IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC04-2231

CHRISTOPHER DALE JONES, JR,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR OKEECHOBEE COUNTY, FLORIDA, (Criminal Division)

****

ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

Leslie T. Campbell
Assistant Attorney General
Florida Bar No.: 0066631
1515 North Flagler Drive
9th Floor
West Palm Beach, FL 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5108

Counsel for Appellee

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PRELIMINARY STATEMENT

Appellant, Christopher Dales Jones, Jr., was the defendant at trial and will be referred to as the "Defendant" or "Jones". Appellee, the State of Florida, the prosecution below, will be referred to as the "State". References to the record on appeal will be by the symbol "R", to the transcripts will be by the symbol "T", to any supplemental record or transcripts will be by the symbols "S" preceding the type of record supplemented, and to Jones' initial brief will be by the symbol "IB", followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On August 14, 2001, Jones was indicted for the first-degree felony murder of Hilario Dominguez ("Dominguez"), home invasion robbery, and possession of a firearm by a convicted felon (R 72-75). Trial commenced September 9, 2003, and on September 16th the jury returned guilty verdicts on first degree felony murder and home invasion robbery. While the charge of possession of a firearm by a convicted felon was not presented to the instant jury, they were asked and did find that Jones carried, threatened or used a firearm during the commission of these crimes, and actually possessed and discharged a firearm during the commission of the murder and home invasion which resulted in the death of Dominguez (R 459-61, 748; T 1239-40).

The penalty phase took place on September 17, 2003, following which, the jury recommended death by a seven to five vote (T 1468). On November 13, 2003, the Spencer v. State, 615 So.2d 688 (Fla. 1993) hearing was conducted. Sentencing occurred on September 1, 2004, at which time the trial court sentenced Jones to death for the murder of Dominguez (T 1507-26) and imposed a concurrent life sentence for the home invasion robbery conviction (R 750; T 1526).

On July 17, 2001, Ashley Ennis ("Ennis"), a long-time friend of Dominguez, discovered his body lying in a pool of blood on the floor of his trailer home and called the police. (T 399, 403). At 11:00 p.m. that night, Okeechobee County Deputy Sheriff, Sergeant Bradley, was dispatched to the crime scene, and upon his arrival, entered the trailer through the rear door. He saw trauma to Dominguez's body, then exited and secured the scene (T 412, 414, 430). After the crime scene was secured, Detective Lewis ("Lewis") noted there was no blood on the hammer found near Dominguez's head, but blood spatter was on the window curtains of the front door and on the wall near the kitchen area. The placement of the blood spatter led him to believe the assault occurred just within the trailer (T 430-31, 439-40, 443, 445). Lewis also noted two defensive wounds to the victim's left hand and most of the blood was around the victim's head (T 414, 449, 458). Further, it was determined that

Dominguez's right rear pants' pocket had been turned inside out. (T 643).

Dr. Diggs, an associate medical examiner, performed the autopsy on Dominguez (T 740, 746) and observed seven lacerations to Dominguez's head and face and a single gunshot wound to his chest. The five lacerations to Dominguez's forehead were approximately 1 to 2 inches each in length, and cut through the scalp to the skull. There was a laceration over Dominguez's lip and one above his left eyebrow. According to Dr. Diggs, the blows to Dominguez's head could have been inflicted by the gun used in the murder, and such blows could have stunned a person and driven him to his knees (T 740, 746-49, 751, 753, 770-71). Dr. Diggs opined that the cause of death was a gunshot wound to the chest which perforated the heart (T 753). The trajectory of the bullet was consistent with the victim lying or squatting on the floor, and being shot at close range from above and from the front (T 755, 771). The doctor observed tattooing where the bullet entered the body which led him to believe that the shot was fired within a foot of Dominguez (T 756-58).[1]

Ambria Edmunds ("Edmunds"), an eyewitness to the robbery

[1]Mike Kelley, a forensic firearm and tool examiner, defined stippling as unburned gunpowder which lands on the skin and tattooing as hot gunpowder powder coals which burned into the skin making a permanent mark. He opined that tattooing and stippling on the body would not occur with such a firearm if it were more than twelve inches from the victim (T 718-19)

and murder, described the sequence of events which transpired the night of Dominguez's murder. On July 17, 2001, Jones' girlfriend, Edmunds, had driven with him from West Palm Beach to Okeechobee. (T 545,547). During the course of the evening she and Jones met up with Paul Rosier("Rosier"), Jones' cousin. Rosier asked for a ride to a known drug area, referred to as the "camp." (T 543, 576). When they met Ellen Cuc ("Cuc"), Rosier took over driving Jones' car with Cuc, Jones, and Edmunds as passengers. While together in the car, Cuc told the group, so that all could hear, that she knew a Mexican who had money from selling beer and cigarettes out of his house. Cuc reported she had been Dominguez's friend for a long time, had been to his home, and that he had given and/or loaned her money. She explained, that she needed $100 to return to Iowa, and was upset with Dominguez because he had some of her money which he had not returned. Rosier inquired where Dominguez lived and how much money he had. (T 524, 575, 577-78, 605).

Cuc confided that she did not care if they robbed Dominguez because he owed her money and did not take her anywhere (T 628). Jones said: "I hope the man got money because I hope we're not going on a blank trip." Edmunds admitted, that based on the conversation in the car, she **knew** Dominguez was "gonna get robbed of his money" (T 579-80). Arriving at Dominguez's trailer, Rosier gave Cuc a dollar to buy a beer from Dominguez,

and see if anyone else was in the trailer. After Cuc's reconnaissance, she reported Dominguez was home alone. Rosier then ordered her to go back and find out if all of them could buy a beer. Upon Cuc's return, she advised the group that Dominguez would not sell because "black people were snitches." Hearing this, Rosier and Jones left the automobile, followed by Edmunds, and made their way to the back of Dominguez's trailer (T 581).

From her vantage point near the front entrance, Edmunds observed the robbery of Dominguez transpire (T 582). Jones made the first offensive move by sticking his foot in Dominguez's open door, and striking Dominguez about the head with the butt of the gun he carried. As he repeatedly hit Dominguez a shot went off and, Jones demanded: "Where is the money? Where is the money?". At this time, Rosier took the victim's wallet from his back pocket, leaving the pocket turned inside-out, and ran from the trailer, exclaiming "come on you all, let's go, let's go, let's go"(T 583-85). Jones, however, kept his gun pointed at and touching the victim's chest (T 584). After Rosier ran, Jones directed Edmunds, the remaining assailant at the scene, to get certain items from the trailer. Once inside the trailer, she saw Dominguez staring at Jones and looking scared, with blood dripping down his head from where he had been struck earlier (T 584-85). Jones commanded her to take a *Craftsman*

tool box to “pawn” it later. Instead, she picked up a hammer, but dropped it before taking Dominguez’s rifle so he could not arm himself and “they could get out of there okay.” (T 586).

As she fled the trailer, Edmunds heard a shot, and turning, she saw Dominguez fall from his sitting position onto his right side exclaiming, “Oh, God.” She saw Jones standing over him, with gun in hand. Immediately before the shooting, she had neither seen nor heard anything indicating a struggle between the men. (T 586-87, 590). When Edmunds and Jones got in the car, Jones told Rosier and Cuc he had shot Dominguez (T 591).

Driving from the crime scene, Rosier accidentally struck a tree (T 591). During the escape in the automobile, Jones directed Rosier and Cuc to hand Dominguez’s wallet to Edmunds. The wallet, per Edmunds’ accounting, held $1,000.00. In Fort Pierce, Edmunds gave Rosier half the money (T 591). When Jones learned of this, he was “kind of mad at her” because, in Jones’ estimation, Rosier “didn’t do anything”(T 592).

Edmunds and Jones continued to Fort Lauderdale, where Jones used Dominguez’s money to pay for three or four days at the Lamplighter Hotel (T 594). Jones pawned the rifle taken in the robbery and received five dollars for it. His thumb print and signature matched those found on the pawn shop ticket. (T 775-776, 900). The gun used in the killing remained in Jones’ possession or was stashed in Edmunds’ bag. Upon arriving at the

hotel, and to avoid getting her prints on the gun or being accused of having it in her possession, Edmunds used a towel to secret the gun under the couch in her hotel room. She believed Jones saw her do this. (T 597-98, 620,621).

During the time Edmunds and Jones were in Fort Lauderdale, the police interviewed Rosier and Cuc. Subsequently, a BOLO was issued for the vehicle used in the home invasion (T 644). Fort Lauderdale Officer Fortunato ("Fortunato"), located the automobile and as he called in the vehicle's tag number, Jones noticed the police interest, became frightened, and tried to escape the hotel by breaking a window. (T 594-95). The noise caught Fortunato's attention, and he saw Jones peek out of the window (T 538-39, 540). Afterwards, Jones and Edmunds were arrested.

On July 21, 2001, just four days after the murder and while still at the Fort Lauderdale police station, Jones was interviewed by Lieutenant Suttle ("Suttle") of the Okeechobee Sheriff's Department. (SR 183), Jones admitted knowing a robbery was planned and that he participated in it. However, he claimed he took Dominguez's wallet as Rosier struck and shot the victim. Jones also admitted that Dominguez had been subdued and was no longer a threat at the time of the shooting. (SR 184-200)

A search of Jones' hotel room uncovered a .22 caliber revolver hidden underneath a sofa cushion (T 568). Examination

of the gun revealed blood, hair and serology evidence (T 495). The subsequent DNA testing, revealed Dominguez's blood was on the gun (T 803). Ballistics testing proved that it was the murder weapon (T 484, 715). The gun was a single action revolver, in working order, which could not be fired unless the hammer was pulled back (T 716-17).

The police investigation of the scene corroborated a second shot had been fired from the .22 caliber weapon; the projectile was recovered from Dominguez's kitchen cabinet. (T 663, 665, 671). Also, scuff marks were noted on the tree and on the passenger rear bumper of Jones' car as Edmunds had reported (T 674, 678).

Jones' testimony comports with Edmunds' in almost every respect as to the evening's events with the exception that he claimed he had no idea a robbery was to take place (T 991-92, 1003) and that he stayed in the car with Cuc, as Edmunds and Rosier entered Dominguez's trailer, followed shortly, thereafter, by a gunshot. (T 983). Jones admitted that he told the police the victim was helpless, under control and beaten, but averred he knew that only after talking with the others (T 1003). He agreed he could have protected his girlfriend, Edmunds, by telling the police she stayed in the car with him (T

995).[2] The defense Jones offered was that he knew Cuc was acquainted with Dominguez and was a friend of Rosier's, but he asserted that he did not know the gun used in the murder was in his hotel room (T 1011). After his arrest, Jones admitted writing and forging a letter to the State's Attorney, signed as "Rosier", implicating him as the shooter and describing himself as a reluctant participant in the robbery. Jones offered that the letter was written because he was scared. (SR 203-04, T 919)[3] Jones testified he had two back surgeries within six weeks before the robbery, and though admitting he drove halfway from Jacksonville to Okeechobee, he claimed his back trouble was so bad he could not even lift the gun used in the murder. (T 981,

[2]Contrary to his trial testimony placing Edmunds in Dominguez's home, in his July 21, 2001 police statement, Jones indicated he **knew** a robbery was to take place and that he entered the victim's home with Rosier as the two women watched from the side of the trailer. He stated he took the victim's money while it was Rosier who pistol whipped and shot Dominguez. Jones' police statement noted that the two women, Edmunds and Cuc, had done nothing to assist. At the time these statements were given, Jones was **unaware** of Edmunds' statement to the police implicating Jones as the shooter.

[3]DNA testing of the envelope flap revealed it contained Jones' DNA. (T 807-08, 840, 844). Moreover, the letter's contents were unusual in that the letter, while ostensibly written by Rosier, referred to an interrogation of Rosier in Ft. Lauderdale, but Rosier had never been interrogated there (T 901). The letter stated Rosier was the triggerman who had forced Jones to take the victim's wallet, and that Edmunds took Dominguez's rifle and hit him in the head with a hammer (SR 203-04, T 901-903). No blood was found on the hammer.

1007-09).[4] Upon this evidence, Jones was convicted as charged in the indictment. (R 459-61).

The penalty phase commenced September 17, 2003 when the State called Maria Dominguez, the victim's daughter (T 1329). She testified her father had an operable phone located where his body was found. Also her father drove and parked his vehicle at his home. According to his daughter, Dominguez knew Cuc well and would be able to find her in the community (T 1338-39, 1342-44).

Jones testified on his own behalf. He reported he was 24 years-old at the time of the offense, and primarily had been raised by his grandmother due to his parents' divorce. (T 1357-58) Jones was convicted twice of auto theft (T 1363). While proclaiming his innocence, he told the jury it did not matter to him whether he received a life or death sentence because his life was over (T 1367, 1371, 1377).

The jury was instructed on two aggravators: felony murder (robbery/pecuniary gain) and avoid arrest. (T 1454). The jurors were given the catch-all mitigating circumstance instruction, and a list of mitigators requested by the defense (T 1455-56).

[4]As to Jones' allegation his back was injured, Edmunds testified he had no physical problem running out of the automobile, striking the victim with the gun, or carrying a television sometime between his car accident and the murder (T 631-32).

Upon the jury's deliberations, death was recommended by a vote of seven to five. (T 1468).

At the November 13, 2003 Spencer hearing, the defense presented Manfred Clinton White, Jones' uncle, (SR 14-29) who asked the court to spare his nephew's life. White admitted he was just finding out "more" about the case and had not attended the trial (SR 20, 22, 19, 27).

Sentencing was held September 1, 2004 with the court agreeing with the jury, and imposing a death sentence upon finding the aggravtors greatly outweighed the mitigation. (T1525-26) The court found three aggravators, but merged them into two: (1) felony murder (robbery); (2) pecuniary gain (merged with felony murder); and, (3) avoid arrest (T 1510-17). The court found no statutory mitigators. It rejected the statutory mitigators of age and lack of significant history of prior criminal activity. The prior criminal history statutory mitigator was rejected because Jones' criminal history was not "insignificant" given his two prior felony convictions, however, "very little weight" was given this mitigating factor.[5] Six other non-statutory mitigators were found and weighed:(1) minimal cooperation with law enforcement (very minimal);(2) broken home life (little weight); (3) death of defendant's

[5]Apparently, the court considered the matter as a non-statutory factor.

grandmother (little weight);(4) defendant’s potential prior to his grandmother’s death (some weight); (5) lack of sophistication (little weight); (6) good behavior during trial (little weight) (T 1517-25).

SUMMARY OF THE ARGUMENT

Point I - In addition to the fact that this claim has not been preserved, and has been waived for purposes of appeal, the Court did not abuse its discretion and properly admitted Ambria Edmunds' testimony as to the non-hearsay statements made by Paul Rosier and Ellen Cuc prior to the robbery.

Point II - Based on the circumstances and facts of this case, the trial court applied the correct law in finding the avoid lawful arrest aggravator, and this determination is supported by substantial, competent evidence.

Point III - Jones's death sentence is proportional.

Point IV - While this claim has not been preserved for appeal, and in fact, has been waived for failure to set forth an argument on appeal beyond referencing/reincorporating that which was allegedly argued in the pleading below, the challenge to Florida's capital sentencing statute based upon Ring v. Arizona, 536 U.S. 584 (2002) has been rejected repeatedly. See Porter v. Crosby, 840 So.2d. 981 (Fla. 2003).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING EDMUNDS TO TESTIFY ABOUT STATEMENTS MADE PRIOR TO THE MURDER (RESTATED)

The Appellant contends the court erred by allowing Edmunds to testify to statements made by Rosier and Cuc in Jones' presence prior to the robbery because they were inadmissible hearsay. He claims that allowing the State to offer this testimony to show his state of mind prior to the robbery, deprived him of his defense theory that he was unaware of the robbery and stayed in the automobile during its commission. He also complains that permitting Edmunds to testify to the conversations without calling Cuc and Rosier allowed Edmunds to clear herself, as well as, Rosier and Cuc of the actual shooting without subjecting Rosier and Cuc to cross-examination. Further, he claims he was deprived of his defense of lack of knowledge of the robbery.

While Jones generally attacks the court's ruling, he offers no specifics; he fails to identify the exact portions of Edmunds' testimony with which he takes issue. Such failure renders the matter unpreserved and waived for purposes of appeal. However, with respect to the merits, Jones' argument fails as the elicited testimony was not hearsay, and he was not

precluded from presenting a defense, through cross-examination of witnesses and submission of his own testimony. Moreover, Jones admits that it was permissible for Edmunds to testify about the general content of her conversations with Rosier and Cuc to prove Jones' state of mind, as long as those conversations were held in his presence. (IB 14).

Preliminarily, the State maintains that this claim is not preserved for appeal, and in fact has been waived both at the trial level and through Jones' concession in his initial brief. As noted above, Jones has not outlined in his initial brief the statements made by Rosier and Cuc and reported by Edmunds regarding the anticipated robbery which were alleged hearsay statements. This defect in his pleading rquires that the matter be found waived. See Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.". See Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990). Also, he has not given record citations where he made the specific objection below that he is making here which he did not subsequently waive. As such, the matter is not preserved for appeal. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)

(holding in order for issue to be cognizable on appeal, it must be specific contention asserted below as ground for objection).

Another basis for finding the matter waived is based on Jones' concessions both at trial and on appeal. During the discussion of his hearsay objection the following colloquies took place between defense counsel and the court:

> MR. HARPRING: Well, Judge, that - if - if this witness is testifying as to other witness's statements, then that - that goes right to the heart of it. I don't think we can ask the jury to split that hair because-
>
> THE COURT: Well, I -
>
> MR. HARPRING: - there were more specific statements that would be, at least in my opinion would be hearsay, and I - I recognize the Court's logic in that regard. However, uh, I would respectfully ask the Court to consider that the knowledge of the Defendant, that's the crux of their case (indiscernible-coughing in background). It - it may not be a specifically articulated element of the home invasion robbery because the nature of the felony, the first degree murder charge, the nature of that type of particular charge is not (indiscernible) is the essence of their case prior to them getting here. **And again, while they could elicit through this witness the general statements that there were discussions amongst those present about, you know, any particular plan of action that's not hearsay, but if having, if you're allowing this witness to say that Paul Rosier said, "X, Y and Z" or Ellen Cuc or Cline said, "X, Y, and Z" it would step over the bounds of the hearsay parameters and - and not be so much as to statements (indiscernible) truth of the matter asserted (indiscernible -**

whispering).

(T 550-51)(emphasis added). In a later discussion, the trial court inquired of defense counsel as a point of clarification:

> THE COURT: Okay. All right, **Mr. Harpring your position is that in your view the State can elicit some testimony. There is a discussion about an alleged robbery**, but the details of that conversation between either Ms. Edmunds, I gather, Mr. Rosier, perhaps Ms. Cuc, C-u-c, Cuc and Mr. Jones is hearsay.
>
> MR. HARPRING: Correct.

(T 552-53)(emphasis added). Thereafter, Mr. Harpring requested that he be permitted a continuing objection to Edmunds' testimony as to his specific objection and the court granted same. (T 558, 560). Additionally, Jones has reiterated that concession in his initial brief where he acknowledged: "[t]he defense agreed that the State could elicit general statements from this witness (Edmunds) that there were discussions among those present regarding a particular plan," but continued to assert that the witness should not be allowed to repeat specific statements alleged to have been made by Rosier or Cuc. (IB 11). Given Jones' limitation on his objection and his failure to identify specific allegedly improper hearsay statements, he has waived the issue on appeal. However, should this Court find this claim preserved, the State offers the following argument.

The admissibility of evidence is within the sound

discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So.2d 604, 610 (Fla. 2000); Zack v. State, 753 So.2d 9, 25 (Fla. 2000); Cole v. State, 701 So.2d 845, 854 (Fla. 1997). Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So.2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So.2d 1247, 1249 (Fla. 1990).

During Edmunds direct examination by the State, the defense made a hearsay objection which it later withdrew at a side bar. (T 543-48), However, before the side bar conference concluded, the prosecutor brought to the attention of the court and defense counsel that he planned to elicit from Edmunds' testimony regarding statements and conversations made by Rosier, Cuc, and Jones that occurred prior to the robbery and murder. The prosecutor, Mr. Albright, offered:

> While you are up here, I do intend to elicit a fair amount of conversations that occurred between her, Paul, Ellen Cuc and Chris Jones. The majority of those conversations is the State's position that are not things that we are offering for the truth of the matter asserted. They are going to be used to show one, explain and show further contact. And two, explain and show Mr. Jones' knowledge of the events about to take place. In other words, there will be

> discussions to the extent of discussing and describing a future robbery. It's not being offered to show a robbery took place. It's being offered to show Mr. Jones was aware at the time he went with them to this location, things of that nature.

(T 548).

As support for its ruling to admit Edmunds' testimony, the court referenced Sec. 801.6 of the 2000 Edition of Florida Evidence by Professor Ehrhardt:

> ***Statements Offered to Show the State of Mind of the Hearer.*** When evidence of an out-of-court statement is offered to prove the state of mind of a person who heard the statement, the statement is not hearsay because it is not being offered to prove the truth of the statement's contents. If testimony concerning an out-of-court statement by A to B is offered to show that B was on notice of an event, the statement is not being offered to prove its truth and, therefore, is not excluded by the hearsay rule. Whenever a material issue in an action involves the state of mind of a person, out-of court statements which are probative of that issue are admissible if they are offered to prove this state of mind.[6]

The court also noted several cases cited as examples by Professor Erhardt in support of 801.6.[7] (T 554-57). Again, without identifying those portions of Edmunds' testimony which

[6]The 2005 Edition of Florida Evidence defines "Statements offered to Show the State of Mind of the Hearer" the same.

[7]Taylor v. State, 601 So.2d 1304 (Fla. 4th DCA 1992); Duncan v. State, 616 So.2d 140 (Fla. 1st DCA, 1996); King v. State, 684 So.2d (Fla. 1st DCA 1996); and, Daniels v. State, 606 So.2d 482(Fla. 5th DCA 1992).

he finds objectionable, Jones merely contends that these cases are distinguishable and, with the exception of distinguishing Daniels, offers no other case law in support of his position that the court abused its discretion.

Because Jones does not identify the testimony he challenges, the State assumes that the inarticulated objection was to Edmunds' testimony that statements were made in Jones' presence by Rosier and Cuc that the victim had Cuc's money, sold cigarettes and beer from his home, and was alone that night. It is the State's position that Edmunds' testimony, whether her general comments about the conversation[8] or something more akin to a quote from one of the assailants, none was admitted for the truth that a robbery occurred but, rather, to show knowledge on the part of Jones, and his motivation for the subsequent robbery. This evidence is the sort permitted under the evidence code and under current case law including King, Duncan and Taylor.

To better understand this issue, a review of Edmunds' testimony is required. On direct examination, Edmunds testified

[8]Where Edmunds reports the general terms of her compatriots conversation, Jones' challenge fails as he takes no issue with Edmunds reporting the conversation generally, it was only where Edmunds reported that Rosier or Cuc "said 'X, Y, and Z" that "it would step over the bounds of hearsay." (T 550-51). The State submits that for the most part, Edmunds' reported the conversation in the car in general, and thus, non-objectionable terms, under Jones' characterization of the exception.

as follows:

THE WITNESS: Uh, you want me to tell them when we first met Ms. Cuc or go before that?

BY MR. ALBRIGHT:

Q From the time that Paul was in your presence discussing Ms. Cuc and then when you met up her the whole day.

A Okay, Paul, after we - after me, me and Chris met up with Paul, Paul jumped in the car and I got in the back. Uh, Paul and them was stating that, you know, that he needed some money. Then, uh, we rode, me, me, Chris and Paul, Chris was driving, we rode to Paul's house and Paul said that he needed to get something, so we rode to what is called the Camp. ... And Paul got out the car. I don't know what Paul was doing. I just know he got out the car, so me and Chris were still in the car. So, uh, we seen Ms. Cuc. Ms. Cuc came to the window and was like she needed a ride. Chris told her to get away from the door, you know, because we wasn't gonna give her a ride. So she walked away. Paul came back, got in the car and we drove back to Paul's house. Me and Chris and Paul, we rode back to Paul's house and we were sitting in the car. Paul got out. I don't know where he went. So me and Chris were sitting in the car. We were just sitting there waiting for him to come back. Uh, Paul then came back maybe about ten, fifteen minutes later saying that he met up with this white woman and evidently she said that she knew someone who had some money, who had some money. So, uh, Paul is like, we're gonna go over there and see, you know, what's going on and go pick her up. So we then, so Paul then got back in the car in the driver's side. He drove to Douglas Park and met up with the woman. She was in the bushes like in the dark where you couldn't see her. I don't know if she was hiding, but she was in the bushes. Paul got

out. I don’t know what Paul told her when he got out. Me and Chris was still in the car. I was behind Chris. Then, uh, she - her and Paul and Ellen came back to the car and when she got in, she was saying that she knew someone, a Mexican man who had money. He was a bootlegger who sold beer and cigarettes out of his home and, uh, that’s when everything started. You want me to keep going?

Q So at that point are all four of you in the car together?

A Yes.

...

Q And at that point did Paul begin driving somewhere?

A No, he - after - it was like, uh, Ellen was telling Paul that, uh, he - she knew the Mexican man and Paul was like, you know, well, how much money does he keep on him? And, uh, is it in the house or, you know, that - that -

Q Is that conversation taking place while the four of you where in the vehicle and it is just sitting still?

A Yes, sir.

Q What other specific questions do you recall Paul or anyone asking about this man or his money or things of that nature?

A Uh, Paul is asking her where does he live. Uh, then she stated that, you know, he lived in Dewberry Gardens and that she needed a hundred dollars to get back to Iowa. She said that he took some of her money that she gave him to take her somewhere and he didn’t give it back to her. So, I believe that she was upset with him, you know, so that’s all. She just wanted

her hundred dollars to get back to Iowa. So then Paul was like, well, we're gonna go over there. And she said, "Okay."

Q Did someone start driving then?

A Paul began driving ... Paul was asking Ms. Cuc, where, does the man live.

Q **This whole time this conversation was taking place, was Chris Jones in the car with you?**

A **Yes, sir**.

Q **Did he partake in any of the discussions about this man or this money**?

A **I believe he said that, "I hope the man got money because I hope we're not going on a blank trip."**[9]

Q Do you recall anything else that Chris Jones may have said during that conversation?

A No.

...

Q Does he [Paul] begin driving?

A Yeah, he started driving and Ellen Cuc started giving him directions to where the man stayed. I'm not exactly sure where it was. She was just saying, left, right, you know. She was talking here and there, but Paul kept asking her, which way, which way. So, she just told, went on and told the directions to the place.

Q Did it seem like it was an easy place to find or were there a lot of turns?

[9]Clearly this is admissible as an admission by Jones.

A It was a lot of turns. It was dark.

Q From the time you left the gas station, approximately how long did it take to get to your destination?

A About ten, fifteen minutes.

Q As you're going from the gas station to the final destination, was there any more discussion between anyone about this man or his money or what might be about to take place?

A No.

Q Based on the conversation you were a part of, did you have sort of an idea or a personal feeling of what was going to take place when you arrived there?

A Yes, sir.

Q What did you think was going to take place?

A I knew that the man was gonna get robbed of his money.

Q When you got to that home, did you get to the home?

A Yes, sir.

Q Or a home?

A It's a mobile home, trailer.

Q When you got there, where did you park? Where did Paul park?

A Uh, it was in the front of the trailer right in front of the trailer by the tree.

Q Were there any lights on in the home?

A Yes.

Q Did you see any people out on the streets or any neighbors out in the yards or anything like that?

A No, sir.

Q What happened once Paul parked the car in that yard?

A Okay, uh, when Paul - when Paul parked, he told Ellen Cuc to get out and go buy a beer and see if anybody else is in the house. Paul then gave her a dollar to go buy a beer. She got out of the car, went up there to go purchase a beer to see if anyone was in the house. Uh, she came back and say nobody was there, he was there alone.

Q Did she have a beer when she came back?

A Yes, she did. Uh, Paul then told her to go back to see if, uh, we could buy a beer. So she went back and she came back When she went, she came back and said the man didn't want to - want us to buy beer from him because black people were snitches. So, Paul - Paul is like - Paul and Chris is like, well, just come on, let's go. Ellen got back in the car and sat in the back seat with her beer and she started drinking it. Paul and Chris got out and they started walking up to the - the - the entrance was in the back of the trailer. So they started walking behind the trailer where the entrance was and as they were walking, I went ahead and got out and I started walking behind them.

Q How far were you behind them?

A I'm not sure how far, but I was a good ways. By the time they cut the corner, I was still trying to get to the corner, you know, to turn.

Q Did you actually go around the trailer

> to where you could see, I guess it would be the back of the trailer with the entrance to the home?
>
> A Yes.

(T 576-82).

It is of import to note that it was Edmunds who believed robbery would take place, and that it was not until cross-examination by Jones' counsel that Edmunds quoted one of her compatriots as saying the word "robbery."

> Q [by Defense Counsel} Wasn't Ms. Cuc talking about this gentleman owing her some money?
>
> A Yes.
> Q She said that, in fact, he was supposed to give her a ride someplace, something along those lines – she had given him money– but he never did? So she wanted to go over there and get that money back; right?
>
> A She didn't say it like that. **She just said – at that point she was saying she don't care if we rob him because he owed her money and because he didn't take her anywhere.** She just didn't really care about what happened.
>
> Q Your testimony here today is that she said in that car to you that she doesn't care if you rob – if you rob them?
>
> A Uh-huh.

(T 627-28) (emphasis supplied).

Upon eliciting the above testimony from Edmunds, defense counsel did not move to strike her testimony as to Cuc's comments regarding the robbery and, moreover, repeated Edmunds'

testimony in his next question. Accordingly, the jury heard the testimony of a planned robbery elicited through defense cross-examination of Edmunds. Further, in Jones' police statement, played for the jury, Jones clearly indicates he knew a robbery was to occur and that he was to participate in it. (SR 183-201). More specifically, Jones stated:

> He (Rosier) came back, went into the car, talk about this white female (Cuc) know where (indiscernible) with some money at. (Indiscernible) said amigo had a lot of money that bootleg. So he say he want a rob the amigo so you know what I'm saying...Sat in front of the--driveway and plotted out how we gonna uhm, go out the amigo and everything."

(SR 186)(emphasis added).

Jones does not contend the court mis-characterized the facts or rulings in King, Duncan and Taylor. Rather, he suggests the court's reliance on them was misplaced.[10] It is clear King, Duncan and Taylor stand for the legal principle that evidence of an out-of-court statement offered to prove the state of mind of the person who heard the statement, is not hearsay

[10]Additionally, Jones neglects to mention the trial court's reference to Professor Ehrhardt's citation to Professor Wigmore on evidence: "Professor Ehrhardt cites Professor Wigmore, I believe it's 6 Wigmore, Evidence, Section 1789. **Whenever an utterance is offered to evidence the state of mind which ensued in another person, and those are in italics, in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the hearsay rule is concerned**."(T 555-56)(emphasis added).

because it is not being offered to prove the truth of the statement's contents. Contrary to Jones' position, these cases are on point and support the admission of the evidence here, in spite of the fact that they differ only with respect to the party seeking admission of the state-of-mind testimony, i.e., the State asked in the instant case, while the defense was requesting it in the other cases.

Jones contends that Daniels actually supports his position. However, in Daniels, the Fifth District Court of Appeal cited Professor Graham's Handbook of Florida Evidence, article VIII, section 801.1 (1987) as authority for the proposition that a statement "made by one person to another upon which the latter acted and which had a bearing on his conduct" is not hearsay. Daniels, 606 So.2d at 484. Moreover, in Daniels, the State was attempting to introduce the statements under the guise of proving the "logical sequence of events":

> The state seems to be trying to argue that the out-of-court statements were nonhearsay offered to show what has been labeled the "logical sequence of events." *See, e.g., Harris v. State*, 544 So. 2d 322 (Fla. 4th DCA 1989). Typically, a police officer's testimony as to the content of a dispatch has been ruled admissible to explain why officers were at a particular place and took a particular action. The testimony is admitted to establish that the statements were made, not that they were true. *Johnson v. State*, 456 So. 2d 529 (Fla. 4th DCA 1984), *review denied*, 464 So. 2d 555 (Fla. 1985).

Daniels, 606 So.2d at 484. Furthermore, Daniels dealt with the reporting of the content of an anonymous phone call to a co-custodian working at a school with the defendant (another school custodian) about missing items from the school which he saw in the defendant's car. These facts are distinguishable from the case at bar where the comments reported were made in Jones' presence, and were not offered to prove the truth of the matter, but to show Jones' state of mind, once having heard the conversations.

Section 90.801(1)(c), Florida Statutes (1997), defines 'hearsay' as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A statement may, however, be offered to prove a variety of things besides its truth. Foster v. State, 778 So.2d 906, 915 (Fla. 2000) citing Williams v. State, 338 So. 2d 251 (Fla. 3d DCA 1976) (opining "[m]erely because a statement would not be admissible for one purpose (i.e., its truth or falsity) does not mean it is not admissible for another (*e.g.*, to show the declarant's state of mind.")).

This Court has upheld the admissibility of statements offered to show the state of mind of the hearer. See Blackwood v. State, 777 So.2d 399, 407 (Fla. 2000) (noting testimony

concerning victim's statements to defendant that she aborted his child and that she was leaving him for someone else were not hearsay as his state of mind and knowledge were relevant to show both his motive and intent in committing murder); Foster v. State, 778 So.2d 906, 915 (Fla. 2000) (finding victim's statement that he would report co-conspirators was not hearsay to show groups knowledge of the statements and their motive to kill victim); Koon v. State, 513 So.2d 1253, 1255 (Fla. 1987) (determining testimony by Magistrate, given in defendant's presence, that she would have dismissed charge against him if there had been only one witness who testified against him, was not hearsay because, having heard the statement, defendant could have formed the motive for eliminating one of the two prosecution witnesses).

Even if this Court finds the trial court abused its discretion in allowing Edmunds to testify about the discussion held in Jones' presence prior to the robbery, such had no effect on the outcome of the case. The elements of home invasion robbery and felony murder were clearly satisfied through the eye-witness testimony of Edmunds and Jones' statement to the police, which were corroborated through other testimonial and forensic evidence at trial.[11] Edmunds followed Jones to

[11]As to his guilty knowledge adduced from conversations in the automobile, even Jones admits as much in his brief: "First,

Dominguez's home entranceway; she saw him jam the door with his foot as Dominguez was about to close it, and observed Jones take a gun from his waistband, and strike Dominguez several times in the head with the butt of the gun. As Jones repeatedly struck the struggling Dominguez, Edmunds heard Jones demand: "Where's the money? Where's the money?". Edmunds testified Jones pointed the gun at Dominguez's chest, as Rosier forcibly took the victim's wallet from his back pocket. After a shot rang out, Edmunds watched Rosier run from the scene and heard Jones commanding her to go into the house and take items so they could pawn them later. All this occurred while Jones held the gun to Dominguez's chest. As Jones directed Edmunds to a *Craftsman* tool set, she grabbed a rifle from the wall and fled the house. Descending the steps, she heard a shot ring out and Dominguez exclaim "Oh, God", and as she turned, she saw Dominguez fall to the floor. Edmunds testified Jones admitted to her and the others that he shot Dominguez; thereafter, the money taken in the robbery was split among the compatriots.

In his police statement, Jones admitted to pawning Dominguez's rifle. The pawn shop receipt reflected Jones'

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the State was not required to prove that the defendant had guilty knowledge of the crimes committed. There is no such requirement in the elements for Home Invasion Robbery or for Felony Murder. All the State had to prove was that the crimes were committed by the Appellant. His state of mind in committing these crimes is irrelevant."(IB 16)

signature. He subsequently spent his share of Dominguez's money on hotel rooms in Ft. Pierce and Fort Lauderdale. A police search of his hotel room led to the discovery of the gun used in the robbery and murder; the gun contained Dominguez's DNA.

Given the above recitation of facts, the evidence against Jones in the home invasion robbery and felony murder is convincing and overwhelming. His intent and involvement with the underlying felony of the robbery was clear: Jones inquired where Dominguez's money was, used the gun he carried to strike the victim repeatedly, held Dominguez at gunpoint as his co-defendant rifled through the victim's pants, and directed Edmunds to take items in the home to "pawn later." Moreover, his role in the subsequent murder of Dominguez is clear and unambiguous; Jones was the shooter and fired his weapon at point blank range. Any conversations between the co-defendants prior to their assault upon Dominguez's home pale in comparison to the evidence of the attack which is direct proof of Jones' intent to commit robbery and murder. Edmunds' direct testimony, even if improperly admitted, had a negligible effect on the jury's verdict given the above facts. Moreover, as noted above, it was on cross-examination that Edmunds made a direct reference to the planned robbery. Having brought out this testimony during defense cross-examination renders any alleged error immaterial. This Court should find that the trial judge did not abuse his

discretion. Jones' conviction and death sentence must be affirmed.

POINT II

THE EVIDENCE SUPPORTS THE COURT'S FINDING OF THE AVOID ARREST AGGRAVATOR (RESTATED)

Jones argues that the court erred in finding the aggravating circumstance that Dominguez's murder was committed to avoid a lawful arrest. He also asserts the court found this aggravator on facts not in evidence and that the circumstances surrounding the shooting of Dominguez are subject to speculation. The State disagrees.

Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So. 2d 148 (Fla. 1998, reiterated the standard of review, noting that it "'is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.'" Id. at 160 (quoting Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997)(footnotes omitted)).

The State submits that the evidence supports the trial court's finding that this aggravator was established beyond a reasonable doubt. In sentencing Jones, the court found:

> Florida Statute 921.141(5)(e). The capital felony was committed to avoid lawful arrest. There is no presumption of the existence of this circumstance. The evidence presented to support these aggravating factors must be "very strong" to permit a finding of this circumstance Riley v. State, 366 So.2d 19 1978; Rodriguez v. State, 753 So.2d 29 2000. In cases where the victim is not a law enforcement officer the State must prove that "the sole or dominant motive for the murder was the elimination of the witness." Zack v. State, 753 So.2d 9, 2000; Consalvo v. State, 697 So.2d 805, 1996 (speculation is not enough); Preston v. State, 607 So.2d 404, 1992. The fact that it may have been one of the motives is not enough. Davis v. State, 604 So.2d 794, 1992; Conner v. State, 803 So.2d 598, 2001. In Urbin v. State, 714 So.2d 411, 1998 The Florida Supreme Court refused to allow this circumstance even though the Defendant assigned one of the reasons for the murder was the victim "saw his face", the Court found the facts showed this was a "corollary, or secondary motive, not the dominant one." Urbin, supra. at 416. See also Hurst v. State, 819 So.2d 689, 2002 where the defendant stated he killed the victim because "he didn't want the woman to see his face" was not enough when considered other evidence that the defendant and victim were in an argument prior to the killing. See also Caruthers v. State, 465 So.2d, 465 So.2d 496, 1985; Consalvo v. State, 697 So.2d 805, 1997; Zack v. State, 753 So.2d 9; Harmon v. State, 527 So.2d 183 1988; Derrick v. State, 641 So.2d 378, 1994; Trease v. State, 768 So.2d 1050, 2000; Routly v. State, 440 So.2d 1257; Davis v. State, 604 So.2d 794, 1992.

On the other hand the fact that the defendant may have had other motives for the killing does not preclude a finding of this aggravating factor Howell v. State, 707 So.2d 674. When no other reason exits (sic) for the killing, the Florida Supreme Court has upheld this aggravating factor, Willacy v. State, 696 So.2d 693, 1997; Jennings v. State, 718 So.2d 144, 1998; Corell v. State, 523 So.2d 562, 1998. See also Vaught v. State, 410 So.2d 147, 1982; Harmon v. State, 527 So.2d 182, 1988; Lightbourne v. State, 438 So.2d 144, 1998.

In Henry v. State, 613 So.2d 429, 1992, where the defendant robbed a store, disabled both victims whom he knew, by tying one up and hitting the over the head and could have completed the robbery without killing them the Supreme Court found that the defendant killed the victims to eliminate them as witnesses.

...

The evidence at trial revealed that the defendant and co-defendants specifically planned to rob this victim, because they knew the victim sold beer and cigarettes out of his home for cash. They went to the home and approached the victim's front door and bought a beer. They went back to their car then returned to the victim's front door where they forced themselves into his home to rob him at gunpoint. The victim had never met the defendant before. The defendant forced the victim on his knees at gunpoint, while the others; Ellen Cuc, Paul Rosier and Ambria Edmonds robbed him of his cash and a gun that was hanging on a door. None of the defendants were masked or attempted to conceal their identity from the victim. The victim was able to see all the assailants and the defendants' faces. As the robbery progressed the victim was severely pistol whipped on the head by the defendant. He was outnumbered by four to one and was

physically incapacitated and posed no threat to the defendant. The testimony also revealed that while the victim did not know the defendant he did know Ellen Cuc and could have easily identified her to law enforcement had he not been murdered. Indeed the defendant testified he was aware the victim knew Cuc. Cuc also knew Rosier who grew up in Okeechobee as did the defendant and he was related to the defendant.

In the victim's living room adjacent to where he was killed was a telephone. Just outside his home was the victim's car, near where the defendant(s) were parked.

As the robbery ended, the other co-defendants left or were leaving the residence. There is no evidence the victim resisted or attempted to resist. As the others left the defendant shot the victim in the heart at point blank range with his firearm. The defendant knew that the victim could call law enforcement via the phone and identify at least two of the co-defendants to the police. The defendant also knew the victim would have transportation just outside his home to also facilitate contacting law enforcement. There were no other items belonging to the victim that were removed after he was killed. Using the guidance of the authority mentioned about and the evidence presented at trial this murder was not committed to facilitate the completion of the robbery in any manner. The robbery was over and the other co-defendants had either exited the victim's home or were about to exit it with the victims property. The victim was unarmed, outnumbered, was physically helpless to resist due to the beating at the hands of the defendant. This killing is not part of a robbery gone awry as in Terry v. State, 668 So.2d 954, 1996; Sinclair v. State, 657 So.2d 1138, 1995 or Thomson v. State, 647 So.2d 827.

> The evidence proves beyond a reasonable doubt that the defendant's sole and dominant purpose in killing the victim was to simply eliminate him as a potential witness who could not only identify the co-defendant(s) but also the defendant who had not concealed their identity in any way. There is no other reason or motive for this killing. Therefore the Court finds this aggravating circumstance proven and gives it great weight.

(R 724-26)

The State contends that the trial court's detailed Sentencing Order thoroughly and lucidly sums up the elements and caveats of the avoid arrest aggravator and applies the law correctly to the facts of this case. Its findings are supported by substantial, competent evidence and should be affirmed.

The mere fact that the victim knew and could identify a defendant, without more, is insufficient to prove this aggravator. Consalvo v. State, 697 So.2d 805, 819 (Fla. 1997); Geralds v. State, 601 So. 2d 1157, 1164 (Fla. 1992); Davis v. State, 604 So. 2d 794, 798 (Fla. 1992). However, this Court has also held the avoid arrest aggravator can be supported by circumstantial evidence through inference from the facts shown. Consalvo, 697 So.2d at 819; Swafford v. State, 533 So. 2d 270, 276 n.6 (Fla. 1988). This factor may be proved by circumstantial evidence from which the motive for the murders may be inferred. Preston v. State, 607 So. 2d 404, 409 (Fla.

1992). Furthermore, an express statement by the defendant as to his intentions is not required. Routly v. State, 440 So.2d 1257, 1263 (Fla. 1983).

In this case, there is competent, substantial evidence which supports the trial court's finding of the avoid arrest aggravator. Among others, there are three significant facts which establish that the sole and/or dominant motive for Dominguez's murder was to avoid a lawful arrest. First, the robbery had been effectuated and there was nothing Dominguez, who was incapacitated, could do to stop the robbery during its commission. Second, Jones knew that the victim was well acquainted with Cuc, a local resident, to whom Dominguez had loaned money. Her discovery could eventually lead to Jones, particularly in light of the fact that on that evening she had been with his cousin, Rosier. Additionally, Jones had ties to the community. Third, co-defendant Edmunds had physically left the house just prior to Dominguez's murder feloniously carrying with her the victim's rifle, so he would be disarmed for her and Jones' safety. Other significant facts and circumstances establishing the avoid arrest aggravator will be presented in argument below. However, given these immediate factors, it is clear that the sole motivation for Jones' killing Dominguez was to eliminate the witness/victim to avoid arrest.

Willacy and Henry v. State, 613 So.2d 429 (1992), cited by

the trial court in its Order, are similar to the instant case and attempts by Jones to distinguish them are of no avail. In Henry, the defendant had disabled both victims, one by tethering her, and the other by a blow to her head.[12] Like the facts here, this Court found Henry could have effected the robbery without killing them. The victim in Willacy, like Dominguez here, was surprised by her assailant/burglar. Although the victim in Willacy was disabled by binding her hands and feet, and Dominguez was disabled through blows to his head which would have stunned a person; this difference does not undermine the significance and similarity between the cases. As this Court noted: "**She was incapable of thwarting his purpose** or of escaping and could not summon help. There was little reason to kill her except to eliminate her as a witness since she was his next door neighbor and could identify him easily and credibly both to the police and in court." Willacy, 696 So.2d at 696 (emphasis added). Edmunds' testimony makes it clear Dominiguez was not struggling with Jones, and based on Dr. Diggs testimony it is clear he was incapable of dong so due to the blows to his head. While Edmunds feared that Dominguez may regain control

[12]The means of bludgeoning are similar in that Jones used a blunt force instrument, the gun, and Henry used a hammer. One of Henry's victims even survived long enough to identify Henry as the perpetrator. Henry v. State, 613 So.2d 429, 430 (Fla. 1992).

and attempt to get his gun, the fact is the victim was not struggling, even after the robbery had been completed.

Moreover, in the case at bar, the victim knew Cuc well. It is noteworthy that Cuc went to the victim's door twice on the evening of the robbery. According to Edmunds, Rosier sent her back a second time to see if the victim would sell all of them beer. Cuc left and upon arriving back at the car told the others that Dominguez would not sell to them because "blacks are snitches." Immediately thereafter, Jones and Rozier, both African-Americans, left the car to rob the victim. Accordingly, it is clear Dominguez would have deduced they were associated with Cuc. Furthermore, through his own testimony, Jones acknowledged that he was aware that Dominguez was acquainted with Cuc (T 1011).

What is of manifest commonality in this Court's decisions in Willacy and Henry is the fact that the victims were disabled by the defendants and could not prevent the crime, the effectuation of which had occurred, and the killings were neither retaliatory, reactionary, nor instinctive in nature. Jones claims in this case there was only one blow to the victim's head. His minimizing of the victim's injuries is refuted from the record where Dr. Diggs noted at least seven lacerations to Dominguez's head and face, five of which penetrated to the victim's skull. Nonetheless, whether the blow

be one or one-hundred, the outcome is what is paramount; Dominguez was incapacitated. Such is proven by the victim's position on the floor, with a gun to his chest, and submitting to his assailants. Dominguez was penultimately battered by Jones, and was in no position to stop the robbery.

Another similar case is Thompson v. State, 648 So.2d 692 (Fla. 1995) wherein the defendant robbed his former employers of $1500.00 and jewelry, after which, he murdered the company bookkeeper and his assistant. The last entry in the ledger, dated that same day, was for a check payable to the defendant in the amount of fifteen-hundred ($1,500.00) dollars. Thompson's jailhouse confession was presented to the jury. This Court held:

> To establish the avoid arrest aggravator in this case, "the State must show that the sole or dominant motive for the murders was the elimination of . . . witnesses." *Preston v. State*, 607 So. 2d 404, 409 (Fla. 1992), *cert. denied*, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993). "This factor may be proved by circumstantial evidence from which the motive for the murders may be inferred." Id. **Once Thompson had obtained the $ 1,500 check from Swack and Walker, there was little reason to kill them other than to eliminate the sole witnesses to his actions.** This factor is clearly supported by the evidence. We also reject Thompson's argument that the pecuniary gain aggravator does not apply in this case and that this factor is inconsistent with the avoid arrest aggravator. There is ample evidence in the record to prove that Thompson benefitted financially from these murders. Furthermore,

> we have previously held that it is proper for a trial court to utilize both the pecuniary gain and avoid arrest aggravators. *See Preston*, 607 So. 2d at 409.

Thompson, 648 So.2d at 695 (emphasis added).

The instant case is even more compelling than Thompson, **in that we have the eyewitness testimony of Edmunds to the robbery and murder**. As in Thompson, here there was no reason for Jones to murder Dominguez after obtaining the fruits of the robbery, except to avoid arrest and secure his escape from the scene, where the victim knew at least one of the assailants, and had access to a telephone and an automobile.

In support of his argument, Jones cites several cases for the proposition that more must be proven beyond the possibility of the victim recognizing the defendant. Jones' reliance upon Derrick v.State 641 So.2d 378 (Fla. 1994), Trease v. State, 768 So.2d 1050, Jennings v. State, 718 So.2d 144 (Fla. 1998), and Rodriguez v. State, 753 So.2d 29 (Fla. 2000), is misplaced as each is distinguishable; the victims clearly knew their attackers. In Derrick, the victim's screaming could have brought others to the scene and the defendant stated he killed him to "shut him up". In Trease, the defendant specifically told another that he killed the victim because he could identify him. Though Jones contends these cases are "instructive" for this Court, the State contends they are distinguishable from the

instant facts. A review of the cases discussing this aggravator make it clear that all that is required is proof that avoidance of arrest be the dominant or sole motive in the killing, which can be inferred from the circumstantial evidence established at trial. What Jones fails to note is that the court in its ruling clearly relied on facts, as previously outlined, beyond just the fact that the victim was well-acquainted with one of the co-defendants, who could easily be found to implicate Jones. Furthermore, there need not be a statement by the defendant as to his motivation. In fact, this court has repeatedly upheld the avoid arrest aggravator where there has been no statement of the defendant's intentions. See Knight v. State, 746 So.2d 923 (Fla. 1998) (noting court found if sole motive for the murders had been only financial gain, the defendant's purpose would have been accomplished upon the receipt of the money and get-away car without killing victims); Raleigh v. State, 705 So.2d 1324, 1329 (Fla. 1997) (finding witness elimination was dominant basis for murder of second victim, not involved in the drug trade as was the intended victim, where victim had let defendant in the home, directed him towards first victim who defendant had come to kill, and heard shots fired); Routly, 440 So.2d 1257 (Fla. ; Thompson, 648 So.2d 692.

This Court has upheld the avoid arrest aggravator where the victim was unknown to the defendant prior to the crime. Routly,

440 So.2d at 1264 (finding "no logical reason" for the victim's abduction and killing "except for the purpose of murdering him to prevent detection"); Burr v. State, 466 So.2d 1051 (Fla. 1985), ; Martin v. State, 420 So.2d 583 (Fla. 1982); Griffin v. State, 414 So.2d 1025 (Fla. 1982). Moreover, circumstantial evidence and reasonable inferences therefrom may be used to establish the avoid arrest aggravator. Consalvo, 697 So.2d at 819. While Jones may have been unknown to Dominguez, there is no question, but that Domingues knew Cuc, and that she was involved, and Jones knew this. Because there was no other basis for killing Dominguez, as the robbery was completed and the victim was not offering any resistance, it is clear the killing was to assure a easy escape from the scene and to avoid arrest.

Jones claims that there were no witnesses to the actual shooting and no witnesses to “tell us what actually happened at the moment the trigger was pulled”(IB 34). Accordingly, he posits that the court erred in its factual conclusions. However, Jones’ contentions regarding the circumstances of the actual shooting fly in the face of the facts adduced at trial. Edmunds, an eyewitness to the robbery and shooting, testified that Jones continually held the gun to the victim’s chest as Rosier initially retrieved the victim’s wallet, before fleeing, and Edmunds left the trailer with the victim’s rifle. Dominguez, after being bludgeoned, was compliant on his knees,

and merely staring at Jones. There is absolutely no evidence that, at this point, the victim struggled for or had a weapon. Jones could have left the scene after successfully robbing the victim. Instead, he shot the compliant, kneeling victim at point blank range as reported by Edmunds. Moreover, Jones admitted to his co-defendants that he shot the victim. Beyond Edmunds' eyewitness account and Jones' statement, forensic evidence buttresses the avoid arrest finding. Dr. Diggs testified to the bullet's trajectory which was consistent with the victim lying or halfway sitting on the ground (clearly not an aggressive position), shot at close range from front to back.

Also, Jones contends the court's order is factually incorrect as it appears to indicate Cuc was in the home during the robbery.[13] While it is correct that Cuc was not **physically** present in the home when the victim was robbed and murdered, she clearly was an accomplice as she paved the way for Jones to enter the home. Edmunds testified Cuc knew the victim, knew he would have cash with him, and knew his business was selling cigarettes and beer. Edmunds admitted that the conversations in the car leading up to the crimes led her to know Dominiguez was "gonna get robbed of his money" and that Cuc was directed to

[13]Indeed, Cuc was an accomplice to the robbery. As the court noted in its Order: "Cuc went to trial separately and was convicted of a charge different than first degree murder and she received a thirty year sentence". (SR 729)

conduct a reconnaissance to see if there were others in the home. It was only after they knew Dominguez was alone that Jones and the others attacked.

Furthermore, while Jones' statement to the police lacks credibility as to who actually went into the home to rob and shoot the victim, and conflicts with his trial testimony on these key points, his comments, *vis a vis* initial discussion of the co-defendants prior to the actual robbery, comport with Edmunds' testimony. Jones stated:

> He (Rosier) came back, went into the car, talk about this white female (Cuc) know where (indiscernible) with some money at. (Indiscernible) said amigo had a lot of money that bootleg. So he say he want a rob the amigo so you know what I'm saying...Sat in front of the–-driveway and plotted out how we gonna uhm, go out the amigo and everything.

(SR 186). In response to further police questioning as to whose idea it was to travel to Dominguez's trailer and commit the robbery, Jones responded:

> It don't be–-first she–-she told him about the money and all that and so, he came to me so really this whole plot how to do it, but really–-I could say it was her cause she the one told him how much money–money the man had on him and all that, know what I'm saying. But she's told him she was gonna pay him back and all that cause how he treated her and everything for staying there. So then she's told him– him that, know what I'm saying. He the one came to me with the whole plot, how we gonna bust in the house and all that, know what I'm saying...Him and the old

> lady gonna– the white lady gonna be girlfriend, just live life know what I'm saying, so he–yeah I can't– it's either one, or Ellen or him who came up with the whole plot, cause I ain't no nothing about it at the time.

(SR 191). Later in his police interview, Jones presciently echoes Edmunds' later trial testimony regarding Cuc's actions. When asked why Cuc went into the home first to buy a beer, Jones stated: "... going in and buying one beer was to scope out the whole, you know what I'm saying... Tell him about how we wanna buy beer and see if anybody else in the house. That's it." (SR 192)(emphasis added).[14]

Even if this Court were to find the court's use of the term "they" to be an inarticulate use of the term as it could be mis-interpreted, there is competent, substantial evidence to show that all four assailants were involved in the crimes committed and were in the house at one point in time or another. As such, "they", all four co-defendants, were at the trailer with the purpose of using the ruse of buying beer to facilitate the robbery and eventual killing of Dominguez. Even if the reference to "they" were excised, there is substantial, competent evidence to support the finding of the avoid arrest

[14]Accordingly, not only does Jones inculpate Cuc as an accomplice, but unbeknownst to him when he gave his Fort Lauderdale statement, buttressed Edmunds' later trial testimony on a key point.

aggravator. As the court correctly noted, the victim knew Cuc and Jones testified he knew this fact; Jones was related to Rosier, with whom Cuc was acquainted. There is no question but that all four planned the robbery which was executed by three of the members. As Jones and Rosier forced their way into Dominguez's trailer and Jones beat the victim about the head, forcing him to his knees, and incapacitating him, Rosier and Edmunds, at Jones' direction, robbed Dominguez of his money and gun. The trial court further observed that at all times, all four co-defendants never concealed their identities from the victim. Given these facts, any characterization that the victim was outnumbered four to one, is a correct one.

Just prior to the victim being shot by Jones, the robbery segment of the criminal endeavor ended as all the easily procurable items had been taken. With the robbery completed, nothing more needed to be done in furtherance of the robbery plan. Before the killing, Edmunds had already left with the victim's rifle so they could "get out of there alive", thereby leaving Dominguez defenseless and on his knees before Jones, who was keenly aware Edmunds had taken the weapon from the house. In spite of his defenseless, stunned position, once his assailants left the home, as the court noted, Dominguez, who knew Cuc was involved, had access to a telephone and car. Together the direct and circumstantial evidence supports the

conclusion that the dominant, in fact apparently sole, motivation for killing the defenseless and submissive victim, was to avoid arrest. It is most telling that even Jones noted Dominguez was "under control" during the robbery and was a "threat to no one" at the time. (SR 200). Yet the last thing Jones did before leaving the trailer was to kill Dominguez.[15]

Beyond Edmunds' eyewitness testimony, it is noteworthy that in his self-serving police statement, where Jones lays the blame on Rosier for the actual shooting, he indicated the victim was a "threat to no one" and "was under control." (SR 200) Given Jones' own admissions, the reasonable inference is that the killing was to effectuate his escape and avoidance of arrest. Hence, this Court should affirm the finding of the avoid arrest aggravator based on the fact that the proper law was applied and the factual findings are supported by substantial, competent evidence. Jones' sentence should be upheld.

POINT III

THE DEATH SENTENCE IS PROPORTIONAL (RESTATED)

Jones maintains his death sentence is not proportional.

[15]In his trial testimony, Jones stated he was not in the house when the shooting occurred, but proposes that a struggle **might** have occurred. In spite of unrefuted evidence that there was no struggle, and given Jones' present challenge to the court's alleged factual errors, it is ironic that he should ask this Court to infer that a struggle occurred based on non-existent evidence.

Preliminarily, the State would note that Jones does not challenge proportionality should both aggravators be affirmed. However, he suggests that the sentence would not be proportional if the avoid arrest aggravator were stricken as he requested in Point II. It is the State's position that the sentence is and would remain proportional.

Here, the jury recommended death by a vote of seven to five. The court found three aggravators, but merged them into two giving both great weight: (1) felony murder (robbery); (2) pecuniary gain (merged with felony murder); and, (3) avoid arrest (T 1510-17). The court also found non-statutory mitigation of (1) criminal history ("very little weight"); (2) minimal cooperation with law enforcement (very minimal);(3) broken home life (little weight); (4) death of defendant's grandmother (little weight); (5) defendant's potential prior to his grandmother's death (some weight); (6) lack of sophistication (little weight); (7) good behavior during trial (little weight) (T 1517-25).

As this Court has stated: "[t]o determine whether death is a proportionate penalty, we consider the totality of the circumstances of the case and compare the case with other capital cases where a death sentence was imposed. Pearce v. State, 880 So.2d 561, 577 (Fla. 2004)." Boyd v. State, 910 So.2d 167, 193 (Fla. 2005). See Urbin v. State, 714 So.2d 411, 416-17

(Fla. 1998); Terry v. State, 668 So.2d 954 (Fla. 1996). It is not a comparison between the number of aggravators and mitigators, but it is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). See Fitzpatrick v. State, 900 So.2d 495, 526 (Fla. 2005). This Court's function is not to re-weigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing of the evidence. Bates v. State, 750 So.2d 6 (Fla. 1999).

With respect to the statutory mitigator found (lack of a significant prior criminal history), Jones states the court's finding is unclear. He makes this observation without further argument as to proportionality. (IB 39-41). It is the State's position that the order is clear. The court rejected the statutory mitigator of lack of significant prior criminal history because Jones had two prior felony convictions, which the trial court found were not "insignificant." Nonetheless, in rejecting the statutory nature of the mitigator, i.e., its level of significance, the court implicitly found it to be non-statutory mitigation of "very little weight." (R 730). While this factor was omitted from the recitation of non-statutory factors listed in the summation portion of the order, such a scrivener,s error is of no moment. This is true in light of the

court's assigning "very little weight" to the mitigating factor, thereby, indicating it was proven and then by making the assessment that the two aggravators greatly outweighed the "relatively insignificant non-statutory mitigating circumstances" proven by the defense. (R 730-31). With such a low weight assignment, however, the mitigator is designated, the sentence would not have been different.

A review of similar cases shows the death penalty is proportional. In Sliney v. State, 699 So.2d 662 (Fla. 1997), the defendant was convicted of first-degree premeditated and felony murder and robbery with a deadly weapon. As in the instant case, the jury returned a death recommendation of seven to five and the court found the same aggravation as in the instant case, felony murder (robbery) and avoid arrest, but greater mitigation: two statutory mitigators (youthful age and no significant prior criminal history) as well as five non-statutory mitigators. Id., at 667. In light of those findings, this Court found the death sentence proportional.[16] See Evans v.

[16]While this Court noted the murder was particularly brutal, it went on to note the trial judge did not find the murder was HAC and that the "trial court did not find any statutory mental mitigation." Sliney, 699 So.2d at 672 (emphasis added). The State would re-iterate the victim, in the instant case, was severely beaten prior to his murder, had a gun pressed against his chest during the time-span of the robbery and was shot at point blank range. As in Sliney, the court did not find mental mitigation, either statutory or non-statutory.

State, 838 So.2d 1090, 1097, 1098 (Fla. 2002)(finding death sentence proportional where court found two aggravators of prior violent felony and crime committed while defendant on probation along with five non-statutory mitigators-including deprived childhood, and where mitigating circumstances did not involve the crime itself); Shellito v. State, 701 So.2d 837 (Fla. 1997) (affirming death penalty of a twenty-year-old defendant where the court found two aggravators and various non-statutory mitigation consisting of alcohol abuse, a mildly abusive childhood, difficulty reading, and a learning disability); Pope v. State, 679 So.2d 710, 716 (Fla. 1996) (concluding sentence proportionate in stabbing where two aggravators of pecuniary gain and prior violent felony outweighed two statutory mental health mitigators as well as non-statutory mitigators of intoxication and extreme mental or emotional disturbance) Geralds v. State, 674 So.2d 96, 105 (Fla. 1996) (affirming death sentence based on HAC and felony murder (robbery) aggravation with little weight ascribed to statutory mitigator and very little weight accorded non-statutory mitigators); Melton v. State, 638 So.2d 927 (Fla. 1994) (upholding sentence for defendant convicted of shooting during a robbery where there were two aggravating factors and little mitigation); Hayes v. State, 581 So.2d 121 (Fla. 1991) (finding sentence for armed robbery proportionate); Young v. State, 579 So. 2d 721 (Fla.

1991) (sentence proportionate for murder committed during the course of burglary where court affirmed two aggravating factors balanced against little mitigation).

Jones argues that should this Court strike the avoid arrest aggravator, his death sentence is disproportionate. He points to Terry v. State, 668 So.2d, 954 (Fla. 1996), Thompson v. State, 647 So.2d 824 (Fla. 1994) and Sinclair v. State, 657 So.2d 1138 (Fla. 1995) as authority for his position. Contrary to his cases and argument, his sentence is proportional given the totality of the circumstances of this case in comparison to others where the death sentence was imposed.

Terry, Thompson and Sinclair, do not further Jones' position. He contends Terry is similar to the instant case in that no one saw the actual shooting and the motives for it were drawn from the circumstantial evidence and speculation (IB 43). The State incorporates by reference its argument in **Point II** on this point showing that the avoid arrest aggravating factor was found properly. Moreover, in Terry while this Court found the evidence insufficient to support first-degree murder, the evidence did support felony murder. In the case at bar, Jones was only convicted of felony murder. In addressing proportionality in Terry, this Court made two observations regarding the underlying facts of the case in finding the death sentence not proportional: first, it appeared to be a case where

the "robbery had gone bad" and, second, the Court could not "conclusively determine on the record before us what actually transpired immediately prior to the victim being shot." Id., at 965. Here, such is not the case. As the trial court found in its sentencing order, Jones brought the handgun to the victim's home, used it to subdue Dominguez, and directed others to steal property from the home as he held the gun to the victim's chest. At the time of the shooting there was no evidence of a struggle and the eyewitness saw the victim collapse to the floor from the gunshot while Jones, with gun in hand, stood over the fallen man.

Addressing proportionality in Sinclair, beyond the three mitigators assigned "some weight" by the trial court including the defendant had a "dull normal intelligence", this Court found further "evidence in the record that the low intelligence level of and the emotional disturbances inflicting this defendant were mitigators which had substantial weight." Id., at 1142. Such is not the case here as there was no evidence of mental health issues. See Sliney. Furthermore, the defendant in Sinclair claimed the shooting was an accident, which is not the case here.

Finally, Jones cites Thompson, which is also dissimilar to the case at bar. In Thompson, this Court struck three out of the four aggravators, while here, two aggravators remain. Also,

Thompson is factually distinguishable. The witness in Thompson was across the street from the scene when he heard the shot fired, and did not see what transpired just prior to and during the shooting. Here, in contrast there is no question as to how the shooting occurred following the robbery - according to Edmunds, Dominguez was at Jones' mercy with a gun in contact with his chest. Without provocation and after the other assailants had taken the victim's property, Jones pulled the trigger, shooting the defenseless, kneeling Dominguez through the heart from point blank range. While the Thompson court struck three of four aggravators leaving only the felony murder (robbery) aggravator, they noted the case involved significant documented mitigation. Id., at 827. Such is not the case here, the avoid arrest and felony murder aggravators assigned great weight are supported by substantial, competent evidence and the non-statutory mitigation was "relatively insignificant."[17]

Furthermore, as this Court in Thompson observed: "We have in the past affirmed death sentences that were supported by only one aggravating factor, but those cases involved either nothing or very little in mitigation." (citing Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989)). See Blackwood v. State, 777 So. 2d 399, 412 (Fla. 2000) (finding death sentence proportional

[17]The trial court did not assign the defendant's potential prior to the death of his grandmother some weight. (R 729)

where defendant had been involved in relationship with the victim several months before the murder and sole aggravating circumstance of HAC outweighed statutory mitigator of no significant history of prior criminal conduct and eight non-statutory mitigators); Burns v. State, 699 So.2d 646 (Fla. 1997) (finding sentence proportionate where trial court merged three aggravators, including avoid arrest, into one aggravator for sentencing). Ferrell v. State, 680 So.2d 390 (Fla. 1996) (lone aggravator, prior violent felony, was weighty, in that the prior offense was a second-degree murder bearing many earmarks of the present crime). Jones' sentence for the shooting death of Dominguez based on two aggravators and "relatively insignificant" non-statutory mitigation is proportional and should be upheld.

POINT IV

RING V. ARIZONA DOES NOT CALL INTO QUESTION THE CONSTITUTIONALITY OF FLORIDA'S CAPITAL SENTENCING (RESTATED)

Jones contends his death sentence is improper as Florida Statutes 921.141 violates his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. He cites Ring v. Arizona, 536 U.S. 584 (2002) and refers this Court to the Motion he filed on this issue below. (SR 201-203). Not only has this issue been waived due to Jones' failure to present an appellate argument, but the matter has

been rejected repeatedly.[18]

While Jones notes that Ring found Arizona's capital sentencing statute to be unconstitutional, and that he filed a motion below on a Ring claim, he merely directs this Court to "arguments made herein and the precedent relied upon" in the motion "are incorporated herein by reference." (IB 49). Without further elucidation of his position, he concludes that his sentence is unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments. The State submits that Jones' incorporation by reference of the issue he claims to have presented in a motion below, without further clarification/argument in his initial brief on appeal is insufficient to present the matter to this Court and the issue should be deemed unpreserved and waived. See Duest, 555 So.2d at 852 (opining "purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."); Cooper, 856 So.2d at 977 n.7 (same); Roberts, 568 So.2d at 1255 (same).

Furthermore, while Jones filed his Motion, based on Ring,

[18]Questions of law, are reviewed *de novo*. Elder v. Holloway, 510 U.S. 510, 516 (1994) (holding the issue is a question of law, not one of "legal facts," which is reviewed *de novo* on appeal).

that Florida Statute 921.141 is unconstitutional as violative of his Sixth Amendment rights, he does not cite to that portion of the record where this motion was argued or where the trial court ruled on said motion. Likewise, he does not identify where he argued and obtained a ruling on his motion to prohibit argument and an instruction on felony murder. Accordingly, these matters have not been preserved for appeal because Jones seemingly failed to obtain rulings from the trial court. Armstrong v. State, 642 So. 2d 730, 740 (Fla. 1994) (finding claim procedurally barred where judge heard motion, but never ruled); Richardson v. State, 437 So. 2d 1091, 1094 (Fla. 1983)(same); State v. Kelley, 588 So. 2d 595, 600 (Fla. 1st DCA 1991) (noting failure to obtain ruling effectively waives motion).

With respect to Jones' reliance on the Fifth, Eighth, and Fourteenth Amendments to challenge the death penalty statute, even if this Court permits Jones to substitute his motion filed with the trial court for an appellate argument, the matter has not been preserved for review. Jones limited the argument in his Motion to Declare Florida's Death Penalty Statute Unconstitutional to a Sixth Amendment challenge. As such, the Fifth, Sixth, and Fourteenth Amendment arguments have not been preserved for appeal. See Steinhorst, 412 So.2d at 338 (holding in order for issue to be cognizable on appeal, it must be specific contention asserted below as ground for objection).

Hence, these matters are unpreserved.

Should this Court reach the merits, the State submits that this Court has rejected repeatedly constitutional challenges to Florida's death penalty statute. Jones has offered no case law calling into question the well settled principles that death is the statutory maximum sentence, that death eligibility occurs at time of conviction, Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001), and that the constitutionally required narrowing occurs during the penalty phase where the sentencing selection factors are applied to determine the appropriate sentence. See Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (noting repeated finding that death is maximum penalty under statute and repeated rejection of arguments that aggravators had to be charged in the indictment, submitted to the jury and individually found by a unanimous jury). See also Perez v. State, 31 Fla. L. Weekly S23 (Fla. Jan. 5, 2005) (rejecting challenges to capital sentencing under Ring and Furman); King v. Moore, 831 So.2d 143 (Fla. 2002). Florida's capital sentencing statute is constitutional. See Proffitt v. Florida, 428 U.S. 242, 251 (1976) (upholding Florida's capital sentencing as defined by Furman); Hildwin v. Florida, 490 U.S. 638 (1989)(noting case "presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida" and determining it does not);

Spaziano v. Florida, 468 U.S. 447 (1984); Parker v. State, 904 So.2d 370, 383 (Fla. 2005); Jones v. State, 845 So.2d 55, 74 (Fla. 2003). Moreover, Jones has a contemporaneous felony conviction (home invasion robbery). This Court has rejected challenges under Ring where the defendant has a contemporaneous felony conviction. See Robinson v. State, 865 So.2d 1259, 1265 (Fla.2004) (announcing that "a prior violent felony involve[s] facts that were already submitted to a jury during trial and, hence, [is] in compliance with Ring"); Banks v. State, 842 So.2d 788, 793 (Fla. 2003) (denying Ring claim and noting that "felony murder" and the "prior violent felony" aggravators justified denying Ring claim). Relief must be denied and Jones' convictions and sentences affirmed.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

LESLIE T. CAMPBELL
Assistant Attorney General
Florida Bar No.: 0066631
1515 N. Flagler Dr 9th Floor
West Palm Beach, FL 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5108

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Russell L. Akins, Esq. Smith, Akins & Associates, 101 N. U.S. Hwy 1, Suite 209, Fort Pierce, FL 34950 on March 27, 2006.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on March 27, 2006.

LESLIE T. CAMPBELL