) Detective Bolina assisted Parker and during the trip. (T7:1257-1260)

Argument

As Miranda, Edwards and their progeny explained, the inquiry in these cases is a two-part one: (1) did the defendant request counsel, and (2) if a request was made, did the defendant initiate further discussions with the police and make a knowing, intelligent

and voluntary waiver of his Fifth Amendment right to counsel prior to answering further police interrogation. As stated in Smith v. Illinois, 469 U.S. 91, at 94-95:

> This "rigid" prophylactic rule, Fare v. Michael C., 442 U.S. 707, 719, 99 S.Ct. 2569, 61 L.Ed.2d 197 (1979), embodies two distinct inquiries. First, courts must determine whether the accused actually invoked his right to counsel. See, e.g., Edwards v. Arizona, supra, 451 U.S., at 484-485, 101 S.Ct., at 1884-1885(whether accused "expressed his desire" for, or "clearly asserted" his right to, the assistance of counsel); Miranda v. Arizona, 384 U.S., at 444-445, 86 S.Ct. at 1612(whether accused "indicate[d] in any manner and at any stage of the process that he wish[ed] to consult with an attorney before speaking"). Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowing and intelligently waived the right he had invoked. Edwards v. Arizona, supra, 451 U.S., at 485, 486, n.9, 101 S.Ct., at 1885, n.9.

Smith v. Illinois, at 94-95.

The first question of the two-part inquiry was satisfied, since Jones made a valid request to talk to his lawyer before he made statements to Correctional Officer Vonk and before his final interview with Detective Parker on February 21. In fact, Jones made two requests for his lawyer before the final interview with Parker. Jones' first request was to Sergeant Frazier and she testified:

> A. Okay. I walked over to [Jones'] cell and he said he had talked to his mom and his mom told him that he needed to confess or to show them where the body and stuff was at, and ***he said that he wanted to speak with -- he wanted to talk to his mom. He wanted to talk to his attorney. He wanted to talk to detective*** -- whom I thought at the time he said Barker and later on I found out the detective's name was Parker.

(T7:1307-1308)(emphasis added) Frazier's response was to call Detective Parker, ignoring Jones first requests to talk to his

mother and his lawyer. (T7:1310) She also had Correctional Officer Vonk watch Jones and conduct a strip search. (T7:1346-1347) During the strip search, Jones made a second request to talk to his lawyer and his mother before speaking to the detective. Jones asked Vonk if he could see his mother to speak to his lawyer.(T7:1349-1350) Vonk testified:

> A. As we were doing the strip search towards about the end of it [Jones] said, just out of the blue, he said if I tell you where the body was now and how I can find it can I speak to my mother.
>
> Q. And what did you reply to that?
>
> A.I told him that I couldn't make those kind of decisions.
>
> * * * *
>
> Q. Now during the strip search or immediately thereafter, ***did [Jones] indicate to you any desire to speak with an attorney?***
>
> A. ***I remember him saying something about him wanting to speak to any attorney to see if he could get his attorney to see his mother before he said anything*** or something like that, but I can't remember when he said that or if it was in the same room then or maybe right afterwards that he mentioned something.
>
> Q. ***Did he indicate to you that he wanted to have his attorney present at that time?***
>
> ***A. No, sir.***
>
> Q. ***Was the only thing he said about that was that I would like my attorney -- to arrange to either for my attorney to see my mother or for me to see my mother.***
>
> A. ***Exactly.***
>
> * * * *
>
> Q. Do you have a recollection at this time whether the statement that he made about the attorney arranging for him to see his mother was made before or after he told you that he choked the woman?
>
> A. Oh, it was afterwards.

(R7:1349-1351)(emphasis added) Jones asserted his right to have access to counsel before speaking with law enforcement. He "erected a constitutional barrier which exists for his protection." Smith v. State, 492 So.2d at 1065.

The second inquiry is whether Jones initiated further interrogation by the police, and thereafter, validly waived the right to counsel he had invoked. Although Jones initiated contact with Detective Parker earlier on February 21, before Jones asked to talk to his lawyer, the later contact with Parker was after Jones asserted his right consult with counsel before speaking to the detective. The fact that Jones spoke with the detective without counsel when Parker arrived, did not constitute a waiver of the invocation of his right to counsel. Further police questioning was improper and Jones responding to such police contact does not constitute a waiver of his right. See, Miranda, Edwards, Smith v. Illinois; Smith v. State, 492 So.2d 1063. Jones made a request to Sergeant Frazier to talk to his lawyer. (T7:1307-1308) Later, Jones made a similar request to Correctional Officer Vonk.(T7:1350-1351) Frazier told Detective Parker of Jones' request for a lawyer. (T7:1326-1329) Although Parker denied hearing this information from Frazier (T7:1268-1270), the information is imputed to him. Kyser v. State, 533 So.2d 285, 288 (Fla. 1988); Williams v. State, 466 So.2d 1246 (Fla. 1st DCA 1985). Parker failed to honor Jones' request to consult with counsel before speaking any further to Parker about the case.

The statements Jones made to Detective Parker and the other officers after requested counsel were obtained in violation of

Jones constitutional rights. These statements should not have been admitted at Jones' trial. He asks this Court to reverse his convictions for a new trial.

ISSUE II
THE TRIAL COURT ERRED OVERRULING DEFENSE OBJECTIONS AND IN DENYING A MOTION FOR MISTRIAL WHEN DETECTIVE PARKER COMMENTED ON JONES' RIGHT TO REMAIN SILENT.

The trial court committed reversible error when it failed to grant Jones' request for a mistrial after Detective Parker commented on Jones' exercise of his right to remain silent and right to counsel during custodial interrogation. See, e.g., Miranda v. Arizona, 384 U.S. 436 (1966); Clark v. State, 363 So.2d 331 (Fla. 1978); State v. Smith, 573 So.2d 306 (Fla. 1990). Parker testified that, after he confronted Jones about a matter during questioning, Jones replied, "I want to stop talking and I want a lawyer." (T20:1321-1322)(Appendix C) Defense counsel immediately objected and moved for a mistrial. (T20:1322) The court overruled the objection and allowed the testimony to continue. (T20:1322) Later, while the jury was out of the courtroom for argument on another objection, the prosecutor brought up the defense motion for mistrial based on the comment on silence and suggested a curative instruction. (T20:1327)(Appendix C) The prosecutor advised the court that the State did not intend to elicit that statement from Detective Parker. (T20:1327) Defense counsel objected to a curative instruction since it would come several minutes after the comment on silence and would merely emphasize the comment to the jury. (T20:1327-1328)(Appendix C) In response, the trial judge merely said, "Motion for mistrial denied." (T20:1328) In overruling the defense objection to the comment on silence and in denying the motion for mistrial, the court violated Jones' constitutional right to remain silent. Amends. V, XIV U.S. Const.; Art. I, Secs. 9, 16 Fla. Const.; Miranda; Clark.

Initially, the trial court improperly ruled that Parker's remarks did not constitute and impermissible comment on Jones' right to remain silent. The court implicitly made such a ruling when denying the defense objection. Under the procedures this Court outlined in Clark, the trial court is to overrule an objection when it determines that the statement could not be construed as a comment on silence:

> When an objection and motion for mistrial are made, the trial court must determine whether there was an improper comment on the defendant's exercise of his right to remain silent. If the court finds that there was not, the objection should be overruled. In that event, the objection is preserved, and if the defendant is convicted, it may be raised as a point on appeal.

Clark, 363 So.2d at 335. Courts are to review any suspected comment on silence to determine if it is fairly susceptible to such a interpretation by the jury. E.g., State v. Smith, 573 So.2d at 319; State v. DiGuilo, 491 So.2d 1129 (Fla. 1986). In this case, the statement "I want to stop talking and I want a lawyer" (T20:1321-1322) is a clear comment on silence and leaves no room for other interpretation. Detective Parker's testimony was a direct, unambiguous comment on Jones' exercise of his rights under Miranda. The State later conceded that the Detective Parker's remarks were an improper comment on silence when the State brought the mistrial issue to the court's attention. (T20:1327-1328) The trial judge should have sustained Jones' objection to the comment on silence.

When the court finally entertained the motion for mistrial, it erred in denying the motion. (T20:1327-1328) The court made no findings and expressed no reasoning for the ruling denying the

motion for mistrial. (T20:1327-1328) Since the court previously overruled the defense objection to the remark, and never changed that ruling, the court's denial of a mistrial must have been based on this previous ruling on the objection. The ruling on the objection must have been based on the clearly erroneous determination that the remark did not constitute a comment on silence. There is nothing in the record to reflect that the court ever premised its denial of the mistrial on a changed ruling on the original objection. Nothing indicates that the court ever acknowledged that the comment was, in fact, a constitutional error requiring an analysis to determine if a mistrial was an appropriate remedy for the error. Consequently, the court's ruling on the mistrial motion was a compounding of the original error in overruling the objection.

Detective Parker commented on Jones' exercise of his right to remain silent and right to counsel. The trial court should have sustained the defense objection and granted a mistrial. Jones' constitutional rights have been violated, and he urges this Court to reverse his case and remand for a new trial.

ISSUE III

THE PROSECUTOR IMPROPERLY ATTACKED JONES' CHARACTER AT TRIAL BY ELICITING PREJUDICIAL, IRRELEVANT AND INFLAMMATORY EVIDENCE WHICH SUGGESTED THAT JONES MIGHT HARBOR RACIAL PREJUDICES AGAINST AFRICAN-AMERICANS.

David Jones is white. The victim, Lori McRae, was white. Nothing in this case intimated, in any way, that race or racial prejudice was involved in the crime. However, the State was permitted to produce evidence suggesting that Jones might have prejudices against blacks. First, the prosecutor was allowed to elicit that in one statement Jones gave to the detective, Jones referenced black males using a racial slur. (T20:1270-1275,1299-1301)(Appendix B) Second, the State was allowed to introduce the specific description of a spider web tattoo Jones had on his arm which is sometimes used by white supremists to indicate the wearer has killed a black person. (T17:665-685, 688)(Appendix B) Neither of these two facts was relevant to any issue in the case. The sole purpose for the evidence was to inject race into the trial to inflame the jury against Jones. Using irrelevant appeals to racial issues was an improper character attack which destroyed Jones' right to due process and a fair trial. See, Art. I, Secs. 9, 16, Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

Detective Parker testified about statements Jones gave to him during questioning. In one statement, Jones explained the scratches on his face as coming from a confrontation with two black men who robbed him. (T20:1270-1271, 1300-1301) Jones referred to the two men using a racial slur "nigger" in his statement. (T20:1271,1300-1301) Defense counsel moved in limine to prevent Parker from using the racial slur when relating what Jones said

during the interview. (T 20:1270-1275) He argued that the racial slur was not relevant to prove any issue at trial and any relevance which might exist was outweighed by the inflamatory nature of the term. (T20:1271-2172) The prosecutor admitted the slur did not prove anything, she sought its admission because "those are the exact quotes from this defendant" and "the jury should get a true reflection of what this defendant is all about." (T20:1271, 1273) The court ruled that the prosecutor could elicit the testimony, but Parker could use the racial slur only once in his testimony, and then, he should use other terms.(T20:1274-1275) Defense counsel objected to the ruling since reference to the racial slur even once is inflamatory and irrelevant. (T20:1275) When Parker testified, he did not actually use the racial slur, but the manner in which the prosecutor emphasized the matter in questioning left no doubt as to the slur used. (T20:1300-1301) Parker testimony proceeded as follows:

> Q.[PROSECUTOR] 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. [DETECTIVE] 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 slur.
>
> 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 used black males --
>
> MR. BUZZELL: [DEFENSE COUNSEL] 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.
>
> Q. [PROSECUTOR] Can you give us the quote without using the word?
>
> A. [DETECTIVE] "I got in a fight with some black guys at Moncrief and U.S. 1." Two or 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.

(T20:1300-1301)

Dennis Marsh and Leonard Hutchins had an automobile detailing business in Baker County, and they testified they saw Jones driving a red Chevy Blazer at their business. (T17:662-664, 685-689) Both men picked Jones' picture from a photographic line-up and also indentified Jones in court. (T17:679,687) The two men also testified that Jones had numerous tattoos. (T17:665-679, 687-688) Before Marsh and Hutchins testified, defense counsel move to exclude any reference to a spider web tattoo. (T17:665-678) Counsel argued that the prejudicial nature of the tattoo outweighed its probative value on the identification issue. (T17:666) In support of the argument, counsel presented news accounts of a publicized case involving a racially motivated killing where there was testimony about spyder web tattoos being worn by white supremists to signify the wearer had killed a black person. (T17:667-669) The concern was the injection of a racial issue in to this case where

none existed. (T17:668-678) The trial court overruled the objection. (T17:677) Marsh and Hutchinson testified about a spider web tattoo on Jones' arm. (T17:678-679, 688) Additionally, Jones was required to exhibit his arm to the jury to show the tattoo. (T17:684-685)

This Court has recognized that emotions can run high and cloud reason when racial prejudice becomes involved in a case. As a result, this Court has guarded against the improper use of racial issues which are not relevant to the issues being litigated in the particular case. Appeals to the racial sensitivies of jurors carries a high risk of inflaming these emotions and diverting the jurors from the relevant issues to be decided. Racial bias simply had no place in this case.

In McBride v. State, 338 So.2d 567 (Fla. 1st DCA 1976), the State elicited testimony, during this robbery prosecution, that the defendant yelled a slur about the arresting deputy's wife suggesting she was having sex with "niggers." Finding that the admission of the testimony denied the defendant a fair trial, the district court stated:

> Such alleged statement had no relevance to the case being tried but was undoubtedly offensive to two members of the jury who were of the black race. The effect of this remark attributed to appellant was to prejudice her in the eyes of the jury--particularly the two black members.

338 So.2d at 568. The court also concluded that the trial judge's cautionary instruction to disregard the remark was insufficient to remove its prejudicial impact. Ibid.

This Court, in Robinson v. State, 520 So.2d 1 (Fla. 1988),

vacated a death sentence because the prosecutor had presented evidence designed to arouse racial prejudices during the penalty phase of the trial. On cross-examination of the defendant's psychological expert, the prosecutor insinuated that the defendant, a black man, had a habit of preying on white women. Concluding that this argument was an improper attempt to make a racial appeal to the all-white jury, this Court stated:

> The prosecutor's comments and questions about the race of the victims of prior crimes committed by appellant easily could have aroused bias and prejudice on the part of the jury. That such an appeal was improper cannot be questioned. The questioning and resultant testimony had no bearing on any aggravating or mitigating factors.

520 So.2d at 7. In a footnote, this Court rejected the relevance of the testimony:

> We disagree with the trial judge's conclusions that the testimony was proper because it was brought up by defense counsel on direct. The only reference to race made by Dr. Krop on direct was his testimony that the defendant stated that he shot the victim the second time because "he wouldn't get a lot of mercy from having shot a `white woman.'" This testimony does not justify prosecutorial speculation that the defendant's crimes were racially motivated. Nor do we believe defense counsel's apparent attempt to rebut the prosecutor's innuendos on redirect were sufficient to cure any risk of prejudice.

Ibid. at 7 n. 3.

Appeals to racial bias have been resoundingly condemned for many years. Robinson; Cooper v. State, 136 Fla. 23, 186 So. 230 (1939). Even without objection, reversible error occurs because the racial remarks are "so obviously prejudicial and of such a

character that neither rebuke nor retraction may entirely destroy their sinister influence." Cooper, 136 Fla. at 28; accord, Robinson, 520 So.2d at 7; Reynolds v. State, 580 So.2d 254 (Fla. 1st DCA 1991). As this Court aptly recognized in Robinson, the danger of prejudice is particularly great in a capital case where the racial bias may affect the jury's sentencing recommendation. The purpose of the racial evidence in this case was to impugn Jones' character before the jury.

Race was not a relevant issue in Jones' case. The trial court erred in permitting the State to introduce evidence which created a racial issue which served no purpose other than arousing emotions and attacking Jones' character. Jones has been denied his right to due process and a fair trial. A new trial is required.

ISSUE IV
THE TRIAL COURT ERRED IN SUBMITTING JONES' MURDER CHARGE TO THE JURY ON THE THEORY OF PREMEDITATION SINCE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH A PREMEDITATED MURDER.

The victim in this case died as the result of ligature strangulation. (T17:618) There was bruising and other injuries consistent with a struggle. (T17:611-614) In his statement to the police, Jones said he did not intend to kill the victim. (T20:1336) Jones said he grabbed her to facillitate the robbery, she resisted, and he noted, "I guess I choked her to death." (T20:1337, 1340) Jones was under the influence of his crack cocaine addiction on the night of the homicide. The evidence fails to exclude the reasonable hypothesis the Jones unintentionally killed the victim during a struggle during the course of the robbery. Premeditation has not been established. Green v. State, Case no. 86,983 (Fla. May 21, 1998)(premeditation not proven where defendant threatened to kill the victim who was later found strangled to death, stabbed three times, suffered blunt trauma, and her nude body found in the middle of the road); Kirkland v. State, 684 So.2d 732 (Fla. 1996)(premeditation not proven where there was evidence of friction between the defendant and the victim because she sexually tempted him, and the victim died from several slashes to her throat and had been beaten with a walking cane); Hoefert v. State, 617 So.2d 1046 (Fla. 1993)(premeditation not proven although victim found nude and strangled to death and defendant had a history of strangling women while raping them).

ISSUE V

THE TRIAL COURT ERRED IN EXCLUDING AS IRRELEVANT THE TESTIMONY OF A DEFENSE WITNESS WHO WAS TO TESTIFY DURING THE PENALTY PHASE ABOUT THE IMPACT OF CRACK COCAINE ADDICTION BASED ON HIS OWN EXPERIENCE AS A FORMER ADDICT AND HIS BACKGROUND AS A PSYCHIATRIST WHO TREATS ADDICTS.

During the penalty phase of the trial, Jones sought to introduce the testimony of Dr. Harold Eaton on the effects of crack cocaine addiction. (R5:783-848; T25:1829-1840) Eaton's experience as a psychiatrist and a former crack cocaine addict provided an unsual background from which to explain to the jury the power of crack cocaine and its impact on those who become addicted. (R5:785-848) In Eaton's deposition,a portions of which was presented as a proffer of testimony he would have given (Appendix F), he related his medical training and experience,(R5:788-789); his becoming addicted to crack cocaine while in his medical residency program after just one use of crack, (R5:794-797); and the impact crack addiction had upon his behavior and ability to function, (R5:797-801) Additionally, Eaton would have testified about the characteristics, behaviors and cravings of crack addicts based on both his background as a fomer addict and his professional experience treating other crack addicts. (R5:806-809, 820-826, 843-845) The trial court excluded Eaton's testimony on the ground that Eaton was not testifying to anything except his personal problems and was not giving an expert opinion relating to the defendant. (T25:1839-1840) Exclusion of this testimony denied Jones his rights to due process and a fair presentation of mitigation in the penalty phase of his trial rendering his death sentence

unconstitutionally imposed. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

Jones had the right to present expert testimony to educate the jury about crack cocaine addiction. This Court addressed a similar situation in State v. Hickson, 630 So.2d 172 (Fla. 1993). After grappling with the admissibility of testimony about battered-spouse syndrome, this Court adopted a position allowing a defendant to either choose to be examined by an expert and have the expert give an opinion about the defendant specifically, or to have an expert, who had not conducted an examination, to testify about the syndrome to educate the jurors and enhance their understanding of the syndrome. Dr. Eaton, who did not examine Jones, was offered as an expert witness to provide information to the jurors to assist their understanding of crack cocaine addiction.

Section 90.702, Florida Statutes permits expert testimony to assist the jury in understanding the evidence. The statute provides:

> If scientific, tehchnical, or other specialized knowledge will assit the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Sec. 90.702 Fla. Stat. The profferd testimony of Dr. Eaton met this criteria.

First, testimony about the impact of crack cocaine addiction on a person's behavior would be helpful to the average juror's

understanding of these issues. Expert testimony on a subject is admissible evidence if the area is beyond the ordinary understanding of the jurors. See, Johnson v. State, 393 So.2d 1069, 1072 (Fla. 1980). Crack addiction is not within the realm of experience of the average juror. Without education on the this problem, the jury would be unable to understand the behavioral manifestations of the addiction.

Second, Eaton's testimony qualified as expert testimony. Although Eaton's testimony was based on both his personal experience and his professional expertise, this did not render the subject of his testimony merely about his "personal problems" as the court ruled. (T25:1839-1840) An expert opinion can be given when based on personally obtained experience as well as through professional training and practice.Sec. 90.702 Fla. Stat. For example, in International Insurance Company v. Ballon, 403 So.2d 1071 (Fla. 4th DCA 1981), the appellate court approved the trial court's decision to allow a former FBI agent with 30 years experience investigating burglaries and robberies and a long-time thief, who participated in many robberies involving alarm systems and safety deposit boxes, to testify about the ease of foiling alarm systems and opening safety deposit boxes. Dr. Eaton had the unique position of possessing expertise through his training as a psychiatrist and his unfortunate experience as a crack cocaine addict. In Eaton's profferd testimony, he rendered opinions about the characteristics, behaviors and cravings of crack addicts based on both his background as a fomer addict and his professional experience treating other crack addicts.

(R5:806-809, 820-826, 843-845)

Third, Eaton's testimony was certainly applicable to the evidence presented at trial. Several witnesses testified about Jones' behavior while using crack cocaine. A crucial issue in the penalty phase was the degree to which his behavior was influenced by his use of and addiction to crack cocaine. Expert testimony was essential to make the link between the drug use and addiction and the behavior. See, Williamson v. State, 681 So.2d 688, 697-698 (Fla. 1996); Geralds v. State, 674 So.2d 96, 101 (Fla. 1996).

Finally, exclusion of Eaton's testimony was not rendered harmless or cumulative because Drew Edwards' expert testimony covered some similar points. (T25:1907-1943) Jones carried the burden of proving the mitigating circumstance by a preponderance of the evidence that his behavior was influenced and impacted by the crack addiction. See, Walls v. State,641 So. 2d 381,390 (Fla. 1994). Excluding Eaton's testimony deprived Jones' of his right to present witnesses and impaired his ability to carry this burden of proof. Johnson v. State, 408 So.2d 813 (Fla. 3d DCA 1982)(reversible error to exclude testimony of second psychologist who would testify defendant insane even though one expert already testified to a similar opinion).

Jones had the right to present the testimony of Dr. Eaton as an expert in area of crack addiction based on his training and experiences. The trial court erred in denying Jones this right, and this Court must now reverse this case with directions that Jones be afforded a new penalty phase proceeding before a new

jury.

ISSUE VI

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE INFLAMATORY EVIDENCE DURING THE PENALTY PHASE ABOUT THE JONES' PRIOR MURDER CONVICTION THEREBY IMPERMISSIBLY MAKING THE PRIOR MURDER A FEATURE OF THE PENALTY PHASE TRIAL.

David Jones was previously convicted of second degree murder in 1986, for the homicide of Jasper Highsmith. (T24:1666-1678) Jones pleaded guilty to the offense. (T24:1666-1678) In addition to establishing the conviction for the crime as relevant to prove the aggravating circumstance, the State also introduced Jones' entire confession through the testimony of Detective John Bradley, (T24:1652-1656); the corner's report indicating cause of death was trauma to the head and a stab wound to the chest, (T24:1656-1657); photographs of the crime scene and physical evidence, (T24:1661-1666); and photographs of Highsmith's body as it was found in the trunk of the car. (T24:1664-1666) Defense counsel ojected to all evidence about the collateral crime beyond the judgment as creating an impermissible, inflamatory feature of the penalty phase. (T24:1623-1628) Introduction of this evidence denied Jones his rights to due process and a fair penalty phase trial. Art. I, Secs. 9, 16, 17, Fla.Const.; Amends. V, VI, VIII, XIV U.S. Const.

The State is permitted to introduce relevant collateral crimes evidence to prove an aggravating circumstance, but with limitations: The evidence must not violate the defendant's confrontation or other rights; its prejudicial effect must not outweigh its probative value; and the details of the collateral offense must not be emphasized to the point where that offense

becomes a feature of the penalty phase. This Court in Finney v. State, 660 So. 2d 674, 683 (Fla. 1995), cert. denied, 116 S. Ct. 823 (1996), made a special point to limit the State's use of collateral crimes evidence to prove aggravating circumstances to insure that such evidence did not become a prejucial feature of the trial:

> Testimony concerning the circumstances that resulted in a prior conviction is allowed to assist the jury in evaluating the defendant's character and the weight to be given the prior conviction so that the jury can make an informed decision as to the appropriate sentence. Rhodes, 547 So. 2d at 1204. However, the collateral offense need not be "retried" before the capital jury, in order to accomplish that goal. Evidence that may have been properly admitted during the trial of the violent felony may be unduly prejudicial if admitted to prove the prior conviction aggravating factor during a capital trial. This is particularly true where highly prejudicial evidence is unnecessary, or where the evidence is likely to cause the jury to feel overly sympathetic towards the prior victim.

Finney, 660 So. 2d at 683-84. Similar holdings have been made in many other cases. See Hitchcock v. State, 673 So. 2d 859, 861 (Fla. 1996) (reversible error to make feature of penalty phase pedophilia and sex crimes committed upon the juvenile sister of the murder victim); Wuornos v. State, 676 So. 2d 966, 971 (Fla. 1995) (error to prove CCP aggravator relying entirely on collateral crime evidence), cert. denied, 117 S. Ct. 395 (1996); Duncan v. State, 619 So. 2d 279, 282 (Fla. 1993) (error to introduce photo of collateral murder victim when collateral crime had been proved through judgment and officer's testimony), cert. denied, 510 U.S. 969 (1993); Rhodes v. State, 547 So. 2d 1201, 1204-05 (Fla. 1989) (error to introduce statement of collateral crimes victim when crimes proved through judgment and officer's

testimony); Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990) (spouse of collateral crime victim should not have been permitted to testify to prove prior felony conviction), cert.,denied, 501 U.S. 1259 (1991). Cf. Old Chief v. United States, 117 S. Ct. 644 (1997) (because of undue prejudice of evidence underlying prior collateral conviction, courts should accept stipulation that conviction existed rather than introduce details of conviction).

Although the State had the authority to present some evidence of Jones' prior murder conviction, the State exceeded the limitations on such evidence and prejudiced the penalty phase of Jones' trial. Evidence of Jones' previous conviction became an impermissilbe feature of the penaltly phase. He now urges this Court to reverse his death sentence with directions to afford him a new penalty phase trial.

ISSUE VII

THE TRIAL COURT ERRED IN REFUSING TO ALLOW JONES' PRIOR ATTORNEY IN THE PREVIOUS MURDER CASE TO TESTIFY ABOUT THE PSYCHIATRIC REPORT PREPARED BY DR. MILLER IN THAT CASE, WHICH RESULTED IN JONES BEING FOUND INCOMPETENT TO STAND TRIAL, ON THE GROUND THAT THE TESTIMONY WAS HEARSAY.

The attorney who represented David on the second degree murder charge, Michael L. Edwards, testified.(T25:1807) He was appointed to represent Jones in 1986, and Jones ultimately pled guilty to that charge.(T25:1808-1809) Edwards had Jones examined by a psychiatrist prior to the plea. (T25:1809) The Defendant's Exhibit P and Q was the report made by the psychiatrist. (T25:1810)(Appendix D) The prosecutor objected to allowing Edwards to relate the content of the report on the grounds that it was hearsay. (T25:1810-1812) Defense counsel was allowed to proffer the testimony of Edwards about the report Dr. Miller prepared to determine David's competency to stand trial.(T25:1844-1848) Miller found Jones incompetent to proceed, and the court ordered Jones committed to Florida State Hospital where he remained for about six months. (T25:1844-1846) The trial court's ruling excluding this evidence from Jones' penalty phase trial violated Jones rights to due process and a fair sentencing proceeding. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

Hearsay is admissible in the penalty phase of the capital trial provided it is reliable and a fair opportunity to rebut the evidence is available. See, Sec. 921.141(1) Fla. Stat.; Lockhart v. State, 655 So.2d 69, 72 (Fla. 1995); Rhodes v. State, 638 So.2d 920 (Fla. 1994). The psychiatric reports in question here

were reliable and subject to being rebutted. The reports were made pursuant to a suggestion of incompetency to stand trial. The reports were relied upon by a trial court to declare Jones incompetent. Pursuant to the order of incompetency, Jones spent six months in the state hospital. The reports were produced by a local psychiatrist who was available as a witness to the State. The defense was not presenting the reports to examine the complexities of Jones mental condition at the time. As the proffer shows, the testimony was about historical facts: Jones was examined, found incompetent by a court and sent to the state hospital. Jones was entitled to present this relevant and reliable information to the jury.

The trial judge relied on Johnson v. State, 660 So. 2d 637 (Fla. 1995) to exclude the defense evidence. This reliance is misplaced since Johnson dealt with different circumstances. First, in Johnson, the defense attempted to introduce medical records about the defendant's various psychological problems without presenting anyone to authenticate the documents. Here, the psychological report from Dr. Miller reporting his findings of Jones' incompetency to go to trial had already been presented to the trial court in an earlier proceeding. The court had relied on the report to order Jones committed to the state hospital. There was no question about the authenticity of Dr. Miller's report. Second, in Johnson , the medical records were found not complete in themselves and required interpretation to be understood. This problem does not exist here. Dr. Miller's report clearly delineates the conclusions about Jones' mental

condition a the time. The report does not need interpretation. In fact, Jones only desired to introduce the historical fact of the examination and Miller's finding of incompetency. Miller's report is not the same as the raw medical records in issue in Johnson. Furthermore, Jones was not introducing Miller's report for the purpose of establishing a complex psychologial diagnosis.

The trial court erroneously deprived Jones of his right to present mitigating evidence. Testimony about Dr. Miller's report of Jones' incompetence to stand trial was admissible. Jones urges this Court to reverse his death sentence with directions that he be given a new penalty phase trial before a new jury.

ISSUE VIII
THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED TO AVOID ARREST.

In his sentencing order, the trial judge found as an aggravating circumstance that the homicide was committed to avoid a lawful arrest. (R6:1138-1139) (Appendix A) Sec. 921.141(5)(e) Fla. Stat. (1995) This Court has held that for this aggravating circumstance to apply for the homicide of a victim who is not a law enforcement officer perfecting an arrest, the evidence must demonstrate that preventing an arrest via witness elimination was the dominate motive for the murder. See, e.g., Robertson v. State, 611 So.2d 1228 (Fla. 1993); Geralds v. State, 601 So.2d 1157 (Fla. 1992); Mendendez v. State, 386 So.2d 1278 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1978). Proof that witness elimination was one of several motives is insufficient. Jackson v. State, 502 So.2d 409 (Fla. 1986). Evidence in this case fails to prove that witness elimination was the dominate motive for the homicide. The trial court should not have found and weighed this aggravating circumstance in the sentencing equation. Jones death sentence was not imposed in a reliable manner and is unconstitutional. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VIII, XIV U.S. Const.

Finding the avoiding arrest aggravating circumstance, the trial court wrote:

> 4. The Murder was committed to avoid a lawful arrest.
>
> This aggravating circumstance requires clear proof that the Defendant's dominate motive was the elimination of a witness.

> Although it is clear that this aggravator was proven be[sic] circumstantial evidence, the facts are clear that the Defendant selected Lori McRae as 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.

(R6:1138-1139)(Appendix A) In reaching the conclusion that the circumstantial evidence left no other reason for the homicide besides elimination of a witness, the trial court has improperly speculated a reason for the homicide where no evidence establishes such a reason. Such "logical inferences" are not enough to support the strong proof required that the homicide was committed for the dominate reason of avoiding arrest. Robertson, 611 So.2d 1228, 1232. Initially, the trial

court mistakenly concluded that the homicide occured when the victim was transported to the remote area in Baker County. No evidence conclusively supports this position. In fact, in Jones' confession, he stated that he unintentionally strangled the victim much earlier during the course of the abduction and robbery. He later took the victim's body to the location where it was found.

Homicides committed during the course of a robbery or other felony do not necessarily qualify for the avoiding arrest aggravating circumstance. In Geralds, 601 So.2d at 1164, this Court disapproved the finding of the avoiding arrest aggravating factor where the victim, who knew the defendant, was bound and stabbed to death during an obvious struggle during a robbery. This Court noted that the circumstances supported the hypothesis that the victim was killed when she refused to disclose the location of valuables or when she attemted to escape. Consequently, the evidence did not prove witness eliminatoin as a dominate motive for the killing. In the instant case, Jones stated that he killed the victim during the course of the abduction and robbery. A reasonable conclusion is that the victim was killed while being pressed to disclose the PIN number for the ATM cards. Another possisbility is that the killing occured during a struggle and her attempt to escape. Consequently, the circumstances do not support avoiding arrest as a dominant or sole motive for the homicide.

In finding this aggravating circumstance, the trial judge

reached conclusions and inferences which the evidence did not support beyond a reasonable doubt. The avoiding arrest aggravating circumstance was improperly found and weighed in sentencing Jones to death. Jones asks this Court to reverse his death sentence.

ISSUE IX

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION TO WITHDRAW AFTER A PRESENTENCE INVESTIGATION REPORT PREPARED BEFORE THE PENALTY PHASE PORTION OF THE TRIAL COMMENCED REVEALED A STATEMENT JONES GAVE THE PREPARER OF THE REPORT WHICH CREATED A CONFLICT OF INTEREST FOR COUNSEL IF HE REMAINED IN THE CASE.

The trial court ordered a break of several days between the guilt and penalty phases of the trial. During this time, without the court's or counsel's knowledge, Department of Corrections personel prepared a presentence investigation report. (T24:1555-1585) Preparation of this report included an interview with Jones. A comment Jones made to the preparer was published in the PSI. The PSI reported:

> ...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 that I had to put the girl's family through this."

PSI at 6.(Appendix E) Before penalty phase began, defense counsel moved to withdraw as counsel because Jones' remarks and the position he took regarding counsel's actions during the guilt phase of the trial created a conflict of interest for counsel. (T24:1557-1574, 1589-1585) As trial counsel explained conflict free counsel could present Jones' remarks before the jury in mitigation, but since the remarks attacked counsel's trial strategy in the case, counsel had a conflict of interest and could not present the information. Counsel explained the conflict during the argument on the motion to withdraw:

MR. CHIPPERFIELD: The problem is that

> conflict free counsel could present this as mitigation, what appears in the penalty phase and we cannot. It places our client at odds with us and that's a conflict of interest that we feel we can't resolve.

(T24:1572)

* * * *

> MR. CHIPPERFIELD: My response is a lawyer can be wrong about the fact whether something is true or not, Your Honor, there is a third possibility that Mr. Phillips has not discussed and that is if there a disagreement about whether it is true or not and that's the whole problem, the statement itself sets up that conflict between Mr. Jones and us. And that is the problem. It's the third option that Mr. Phillips has not discussed because conflict free counsel could investigate and present, we cannot because we have a conflict and we're a part of the conflict, we can't get out of it.

(T24:1582)

Counsel was placed in the position of forgoing a point of mitigation for Jones or presenting Jones' position which carried with it an attack on the direction counsel took the case or counsel's credibility. This placed the defendant and counsel in an adversarial situation. Counsel did not present this information to the jury during the penalty phase. This denied Jones the benifit of having this particular mitigating factor produced for the jury's consideration.

In other contexts, conflict of interest between counsel and the defendant have arisen requiring counsel to withdraw before completion of the case due to a conflict regarding the handling of the case which place the client and counsel in an adversarial posture. The Fourth District Court of Appeal recently addressed the issue in Roberts v. State, 670 So.2d 1042 (Fla. 4th DCA

1996). Defense counsel in Roberts moved to withdraw as counsel prior to sentencing. On the date of the sentencing, counsel told the court that the defendant wished to withdraw his plea because counsel had misled or coerced him into entering the plea. The court deferred ruling on the motion to withdraw as counsel. Because he was concerned about a waiver of Roberts' right to pursue a withdrawal of the plea, counsel orally moved to withdraw the plea while advising the court he did not think it was appropriate for him to pursue the motion. The trial court reviewed the prior plea colloquy, conducted an inquiry on the motion to withdraw the plea, and determined that the plea was not coerced and that counsel did not have to testify. On appeal, the district court reversed holding that Roberts was denied his right to conflict-free counsel on the motion to withdraw the plea. Recognizing that not every complaint about a lawyer's performance or actions will require appointment of new counsel to pursue a motion to withdraw a plea, the Fourth District Court found the conflict presented in Roberts an actual conflict of interest mandating new counsel be appointed:

> Although a trial court may not be compelled to grant a defense counsel's motion to withdraw simply because "irreconcilable differences" are alleged, here defendant based the request to withdraw his guilty plea on the assertion that it had been coerced by counsel. This placed trial counsel in an actual conflict of interest with his client on a pending matter.
>
> In addition, one of the reasons advanced by defendant for withdrawal of his plea was his claim that he had been told that two defense witnesses could not be found to testify at trial. Defendant claimed it was not until after his plea that he learned that these witnesses were in fact available.

> Whether or not this claim would support withdrawal of his plea, the allegation further placed defendant in a direct adversarial relationship with his attorney. [citation omitted]

Roberts, 670 So.2d at 1044; see, also, Hope v. State, 682 So.2d 1173 (Fla. 4th DCA 1996); Brye v. State, 702 So.2d 257 (Fla. 1st DCA 1997).

Just as in Roberts, Hope and Brye, Jones and his lawyers were placed in an adversarial posture which deprived Jones of conflict free counsel. Jones was entilted to conflict free counsel at the penalty phase of his trial. He was entitled to a lawyer who could freely present Jones' position regarding the guilt phase of the trial as a mitigating point. Denying counsel's motion to withdraw left Jones with a lawyer who could not present a mitigating factor which involved an attack on the lawyer's handling of the case. Jones has been denied his constitutional right to conflict free counsel and his death sentence has been rendered uncostitutionally imposed. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. Jones asks this Court to reverse his death sentence for a new penalty phase trial with the appointment of new, conflict free counsel.

ISSUE X

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE VICTIM IMPACT EVIDENCE IN THE PENALTY PHASE OF THE TRIAL BECAUSE THE EVIDENCE WAS INFLAMATORY AND THE STATUTE PERMITTING VICTIM IMPACT EVIDENCE IS UNCONSTITUTIONAL.

The defense moved the trial court to prohibit the introduction of any penalty phase evidence which is designed to invoke sympathy for the victim or victim's family. (R2:294-313) Over defense counsel's continued objections, the trial court admitted testimony of victim impact witnesses under the authority of Section 921.141(7), Florida Statutes. (T24:1610-1619) The State was allowed to read statements by Melissa Leopard, Lori McRae's sister, and by Lori McRae's husband, Doug McRae, dealing with the impact of the victim's death. (T24:1679-1681) Jodi Brenner-Burney, another sister of Lori McRae's, testified. (T24:1683-1690) She told the jury about a picture that the victim's daughter drew at school after her mother's death. (T24:1684-1685) Brenner-Burney also read her own statement about the impact of her sister's death. (T24:1685-1686) Defense counsel objected to the victim impact evidence, specifically noting the witness's emotional outburst during the testimony and the inflamatory nature of the evidence. (T24:1686-1689) During closing argument, the prosecutor told the jury that the evidence, although not relevant to aggravating or mitigating circumstances, could be used by the jury in reaching its sentencing decision. (T26:2057-2059)

The admission of this irrelevant and emotionally inflammatory evidence violated appellant's right to a fair

penalty proceeding under the state and federal constitutions. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. Appellant acknowledges this Court's previous decisions which have permitted victim impact evidence. See, Bonifay v. State, 680 So.2d 413 (Fla. 1996); Windom v. State, 656 So.2d 432 (Fla. 1995). However, Jones asks that this ruling be reconsidered in light of the following constitutional arguments:

A. Section 921.141(7) is Unconstitutional as it Leaves Judge and Jury with Unguided Discretion Allowing for Imposition of the Death Penalty in an Arbitrary and Capricious Manner.

Section 921.141(5), Florida Statutes, specifically limits the prosecution to the aggravating circumstances listed in the statute: "Aggravating circumstances shall be limited to the following . . ." (emphasis added). Accord Elledge v. State, 346 So. 2d 998, 1002-10 (Fla. 1977). The consideration of matters not relevant to aggravating factors renders a death sentence under Florida law violative of the United States and Florida Constitutions. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. VIII, XIV U.S. Const.; Socher v. Florida, 112 S.Ct. 2114, 117 L.Ed.2d 326 (1992); Stringer v. Black, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992).

B. Section 921.141(7), Florida Statutes, is Vague and Overbroad and Therefore Violative of the Due Process Guarantees of the Florida and United States Constitutions.

The victim impact statute provides that "such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the communities members by the victim's death." This language contains no defini-

tion or limitations.

A statute, especially a penal statute, must be definite to be valid. Locklin v. Pridgeon, 30 So. 2d 102 (Fla. 1947). An attack on a statute's constitutionality must "necessarily succeed" if its language is indefinite. D'Alemberte v. Anderson, 349 So. 2d 164 (Fla. 1977). The statute at issue here clearly fails under any standard of definiteness required by the Unites States and Florida Constitutions. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

Victim impact evidence asks a jury to compare the value of a victim's life to the value of other victims' lives and to the value of a defendant's life. The inherent risk that prejudice on racial, religious, social or economic grounds, will infect this decision are unaccepted under the Florida and United States Constitutions. As such, the vagueness of the victim impact evidence renders this statute unconstitutional.

C. The Florida Constitution Prohibits Use Of Victim Impact Evidence.

The Florida Constitutional requires that victim sympathy evidence and argument be excluded from consideration whether death is an appropriate sentence, and provides broader protection than the United States Constitutions for the rights of a capital defendant. This Court recently found significant the disjunctive wording of Article I, Section 17 of the Florida Constitution, which prohibits "cruel or unusual punishment." Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). The Court in Tillman explicitly held that a punishment is unconstitutional under the Florida Constitution if it is "unusual" due to the procedures

involved. The allowance of victim sympathy evidence and argument would violate Article I, Section 17. The existence of this evidence is totally random, depending upon the extent of the deceased's family and friends, and their willingness to testify.

The admission of victim impact evidence and argument would also violate the Due Process Clause of Article I, Section 9 of the Florida Constitution. In Tillman, supra, the Court states that Article I, Section 9 holds "that death is a uniquely irrevocable penalty requiring a more intensive level of judicial scrutiny or process than lesser penalties." Id. at 169. This Court's opinion in Tillman is clear indication that victim impact evidence violates Article I, Sections 9 and 17 in a capital case, even it it is permitted in other cases.

The admission of victim impact evidence and argument violates Article I, Section 9 and 17 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution for related reasons. First, such evidence introduced into the penalty decisions considerations that have no rational bearing on any legitimate aim of capital sentencing. Second, this proof is highly emotional and inflammatory, subverting a reasoned and objective inquiry which the courts have required to guide and regularize the choice between death and lesser punishments. Third, victim impact evidence cannot conceivably be received without opening the door to proof of a similar nature in rebuttal or in mitigation, further upsetting the delicate balance the courts have painstakingly achieved in this area. Fourth, the evidence invites the jury to impose the

death sentence on the basis of race, class and other clearly impermissible grounds.

Victim impact evidence, whether considered a non-statutory aggravating circumstance or merely a factor to "consider" in the sentencing proceeding, encourages inconsistent, unprincipled and arbitrary application of the death penalty and therefore is violative of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 9, 17 and 21 of the Florida Constitution.

D. Section 921.141(7), Florida Statutes, infringes upon the exclusive right of the Florida Supreme Court to regulate practice and procedure pursuant to Article V, Section 2, Florida Constitution.

Article V, Section 2 of the Florida Constitution provides that the Supreme Court shall adopt rules for the practice and procedure in all courts. Haven Federal Savings and Loan Association v. Kirian, 579 So. 2d 730 (1991).

This Court has relied on these principles to invalidate a wide variety of statutes, involving such topics as juvenile speedy trial (RJA v. Foster, 603 So. 2d 1167 (Fla. 1992)); severance of trials involving counterclaims against foreclosure mortgagee (Haven, supra); waiver of jury trial in capital cases (State v. Garcia, 229 So. 2d 236 (Fla. 1969)); and the regulation of vior dire examination (In Re: Clarification of Florida Rules of Practice and Procedure, 281 So. 2d 204, 205 (Fla. 1973)). The statute at issue here is an attempt to regulate "practice and procedure."

The statute unconstitutionally invades the province of this Court by providing an evidentiary presumption that victim impact

evidence will be admissible at the penalty phase of a capital case, regardless of its relevance toward proving an aggravating or mitigating circumstance. The statute also permits the prosecutor to argue in closing argument evidence that has previously been determined to be irrelevant in capital sentencing proceedings. See Jackson v. State, 522 So. 2d 802 (Fla. 1988) (prohibiting argument that the victims could no longer read books, visit their families, or see the sun rise in the morning).

Through enactment of the victim impact statute, the legislature has tried to amend portions of the Evidence Code without first obtaining approval of this Court as required by Article V.

The victim impact statute, if it is not an aggravating circumstance, is not substantive law. Rather, if the argument that it is merely evidence to be "considered" is accepted, then it must be legislatively determined relevant evidence. It is for the courts to determine relevancy, not the legislature.

ISSUE XI

THE TRIAL COURT ERRED IN READING AN UNCONSTITUTIONAL JURY INSTRUCION TO DEFINE THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

A. The Court Misread The Standard Jury Instruction Defining The Heinous, Atrocious Or Cruel Aggravating Circumstance By Instructing That The Offense Qualified If Conscienceless OR Pitiless Or Unnecessarily Torturous.

The trial court used the standard penalty phase jury instruction defining the heinous, atrocious or cruel aggravating circumstance, but changed a crucial word which rendered the instruction actually given to the jury unconstitutional. (T26:2113) In reading the instruction, the court used the disjunctive "or" instead of the conjunctive "and" between two essential elements. As read to the jury, the instruction stated:

> ... one, 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 consciencelessly[sic] or pitiless ***or*** unnecessarily torturous to the victim.

(T26:2113) (emphasis added)

The United States Supreme Court approved the constitutionality of the heinous, atrocious or cruel aggravating circumstance provided it was applied to crimes which were both

conscienceless or pitiless ***and*** unnecessarily torturous to the victim. See, Sochor v. Florida, 504 U.S. 159 (1992); Proffitt v. Florida, 428 U.S. 242 (1976). This Court acknowledged this requirment:

> The United States Supreme Court recently has stated that this factor would be appropriate in a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Sochor v. Florida*, __U.S.__, __ 112 S.Ct. 2114, 2121, 119 L.Ed.2d 326, 339 (1992). Thus, the crime must be ***both*** conscienceless or pitiless ***and*** unnecessarily torturous to the victim. *Id.*

Richardson v. State, 604 So.2d 1107 (Fla. 1992). The trial court's change to the instruction rendered it unconstitutional since it eliminated the need for an essential limitation before the circumstance is applicable. Art. I, Sec. 9,16, 17 Fla.Const.; Amends. VIII, XIV U.S. Const. Jones' jury was given an unconstitutional instruction which failed to apprise the jury of an essential limitation on the aggravating circumstance, and a new penalty phase before a properly instructed jury is now required.

B. Assuming The Court Properly Read The Standard Jury Instruction Defining The Heinous, Atrocious Or Cruel Aggravating Circumstance, The Standard Instruction Is Unconstitutional.

The defense objected to the standard penalty phase jury instruction on the heinous, atrocious or cruel aggravating factor and requested a substitute instruction. (R1:161-178, 179; R4:686; T26:2028-2029) The trial court overruled the objections and refused to give the requested instruction. (T 26:2031) The

jury was not sufficiently instructed on the heinous, atrocious or cruel aggravating circumstance. Jones recognizes that this Court has approved as constitutional the current standard jury instruction on the heinous, atrocious or cruel aggravating circumstance in Hall v. State, 614 So.2d 473 (Fla. 1993). However, he urges this Court to reconsider the issue in this case.

The standard jury instruction on the aggravating circumstances provided for in Section 921.141(5)(h), Florida Statutes is unconstitutionally vague because it fails to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Amends. VIII, XIV U.S. Const.; Art. I, Secs. 9, 16 & 17, Fla. Const.; Espinosa v. Florida, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990).

The United States Supreme Court held Florida's previous heinous, atrocious or cruel standard penalty phase jury instruction unconstitutional in Espinosa v. Florida. This Court had consistently held that Maynard v. Cartwright, which held HAC instructions similar to Florida's unconstitutionally vague, did not apply to Florida since the jury was not the sentencing authority. Smalley v. State, 546 So.2d 720 (Fla. 1989). However, the Espinosa Court rejected that reasoning since Florida's jury recommendation is an integral part of the sentencing process and neither of the two-part sentencing authority is constitutionally

permitted to weigh invalid aggravating circumstances. Although the instruction given in this case included definitions of the terms "heinous, atrocious or cruel", where the instruction in Espinosa did not, the instruction as given, nevertheless, suffers the same constitutional flaw. The jury was not given adequate guidance on the legal standard to be applied when evaluating whether this aggravating factor exists.

In Shell v. Mississippi, the state court instructed the jury on Mississippi's heinous, atrocious or cruel aggravating circumstance using the same definitions for the terms as the trial judge used in this case. The Mississippi court told the jury the same definitions of "heinous", "atrocious" and "cruel" as the trial judge told Jones' jury. 112 L.Ed.2d at 4, Marshall, J., concurring. The Supreme Court remanded to the trial court stating, "Although the trial court in this case used a limiting instruction to define the `especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient." 112 L.Ed.2d at 4. Since the definitions employed here are precisely the same as the ones used in Shell, the instructions to Jones' jury were likewise constitutionally inadequate. This Court held that the mere inclusion of the definition of the words "heinous," "atrocious," or "cruel" does not cure the constitutional infirmity in the HAC instruction. Atwater v. State, 626 So.2d 1325 (Fla. 1993).

The remaining portion of the HAC instruction used in this case reads:

> The kind of crime intended to be included as heinous, atrocious, or cruel is one

> accompanied by additional acts to show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(Tr 1689)(R 123-124). This addition also fails to cure the constitutional infirmities of the HAC instruction. First, the language in this portion of the instruction was taken from State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) and was approved as a constitutional limitation on HAC in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). However, its inclusion in the instruction does not cure the vagueness and overbreadth of the whole instruction. The instruction still focuses on the meaningless definitions condemned in Shell. Proffitt never approved this limiting language in conjunction with the definitions. Sochor v. Florida, 504 U. S. 527, 112 S.Ct. 2114, 2121, 119 L.Ed.2d 326 (1992). This limiting language also merely follows those definitions as an example of the type of crime the circumstance is intended to cover. Instructing the jury with this language as only an example still gives the jury the discretion to follow only the first portion of the instruction which has been disapproved. Shell; Atwater. Second, assuming the language could be interpreted as a limit on the jury's discretion, the disjunctive wording would allow the jury to find HAC if the crime was "conscienceless" even though not "unnecessarily torturous." The word "or" could be interpreted to separate "conscienceless" and "pitiless and was unnecessarily torturous." Actually, the wording in Dixon was different and less ambiguous since it reads: "conscienceless or pitiless crime which is unnecessarily torturous." 283 So.2d at 9. Third, the

terms "conscienceless," "pitiless" and "unnecessarily torturous" are also subject to overbroad interpretation. A jury could easily conclude that any homicide which was not instantaneous would qualify for the HAC circumstance. Furthermore, this Court said in Pope v. State, 441 So.2d 1073, 1077-1078 (Fla. 1983) that an instruction which invites the jury to consider if the crime was "conscienceless" or "pitiless" improperly allows the jury to consider lack of remorse.

Proper jury instructions were critical in the penalty phase of Jones' trial. However, the jury instruction as given failed to apprise the jury of the limited applicability of the HAC factor when the perpetrator of the homicide does not have the requisite intent to cause suffering. See, Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990). Jones was entitled to have a jury's recommendation based upon proper guidance from the court concerning the applicability of the aggravating circumstance. The jury should have received a specific instruction on HAC which advised the jury of the necessary mental state required before HAC could be considered. The deficient instructions deprived Jones of his rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution. This Court must reverse the death sentence.

ISSUE XII
THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT AN AGGRAVATING CIRCUMSTANCE COULD BE BASED ON THE CONVICTION FOR THE UNDERLYING FELONY FOR THE FELONY MURDER THEORY OF THE PROSECUTION AND IN FINDING THE UNDERLYING FELONY AS AN AGGRAVATING CIRCUMSTANCE.

Jones moved to dismiss Section 921.141 Florida Statutes on numerous grounds including the fact that Section 921.141(5)(d) permits the State and the Court to use as an aggravating circumstance a felony which also forms the basis of a felony murder theory of prosecution. (R2:226-227) The Court denied the motion. (R 2:235) Additionally, the Court denied Jones' motion for special verdicts requiring the jury to indicate upon which theory or theories its verdict for first degree murder is based. (R2:208-212) The jury was instructed on a felony murder theory with robbery and kidnapping as underlying felonies. (T21:1492) A general verdict for first degree murder was returned. (R4:679) Additionally, the jury was instructed that robbery and kidnapping were felonies qualifying as an aggravating circumstance under Section 921.141(5)(d) Florida Statutes. (T26:2114) The trial court found the robbery and kidnapping as an aggravating circumstance. (R6:1136)(Appendix A)

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. Amends. VIII, XIV U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const. Jones realizes that his Court has rejected this argument, however, he urges this Court to reconsider this position in light of Justice Anstead's concurring

opinion in Blanco v. State, Case No. 85,118 (Fla. Sept. 18 1997).

ISSUE XIII

THE TRIAL COURT ERRED IN NOT DECLARING SECTION 921.141 AND 922.10 UNCONSTITUTIONAL BECAUSE IMPOSITION OF A DEATH SENTENCE BY ELECTROCUTION IS CRUEL AND UNUSUAL PUNISHMENT.

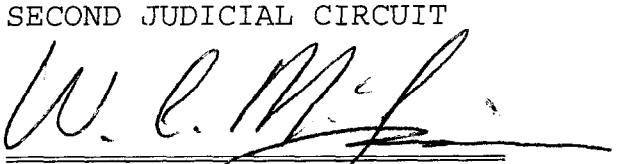
Jones moved to declare Sections 921.141 and 922.10 Florida Statutes unconstitutional on the ground that a death sentence by electrocution is cruel or unsual punishiment in violation of the United States and Florida Constitutions. (R1:96-111) Amends. V, VIII, XIV U.S. Const.; Art. I Secs. 9, 16, 17 Fla. Const. The trial court denied the motion. (R1:111) Appellant realizes that this Court has ruled adverse to his position in Leo Jones v. State, 701 So.2d 76 (Fla. 1997). However, Appellant asks this Court to reconsider this decision in his case and reverse his death sentence.

CONCLUSION

For the foregoing reasons and authorities, David Wyatt Jones asks this Court to reverse his convictions and remand for a new trial. Alternatively, Jones asks this Court to reduce his death sentence to life imprisonment.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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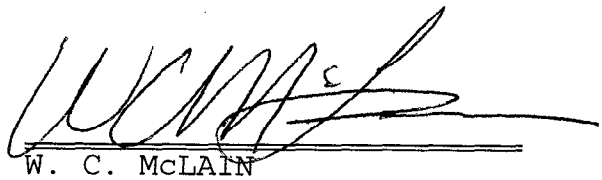
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Richard B. Martell, Chief, Capital Appeals, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, on this 26 day of May, 1998.



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