IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER DALE JONES JR.	:	
Appellant,	:	
vs.	:	Case No. SC04-2231
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR OKEECHOBEE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The record on appeal consists of the original record containing 26 volumes, a supplemental record containing 2 volumes. References to the original record will be designated by volume number, followed by either an “R” or “T” and the appropriate page number. References to the supplemental record will be designated “S” and the volume number, followed by either an “R” or “T” and the appropriate page number.

The prefix “T” indicates transcript from the trial itself. The prefix “R” indicates documents filed with the clerk, transcript of pretrial hearings, transcripts of the *Spencer* hearing and transcript of sentencing hearing.

REQUEST FOR ORAL ARGUMENT

Mr. Jones has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Jones, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

An Okeechobee County grand jury returned an indictment on August 14, 2001, charging Christopher Jones with committing Home Invasion Robbery, First Degree Felony Murder and Possession of a Firearm by a Convicted Felon (I, R66).

On September 7, 2001 the State filed a Notice of Intent to Seek Enhanced Penalties (I, R80). On April 10, 2002 the State filed a Notice of Intent to Seek the Death Penalty (I, R88). On May 31, 2002 the Appellant filed a Motion in Limine and to Strike Portions of "Florida Standard Jury Instructions in Criminal Cases" (I, R96). On June 6, 2002 and June 24, 2002 the Appellant filed several enumerated pretrial motions attacking the application of various aspects of Florida's death penalty procedure (I R124, R177). On October 7, 2002 the Appellant filed a Motion to Suppress Statement (I, R193). On February 6, 2003 the Appellant filed various enumerated motions attacking the constitutionality of Florida's death penalty statute (II, R201, R230, R373).

Appellants Motion to Suppress was denied on February 20, 2003 (II, R366). The court entered written or oral orders on all other motions including the denial of the motion to find Florida's death penalty statute unconstitutional (VII, R362).

STATEMENT OF THE FACTS

On July 17, 2001 Ms. Ashley Ennis, a neighbor of the victim Mr. Hilario Dominguez, came over to the victim's mobile home at approximately 11:00 P.M. to borrow a lighter (VII, T399-400). When she approached the house she saw that the door was open and could see the victim lying inside his house by the front door (VII, T400). When she saw blood she ran back to her house to call the police (VII, T400). It was not unusual for people to frequent the victim's house at all hours because the victim sold beer and cigarettes from his home (VII, T406, VIII, T523-24).

Deputies arrived on the scene at approximately 11:15 P.M. (VII, T412). The deputies went into the mobile home through the rear door and found the victim lying on the kitchen floor (VII, T413-14). Deputies noticed that the victim had injuries to his head (VII, T415).

Christopher Jones and co-defendant Ambria Edmonds were later apprehended in Ft. Lauderdale at a hotel called the Lamplighter Inn (VIII, T540).

Ambria Edmonds testified against the appellant at his trial. In her version of the events she was with the Appellant when they traveled to Okeechobee (VIII, T545). She was the Appellant's girlfriend at the time (VIII, T545). The Appellant and co-defendant Edmonds were driving around Okeechobee when the

met the third co-defendant Paul Rosier (VIII, T547). Rosier is the Appellant's cousin (VIII, T545, XII, T973).

Rosier asked for a ride to an area of town known as the "camp" (VIII, T547). The "camp" is a known drug area with a lot of rooming houses, which are located very close to each other (XII, T975). During the course of the ride Rosier said he needed money (VIII, T576). They drove him to the "camp" (VIII, T576). Once at the "camp" Rosier got out of the car and walked away from the vehicle (VIII, T576).

After Rosier got out of the car a white female by the name of Ellen Cuc approached the car and asked for a ride (VIII, T576). The appellant told her to get away from the car and that they were not going to give her a ride (VIII, T576). Cuc then walked away from the vehicle (VIII, T576).

Rosier then came back to the vehicle and they drove him to his house. (VIII, T576). Rosier got out of the car again while the Appellant and Edmonds waited in the car (VIII, T576-77). Rosier was gone for about 10 to 15 minutes (VIII, T577). In Edmonds version of the story Rosier told the Appellant and Edmonds that he met a white woman who knew someone who had money (VIII, T577). They drove towards a park where they met with the woman (VIII, T577). As it turned out, the woman was Ellen Cuc, the same woman who had previously asked for a ride (VIII, T577).

Rosier again got of the car and talked with Cuc while the Appellant and Edmonds waited in the car (VIII, T577). After conversing outside the car, Rosier and Cuc got in the car and told them about a Mexican that sold beer and cigarettes out of his home (VIII, T577).

They stayed in the car while Cuc told them about the Mexican and how she had given him money for a ride (VIII, T578). She said he took the money, never gave her the ride and then refused to give her back the money (VIII, T578). During this conversation, Rosier was in the driver's seat, the Appellant was in the passenger seat, Cuc was in the driver's side back seat and Edmonds was in the passenger side back seat. (VIII, T578).

Rosier asked Cuc where the Mexican lived (VIII, T578). She told them and Rosier started to drive to the Mexican's house (VIII, T578). They stopped at a gas station to get gas (VIII, T578). After getting gas they drove to the Mexican's house with Cuc giving directions (VIII, T579).

In Edmonds version of events, they arrived at the Mexican's house and Rosier sent Cuc in with a dollar to buy a beer and to see whether the Mexican was alone (VIII, T581). She did so and reported back that he was alone (VIII, T581). Rosier then sent her back to see if he would sell to blacks (VIII, T581). She came back and reported that the Mexican would not sell to blacks because he thought that all blacks were snitches (VIII, T582).

Edmonds testified that the she, Rosier and the Appellant then got out of the car and started walking towards the house (VIII, T582). She said she saw Rosier and the Appellant go up the stairs and give the man some money (VIII, T582). The man went to the refrigerator and came back and opened the door to hand them the beers (VIII, T582). Edmonds then said that the Appellant stuck his foot in the door and pushed it open (VIII, T582).

She then claimed to have seen the Appellant strike the man in the head with a gun (VIII, T583). The man fought back but then fell to a sitting position (VIII, T583). Edmonds said that the Appellant asked the man where the money was while Rosier reached into his pocket and took his wallet (VIII, T583).

It was during this struggle that Edmonds said a shot went off. (VIII, T585). She said that Rosier went outside to see if any lights came on after the shot (VIII, T585). Rosier then came in and said, “let’s go” (VIII, T585). Rosier then ran back to the car leaving the Appellant holding the gun to the man’s chest (VIII, T585).

Edmonds then said that the Appellant ordered her to grab various tools and a rifle that was in the house (VIII, T585). She did and ran down the steps (VIII, T586). She then said that she heard a shot go off behind her and then turned to see that the Appellant had shot the man in the chest (VIII, T586).

They all then got into the car where Cuc was drinking her beer (VIII, T591). They counted out $1,500 and then drove to Ft. Pierce and checked into the Travel Inn (VIII, T591). Once at the hotel, Rosier split the money, called a cab and he and Cuc left leaving her and the appellant at the hotel (VIII, T595).

Edmonds and the Appellant spent the night at the hotel and then drove to Ft. Lauderdale (VIII 594). Once in Ft. Lauderdale they checked into another motel, pawned the rifle and were apprehended (VIII, 594-97).

The Appellant testified at the trial (XII, T971). His testimony agreed with Edmonds up until the point where they started the drive to the Mexican's house. The Appellant testified that they agreed to go to the Mexican's house to buy alcohol because all the stores were closed (XII, T982). The Appellant testified that there was no conversation in the car while they drove to the Mexican's house (XII-T982). When they arrived at the house Cuc went in first and then came back (XII, T982). At that point, Rosier and Edmonds went into the house leaving Cuc and the Appellant in the car (XII, T982).

The Appellant then heard a gunshot and saw Rosier and Edmonds running back to the car (XII, T983). Rosier got in the car and said, "I shot him" (XII, T983). Rosier backed out of the driveway hitting a tree in the process (XII, T983). The Appellant testified that on the way to Ft. Pierce Rosier said

that he had to rob the man because he had to get out of Okeechobee and needed the money (XII, T984). It was only then that the Appellant said he learned of the plot (XII, T984).

The jury found the Defendant guilty as charged (XIII, T1238). The jury recommended the Death Penalty (XV, T1468). The Court found that the state proved three aggravators (two of which were merged into one) (XVI, R1525). The Court found that the defense did not prove any statutory mitigators (XVI, R1525). The Court found five non-statutory mitigators to be proven and gave them little weight (XVI, R1525). The Court then imposed the Death Penalty (XVI, R1526).

SUMMARY OF ARGUMENT

The trial judged erred as a matter of law when it allowed witness Ambria Edmonds to testify as to statements made by Paul Rozier and Ellen Cuc. Edmonds, Rozier and Cuc were all co-defendants in this case. Rozier was sentenced to 17 years prison as result of a plea deal. Cuc was sentenced to 30 years after her trial. Edmonds entered a plea, but had not been sentenced at the time of her testimony.

At trial, the only witnesses to the robbery were Ambria Edmonds and the Appellant. Edmonds testified that she and Rozier were in the house during the robbery while the Appellant held a gun to the victim's chest. As the robbery neared completion Rozier left the house first followed by Edmonds. Edmonds heard a shot and turned back towards the house and saw that the Appellant had shot the victim in the chest.

The Appellant testified at trial and denied any knowledge that a robbery was going to take place. The Appellant testified that he waited in the car while Rozier and Edmonds went into the house. It was the Appellant's testimony that he was unaware of the shooting until after Rozier and Edmonds came to the car. The Appellant also testified that he had just had back surgeries within 6 weeks of the robbery and was unable to move from the car because he was still recuperating from that surgery.

Over the defense objection, the trial court allowed Edmonds to testify as to statements made by Rozier and Cuc prior to the robbery. In those statements, Rozier and Cuc were planning the robbery. According to Edmonds, the Appellant was present in the car while a detailed plan was being discussed.

The defense objected on ground that the statements were hearsay. The state argued that they were not offered to prove the truth of the matter asserted, but were instead offered to show the Appellant's state of mind. More specifically, the state sought to introduce the statements to rebut the defense theory that the defendant did not know that a robbery was taken place.

The trial court committed reversible error in allowing the state to do this. The statements were in fact hearsay. The defense was denied an opportunity to cross-examine the makers of those statements. This was highly prejudicial because it essentially allowed one co-defendant to create a story that cleared her and two of her compatriots of the murder while implicating the Appellant.

Since there were no other witnesses to the actual shooting presented at trial the jury was forced to decide which story was more credible. This prejudiced the defense not only because inadmissible evidence was introduced at trial, but also because

the Appellant was subjected to cross exam on his testimony and the statements made by Rozier and Cuc were not.

The Court also committed error by finding the avoid arrest aggravator. In order to reach the conclusion that the state had proved this aggravator the trial court restructured the facts and relied on a new version of facts that was never presented at trial. The court then misapplied the law to those facts. In finding this aggravator the trial court did not rely upon competent substantial evidence and did not correctly apply the law to the facts.

The trial court committed error in imposing the death penalty. This case is not proportional to other cases where the death penalty was imposed. In fact, it is nearly a mirror image of those cases where the death penalty was imposed by the trial court and vacated by this Court.

For these reasons, the case should be remanded for a new trial on the hearsay issue. And the sentence of death should be vacated and the case remanded for a new sentencing hearing on the remaining issues.

ARGUMENT

ISSUE I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING HEARSAY TESTIMONY BY STATE WITNESS AMBRIA EDMONDS

During the trial the State called Ambria Edmonds to testify. Edmonds was one of the co-defendants who participated in the crime. The State attempted to elicit testimony from her regarding conversations that occurred prior to the robbery between her and the other co-defendants Paul Rosier and Ellen Cuc. The substances of the conversations were in the nature of discussing and planning the robbery (VII-T548). Neither Rosier nor Cuc testified during the trial.

During a bench conference the defense objected on grounds that such conversations were hearsay. The State argued that the statements were not hearsay because they were not offered to show the truth of the matter asserted – i.e. that a robbery took place. Instead, they were being offered to rebut the defense theory that was outlined in the defense opening statement that the Appellant was unaware that there was a robbery being planned when he went with them to the victim's house (VIII-T548).

The defense agreed that the State could elicit general statements from this witness that there were discussions among those present regarding a particular plan. But argued that this

witness should not be allowed to repeat specific statements alleged to have been made by Rosier or Cuc (VIII-T551).

The trial court overruled the defense objection. The defense, with agreement from the State, made a continuing objection to all of this proposed testimony. The trial court agreed that this objection would be sufficient to put all parties on notice regarding the defense objection and would preserve this point for appeal (VIII-T558).

Edmonds was then allowed to testify to detailed statements alleged to have been made by Paul Rosier and Ellen Cuc as they planned the robbery (VIII-576-580).

In overruling the defense objection, the trial court quoted section 801.6 of the 2000 edition of Florida Evidence by Professor Ehrhardt as follows:

> 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 statements' 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.

Allowing Edmonds to testify as to her version of the conversation between her, Rosier and Cuc was fraught with danger. It is important to note that she, Rosier and Cuc were

also being prosecuted for this crime. Rosier entered a plea agreement to Home Invasion Robbery and received a sentence of 17 years in prison (XVI-R1523). Cuc went to trial separately and was convicted of different charges. She received a 30-year prison sentence (XVI-R1523). Edmonds was cooperating with the State to the point of being the only eyewitness for the State. As a result, she too received a lessor sentence than the Appellant.

Edmonds was, in essence, allowed to testify to a conversation that essentially cleared her and her other two compatriots of the actual shooting. Because Rosier never testified at trial those statements could not be tested by vigorous cross exam. In short, the State was allowed to rebut the defense theory that the Appellant was not aware of the robbery and, in fact, stayed in the car during the robbery with a single witness who had a tremendous stake in the outcome.

To allow her to testify to statements allegedly made by the other co-defendants under the theory that those statements conclusively demonstrate that Appellants state of mind, namely that he knew a robbery was going to take place, was highly prejudicial to the defense.

Such statements could only demonstrate the Appellant's state of mind if they were in fact actually made in the presence of the Appellant. Because Rosier and Cuc did not testify at

trial they could not be tested by vigorous cross exam and could not therefore be trusted as an accurate recreation of the conversation. This rendition of the events leading up to the robbery cannot be trusted given the enormous consequences that this witness herself was facing. This is the exact type of evil that the hearsay rule is designed to prevent and the trial court committed reversible error in allowing it to occur.

Additionally, the trial court's reliance on the cases cited to support its position is misplaced. The trial court relied on Taylor V. State, 601 So.2d 1304 (Fla. 4th DCA, 1992); Duncan v. State, 616 So.2d 140 (Fla. 1st DCA, 1993); King v. State, 684 So.2d 1388 (Fla. 1st DCA, 1996); and Daniels v. State, 606 So.2d (Fla. 5th DCA, 1992) for the proposition that out of court statements offered to prove the defendant's state of mind are not hearsay.

In Taylor the defendant was charged and convicted of aggravated battery of a pregnant woman. Under that statute, the State was required to prove that Taylor knew or should have known that the victim was pregnant. The trial court did not allow Taylor to testify regarding his lack of knowledge of the victim's pregnancy based on the statement that the victim's father made to him that she could not become pregnant. The appellate court held that this was reversible error because Taylor's knowledge or state of mind as to the victim's condition

was an element of the crime and Taylor should have been allowed to testify as to why he thought the victim was not pregnant. Taylor at 1304-05.

In Duncan the defendant was charged with grand theft of four tire rims. The trial court excluded alleged exculpatory evidence relating to the issue of whether Appellant had guilty knowledge that the items he had purchased were stolen. The defendant had attempted to introduce at trial the explanation given to him by the seller of the rims in order to show why the rims were being sold at such an unusually low price. The Appellate Court held that the statements were not being offered for the truth of the matter asserted, that is that the seller actually had a Nissan pickup that was wrecked and from which the rims were salvaged. Instead it was being offered to show why the defendant did not think they were stolen when he bought them. Duncan at 141.

Likewise, in King the defendant, who was being prosecuted for uttering a forged instrument, was not allowed to introduce exculpatory evidence that would show an absence of scienter on his part, to wit: lack of knowledge that the check was forged. King at 1390.

In all three of those cases, the State was required to establish guilty knowledge on the part of the defendant. Each defendant attempted to demonstrate their lack of knowledge based

on statements made to them regarding the transactions in each case. In those cases it was the defendant attempting to introduce exculpatory statements in order to show the effect that those statements had on their state of mind. Namely, that they didn't know what they were doing was a crime.

The instant case is wholly different from these facts. First, 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.

Additionally, the trial court's ruling in Taylor, Duncan and King had the effect of depriving the defendant of a viable defense. Likewise, the trial court's ruling in the instant case also deprived the Appellant of his defense. The State was, in essence, allowed to present testimony that could not be rebutted or tested by cross exam. The jury was forced to choose between the Appellant's version of events and Edmond's version of events. The biggest difference between the Appellant's testimony and Edmonds testimony is that the Appellant was subjected to cross exam of his testimony. The statements alleged to have been made by Rosier and Cuc were never put to that same test.

Interestingly, the trial court also cited Daniels to support its ruling. However, Daniels actually supports the exclusion of the statements.

In Daniels the defendant was found guilty of petty theft of a television and three videocassette recorders from an elementary school. The defendant was a custodian at the school and became a suspect when a co-custodian received an anonymous telephone call from an individual who reported that he had seen some of the video equipment in the defendant's car. Daniels at 483.

Over defense objection, the trial court allowed the co-custodian to testify as to the detailed statements in that anonymous call. The trial court agreed with the State's argument that the statements were not being offered for their truth but for their effect on the listener. Id.

In reversing the trial court's error the appellate court cited the following quote from page 584-86 of Professor Graham's *Handbook of Florida Evidence,* article VIII, section 801.1 (1987) in which Professor Graham discusses statements made by one person to another upon which the latter acted and which had a bearing on his conduct:

> For example, a law enforcement official explains his going to the scene of the crime by stating that he received a radio call to proceed to a given location; such testimony is not hearsay. However, if he becomes more specific by repeating definite complaints of a

> particular crime by the accused, this is so likely to be misused by the jury as evidence of the fact asserted that it should be excluded on the grounds that the probative value of the statement admitted for a nonhearsay purpose is substantially outweighed by the danger of unfair prejudice.

In reversing the trial court the Daniels court held that the mere positing of a nonhearsay purpose for the out-of-court statements does not necessarily make them admissible. While recognizing that it is important to establish a logical sequence of events, the court also said that the better practice would be to use a more general statement without going into the details of the accusatory information. Id. at 485-85.

This is exactly what the defense argued during the bench conference in the instant case. Because the trial court overruled the defense objection, inadmissible statements that were posited as being introduced for a nonhearsay purpose were admitted into the trial. As previously stated, this was highly prejudicial to the Appellant because the person who was presenting those statements to the jury was herself under prosecution for the same crime. Because the defense did not have the opportunity to cross-examine the maker of the alleged statements the error was not harmless and this case should therefore be remanded for a new trial.

ISSUE II

THE TRIAL COURT ERRED BY IMPROPERLY IMPOSING THE AVOID ARREST AGGRAVATOR

A function of this Court is to review the trial court's findings of the statutory aggravators. The standard of review is found in Willacy v. State, 696, So.2d 693,695 (Fla. 1997) where this Court said, "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 findings. See also, Hurst v. State, 819 So.2d 689, 695 (Fla. 2002).

This Court first extended this aggravator to non-law enforcement personnel in Riley v. State, 366 So.2d 19 (Fla. 1978). In so doing, however the Court cautioned "the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement officer. *Proof of the requisite intent to avoid arrest and detection must be very strong in these cases."* Id. at 22 *emphasis added.*

The degree of proof that is required to prove this aggravator was explained in Urbin v. State, 714 So.2d 411,415 (Fla. 1998) where this Court held that *"[a]n intent to avoid*

arrest is not present, at least when the victim is not a law enforcement officer, *unless it is clearly shown that the dominant or only motive* for the murder was the elimination of witnesses." (emphasis added). The Urbin court then defined "[t]he overarching rule from our earliest cases onward discussing this aggravator: the proof must demonstrate beyond a reasonable doubt that the victim was murdered solely or predominantly for the purpose of witness elimination." Id.

The mere fact that the victim knows the defendant and could identify the defendant, without more, is insufficient to prove this aggravator. Hurst at 696.

Mere speculation on the part of the State that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator. Consalvo v. State, 697 So.2d 805, 819 (Fla. 1996). Moreover, even the trial court may not draw logical inferences to support a finding of a particular aggravating circumstance when the State has not met its burden. Robertson v. State, 611 So.2d 1228, 1232 (Fla. 1993).

This factor may be established from circumstantial evidence from which the motive of the murder may be inferred. Preston v. State, 607 So.2d 404, 409 (Fla. 1992). However, the type of circumstantial evidence that may be used has been defined by several previous opinions. A detailed analysis of the type of circumstantial evidence that may be used is detailed below.

In the instant case, the trial court did not apply the law correctly. Nor, was the court's finding based on substantial competent evidence. In fact, the court's factual findings made during the sentencing hearing were not even the correct facts that were presented at trial.

At trial, co-defendant Ambria Edmonds testified at trial that she traveled to Okeechobee with the Appellant (VIII, T545). She was the Appellant's girlfriend at the time (VIII, T545). While driving around Okeechobee they were joined by the Appellant's cousin Paul Rosier (VIII, T547). They were later joined by Ellen Cuc (VIII, T577).

Edmonds testified that Ellen Cuc told them about a Mexican (the victim in this case) who sold beer and cigarettes out of his home (VIII, T577). All four individuals drove together to the Mexican's house (VIII, T579).

Once at the house they sent Ellen Cuc in with a dollar to buy a beer and to see whether the victim was alone (VIII, T581). Cuc knew the victim and told the others that she was angry with him because she had given him money for a ride. She said he took the money, but never gave her the ride (VIII, T578). The victim's daughter testified during the trial and said that the victim and Cuc were acquaintances (VIII, T524).

According to Edmonds testimony, Cuc went up to the house, bought the beer, came back and then told the others that he was

alone (VIII, T581). Rosier sent her back to see if he would sell beer to blacks (VIII, T581). She did so and upon her return to the car reported that he would not sell to blacks (VIII, T582).

Edmonds then testified that she, Rosier and the Appellant then approached the house (VIII, T582). They gave the victim money for beer and when he came back to the door to give them the beer the defendant's forced their way inside (VIII, T582).

Edmonds claimed to see the Appellant strike the victim in the head with a gun (VIII, T583). The victim fought back but then fell into a sitting position (VIII, T583). Edmonds said that the Appellant asked the man where the money was while Rosier reached into his pocket and took his wallet (VIII, T583).

During the initial struggle a shot was fired, but it missed the victim (VIII, T585). Rosier went outside to see if any lights came on as a result of the gunshot (VIII, T585). Rosier returned to the house and said "let's go" (VIII, T585). Rosier then ran back to the car leaving the Appellant holding the gun to the victim's chest (VIII, T585).

Edmonds then said that Appellant ordered her to grab various tools and a rifle (VIII, T585). She did so and then she ran down the steps leaving the Appellant alone with the victim (VIII, T586). She then said that she heard a shot go off behind her and then turned around to see that the Appellant had shot

the victim in the chest (VIII, T586). They all then got into the car where Cuc was drinking the beer that she had previously bought and then made their getaway (VIII, T591).

The Appellant testified at the trial (XII, T971). His testimony agreed with Edmonds up until the point where they started the drive to the Mexican's house. The Appellant testified that they agreed to go to the Mexican's house to buy alcohol because all the stores were closed (XII, T982). When they arrived at the house Cuc went in first and then came back (XII, T982). At that point, Rosier and Edmonds went into the house leaving Cuc and the Appellant in the car (XII, T982).

The Appellant then heard a gunshot and saw Rosier and Edmonds running back to the car (XII, T983). Rosier got in the car and said I shot him (XII, T983). Rosier backed out of the driveway hitting a tree in the process (XII, T983). The Appellant testified that on the way to Ft. Pierce Rosier said that he had to rob the man because he had to get out of Okeechobee and needed the money (XII, T984). It was only then that the Appellant said he learned of the plot (XII, T984).

Edmonds and the Appellant were the only two witnesses to the actual robbery that testified at trial. Yet, based on these two inconsistent version of events the court created a third version that was never testified to at trial. The trial court

based its finding that the State proved the avoid arrest aggravator on this incorrect version of the facts.

In the trial court's version of the facts the court said that Defendant and co-defendants specifically planned to rob this victim because they knew that the victim sold beer and cigarettes out of his home for cash (XVI, R1514-15). The trial court then said that "[t]hey went to the home and approached the victim's front door and bought a beer. They went back to their car and then returned to the victim's front door where they forced themselves into his home to rob him at gunpoint" (XVI, R1515).

These facts were never presented at trial during either Ambria Edmonds testimony or the Appellants testimony. As noted above, during both of their testimony they both agreed that Ellen Cuc was sent, alone, to the front door to buy beer and to determine whether the victim was alone. Ellen Cuc was then sent back to the house to see if he would sell beer to blacks and she went back to the house by herself.

The testimony differs with regard to who went back to the house and forced themselves in. Edmonds testified that she, Roiser and the Appellant went in. The Appellant testified that only Edmonds and Roiser went in. Under both versions of the event Ellen Cuc stayed in the car.

The trial court went on to find that "[t]he 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 the door" (XVI, R1515).

Again, the trial court erred in finding that Ellen Cuc was inside the house during the robbery because both witnesses testified that she was in the car drinking her beer.

The trial court went on to find that the defendant's did not wear masks or attempt to conceal their identity. The trial court further found that "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 (XVI, R1515).

While there was clear testimony that the victim was pistol whipped there was no testimony that the victim was outnumbered four to one. Only three co-defendants were in the house during the actually robbery. This is extremely significant when read in light of the trial court's next finding.

The trial court next found that "[t]he 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 did testify that he was aware that the victim knew Cuc and that Cuc

also knew Rosier grew up in Okeechobee. The Defendant also testified that he was related to the Rosier (XVI, R1515).

It is true that the victim did know Cuc. However, it was never testified in trial that Cuc was in the house during the robbery. The only contact that Cuc had with the victim that evening was before the robbery. First, when she bought a beer and later when she asked whether the victim would sell to blacks. Since Cuc was never in the house during the robbery the victim could not have associated her with the three individuals who later robbed him. And as the trial court correctly points out, the victim did not know any of those co-defendants.

The trial court went on to find that there was a telephone in the living room adjacent to where the victim was killed and that the victim's car was found outside. The court then found that the defendant knew that the victim could call police or could use his vehicle to facilitate contacting the police (XVI, R1516). No testimony was ever presented that the Appellant knew any of this.

Lastly, the trial court found that "[t]here is no evidence that 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" (XVI, R1516).

Just the opposite is true. There was evidence that victim struggled with Defendant at the beginning of the robbery. It

was at that time that Defendant (according to Edmonds testimony) hit the victim in the head with the pistol. At that point the victim fell to his knees and no longer resisted.

It is important to note that there was not one single trial witness that said they saw the Defendant pull the trigger. Ellen Cuc was in the car drinking a beer under both Edmonds version of events and the Appellant's version of the events. Rosier had already run to the car at the time the shots were fired under Edmonds version. And Edmonds herself testified that she was heading towards the car when she heard the shot and had to turn around to see that the Appellant had shot the victim.

Given that no one saw the Appellant or the victim at the time the shots were actually fired it cannot be said that the victim did not fight back at that point once the numbers became even and it was only one on one. He fought at the beginning of the robbery and it is equally possible that he fought again at the end of the robbery.

Applying the facts to the law it cannot be said that the sole or dominant motive of the killing was to eliminate a witness. Since the victim was not a law enforcement officer proof must be very strong. Riley at 22. In the instant case there was evidence that the victim struggled at the beginning of the encounter. There was additional evidence that the victim

ceased struggling after being hit in the head with the gun *and after he was outnumbered three to one.*

The State relies on the assumption that the murder occurred because the victim could identify Ellen Cuc. The logic appears to be that the police could apprehend Ellen Cuc and Ellen Cuc could then lead the police to the defendants.

This argument fails for two reasons. First, Ellen Cuc was never in the house at the same time that defendants were in the house so it is mere speculation that the victim would have made that connection. Mere speculation on the part of the State that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator. Consalvo at 819. Additionally, the mere fact that victim knows the defendant and could identify the defendant, without more, is insufficient to prove this aggravator. Hurst at 696.

Second, the trial court incorrectly found that all four defendants were in the house at the same time. As previously noted, Edmonds testified that she was in the house with the Appellant and Rosier. The Defendant testified that he stayed in the car with Cuc while Edmonds and Rosier went into the house. While the trial court may have found Edmonds testimony more credible than the Appellant's the trial court is not allowed to change the facts in order to support the aggravator. The trial court must pick one version of the event over the other. To

create a third version, as the trial court did in this case, runs afoul of the prohibition expressed by the Robertson court that the trial court may not draw logical inferences to support a finding of a particular aggravating circumstance when the State has not met its burden. Robertson at 1232.

The trial court tried to resolve this deficiency in the evidence by not only rearranging the facts, but by relying on the State's argument that there was a telephone in the house and the victim could use it to call the police. The trial court also relied on the State's argument that there was a car parked outside and the victim could drive to get help.

While, it is probably a safe conclusion that the victim would have sought assistance once the Defendant's left his home this alone is not enough to support that avoid arrest aggravator. The law requires that the *sole or dominant motive* be that of witness of elimination when the victim is not a law enforcement officer.

In the instant case no one can say what the motive was. There are witnesses to the beginning of the encounter who all say that the victim struggled with the Defendants. There are witnesses who saw the victim become compliant after being hit in the head with the gun and after being outnumbered three to one. *There are absolutely no witnesses to the actual shooting itself.*

Because there are no witnesses to the actual shooting under any version of the events no one can say for sure what the actual motive was. No one can say whether or not the victim again decided to fight back once the other two defendants left the house. No one can say whether or not words were exchanged between the victim and the Appellant after the other two victims left the house. It is entirely possible that the shooting occurred as a result of a renewed struggle. The only way that the trial court could find this aggravator is by ignoring that possibility and then speculating on what the victim would have done had he survived and then further speculating that the Appellant shot him to prevent this from happening.

The trial court did not base its finding on competent substantial evidence because it engaged in speculation and impermissibly drew logical inferences to support a finding of the avoid arrest aggravator. The State not only failed to prove that witness elimination was the sole or dominant motive for the murder, but the trial court relied on facts that the State never elicited at trial. This error alone is sufficient to overturn the trial courts finding of this aggravator.

However, in the instant case the trial court did not even apply the correct rule of law on facts that it did find. A close reading of the cases relied on by the trial court, as well

as, other cases reveal that this aggravator has not been found under facts similar to the instant case.

For instance, the record reflects that the trial court recognized the rule that the aggravating factors must be very strong to permit a finding of the avoid arrest aggravator (XVI-R1512). The trial court further understood that the sole or dominant motive for the murder must be witness elimination (XVI-R1512-13). The trial court then correctly noted that this aggravator was not allowed in Urbin v. State, 714 So.2d 411 (Fla. 1998) even though the victim saw the defendant's face because the facts show that this was a corollary or secondary motive and not the dominant one (XVI-R1513).

However, in the instant case the trial court ignored this rule and found that the dominant motive was witness elimination. As previously noted, the trial court did so by engaging in speculation and relying on facts that were not presented at trial.

The facts in Urbin are somewhat similar to the instant case. In Urbin three defendants went to Harley's Rack & Cue poolroom with a plan to rob the first person that walked out of the door. However, the first person to walk out of the door got into his car and left before they could put their plan in action. They followed the intended victim for a few minutes and then abandoned that portion of the plan and returned to the

poolroom. Upon their return Urbin was handed a book bag containing a gun. A second person walked out and the other two defendants drove behind the poolroom leaving Urbin to rob the victim. Neither co-defendant saw the shooting but both testified that Urbin told them he shot the victim because the victim "had bucked him and because he saw his face" Urbin at 413.

The Court overturned the trial court's finding of this aggravator on ground that the victim seeing the defendant's face was a secondary motive to the victim "bucking" the defendant. Id. at 416. In overturning this aggravator the Court relied on Cook v. State, 542 So.2d 964, 970 (Fla. 1989) in which the Court found that the "defendant shot instinctively, not with a calculated plan to eliminate [the victim] as a witness. The Court also relied on Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1988) in which the Court held that the statement made by the defendant after shooting the first victim "now I'm going to get the one in the back [of the store]" did not establish beyond a reasonable doubt that witness elimination was the sole or dominant motive in the shooting.

In the instant, case the trial court relied on these cases to establish the correct rule of law, but then did not apply the rule of the law to the facts. In Urbin, Cook and Livingston the defendant actually made statements that either directly or

impliedly indicated that the defendant shot the victim in order to eliminate a witness. However, the Court overturned those cases because the motive was not the *dominant motive.* In the instant case, there are no statements to indicate the motive. There are no witnesses at all to the actual shooting. No one can say for sure what any motive was to the shooting much less the dominant motive. Not only did the trial court fail to rely on the substantial competent evidence it also incorrectly applied the rule of law to the facts that it did find and filled in the blanks with impermissible speculation.

The trial court attempted to resolve this problem by relying on Henry v. State, 613 So.2d 429 in which the defendants robbed a store and tied up the victims which he both knew, completed the robbery and then killed them. In that case, the Court upheld the avoid arrest aggravator because the victims did know the defendant, the robbery was completed and the victims were disabled. Hence, through deductive reasoning, the Court found that the only motive left would be to eliminate them as a witness.

However, the facts of that case are different from the facts in the instant case. Henry knew both victims because he worked at the place he was robbing. He hit both victims in the head with a hammer and then tied up one of them. He then doused them both with gasoline. See also, Willacy in which the victim

was considered to be disabled after being bludgeoned *and* having her hands and feet tied. Willacy at 694. In both of those cases there were additional factors beyond being hit in the head with a hammer that allowed the court to find that the victims were disabled. Again, in the instant case there was only one blow to the head with the gun and no witnesses to tell us what actually happened at the moment the trigger was pulled.

In the trial court's factual findings for the instant case, the court notes that the Appellant did not wear a mask (XVI-R1515). The trial court then notes that defendants did not attempt to conceal their identity and that the victim knew Ellen Cuc (XVI-R1515). Again, the trial court erred by finding that Ellen Cuc was in the house during the robbery. However, even if she was these facts would not support finding this aggravator. The mere fact that the victim *might* be able to identify an assailant is insufficient. Bates v. State, 465 So.2d 490, 492 (Fla. 1985). In Caruthers v. State, 465 So.2d 496 (Fla. 1985) the Court recognized that the victim's recognition of the appellant as customer did speak to the question of whether he killed her to prevent a lawful arrest. However, the Caruthers court went on to say that " [t]he state does not without more establish this fact by proving that the victim knew her assailant, even for a number of years." Id. at 499. In the

instant case, the trial court itself noted that “the victim had never met the Defendant before” (XVI-R1515).

The following cases are instructive on what must be proven beyond the possibility of the victim recognizing the defendant. In Rodriquez v. State, 753 So.2d 29, 50 (Fla. 2000) the defendant knew the victim, the defendant knew the victim was home at the time he entered, armed himself with a handgun, wore latex gloves, the defendant told the co-defendants not to touch anything, the defendant knew he had outstanding warrants and would go to jail for a long time if caught, the defendant shot the victim and ordered the co-defendant to shoot the other victim, each victim was shot more than once, one victim was shot with more than two guns, and the defendant told the co-defendant to make sure they are all dead.

In Jennings v. State, 718 So.2d 144, 150 (Fla. 1998) there were multiple victims all of which were known by their killer; the victims were bound; the defendant’s did not wear a mask but did use gloves to hide physical evidence such as fingerprints; the defendant had previously stated if he ever committed a robbery he would not leave any witnesses; and the manner of killing (consecutive throat slashing) was not of a nature that could be considered reactionary or instinctive and further supports the finding that the dominant motive for killing at least two of the victims was to avoid identification.

In Derrick v. State 641 So.2d 378, 380 (Fla. 1994) the defendant knew the victim and the defendant himself said that the victim had to be killed to shut him up. This same confession was made to a friend and this statement combined with the fact that the victim was screaming at the time and thus raised the risk of discovery were enough to find the avoid arrest aggravator.

In Trease v. State, 768 So.2d 1050, 1056 (Fla. 2000) the only additional factor besides the fact that the defendant knew the victim came from witness testimony that the defendant told her that the victim had to be killed because he could identify him.

None of these factors are present in the instant case. In fact, the only thing present is a glaring lack of evidence regarding any of the trial court's findings. Because the trial court did not rely on substantial competence evidence in making its findings and because it incorrectly applied the law to those erroneous findings the avoid arrest aggravator should be overturned.

ISSUE III

THE SENTENCE OF DEATH IS NOT PROPORTIONAL TO OTHER SIMILAR CASES

The Supreme Court of Florida has the role on direct appeal, amongst others, to compare the circumstances of any case, where the death penalty is imposed, with other capital cases. The purpose of this review is to conduct a comparison of the totality of the circumstances in this case to similar cases where the death penalty was not imposed to avoid "unusual punishments. Voorhees v. State, 699 So.2d 602 (Fla. 1997). The death penalty is reserved for "only the most aggravated" and the "most indefensible of crimes." Williams v. State, 707 So.2d 683 (Fla. 1998).

Proportionality review was described in Tillman v. State, 591 So.2d 167 (Fla. 1991) as follows: "Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances."

The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Id. It clearly is "unusual" to impose death based on facts

similar to those in cases in which death previously was deemed improper. Id. Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Id.

Proportionality review also arises in part by necessary implication from the mandatory, exclusive jurisdiction [the Florida Supreme Court] has over death appeals. Id. The obvious purpose of this special grant of jurisdiction is to ensure the uniformity of death-penalty law by preventing the disagreement over controlling points of law that may arise when the district courts of appeal are the only appellate courts with mandatory appellate jurisdiction. Id. Thus, proportionality review is a unique and highly serious function of the [Florida Supreme Court] the purpose of which is to foster uniformity in death-penalty law. Id.

The trial court found two aggravating factors. First, the trial court found that the capital felony was committed while the Defendant was engaged in or was an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit robbery pursuant to Fla. Stat. 921.1415(d). The trial court also found that the capital felony was committed for pecuniary gain pursuant to 921.1415(f). The

trial court properly recognized that both aggravators could not apply and considered both aggravators as one pursuant to authority in Francis v. State, 808 So.2d 110 (Fla. 2001).

The trial court trial court also found the statutory aggravator that the capital felony was committed to avoid lawful arrest pursuant to Fla. Stat. 921.1415(e).

The defense argued that statutory mitigator that the Defendant has no significant history of prior criminal history pursuant to Fla. Stat. 921.141(a). The trial court found that the defense proved that the Appellant had two prior third degree felony convictions. Both were separate convictions for grand theft of a motor vehicle. The trial court assigned very little weight to this mitigator (XVI-R1518).

The trial court assigned very minimal weight to the non-statutory mitigator of cooperation with law enforcement officers (XVI-R1521).

The trial court found that the defense proved that the Appellant came from a broken home. The Appellant's parents were divorced and he was raised primarily by his uncle. The divorce was difficult on the Appellant and his mother prevented him from seeing his father. The trial court assigned little weight to this non-statutory mitigator (XVI-R1521).

The trial court found that the defense proved that the death of Appellant's grandmother had an adverse effect on the

Appellant because she helped raise the Appellant. The trial court gave this mitigator little weight (XVI-R1521-22).

The trial court found that the defense proved that the Appellant played football in high school and was a very good player. This testimony also established that he was not violent or in trouble and that he had moved to Jacksonville with his mother and was unable to see his father in Okeechobee. He stole the car to drive to Okeechobee to see his father. The trial court assigned some weight to this mitigator (XVI-R1522).

The trial court found that the defense proved the Appellant's good behavior at trial and took judicial notice of this fact. The trial court assigned little weight to this mitigator (XVI-R1523-34).

The trial court rejected the age of the defendant at the time of crime pursuant to Fla. Stat. 921.141(d). The trial court found that the defense did not prove that the defendant's age was linked with some characteristic of the defendant or the crime such as significant emotional immaturity or mental problems (XVI-R1518-19).

In summary, after merging two of statutory aggravators into one the trial court found 2 aggravators and 5 non-statutory mitigators. The trial court's ruling on the statutory mitigators is unclear. As noted above, the trial court found that the defense had proven that the defendant had no

significant prior criminal history and gave that statutory mitigator very little weight (XVI-R1518). However, in summarizing its findings the trial court said that there were no statutory mitigating circumstances proven (XVI-R1525).

The facts of this case are that the Appellant and co-defendants Ambria Edmonds and Paul Rosier consorted to commit a Robbery upon Hilario Dominquez. Mr. Dominquez was known to sell beer, cigarettes and other items from his home (VIII, T577). On July 17, 2001, the Appellant and defendants approached the door of the home of Mr. Dominquez, knocked on the door, and when Mr. Dominquez opened the door they acted as if they wanted to buy beer (VIII, T582). When the robbery became apparent to Mr. Dominquez, he began to resist and a struggle ensued. The Defendant hit Mr. Dominquez on the head with the gun (VIII, T583). The gun discharged, apparently an accidental and wild shot, and Mr. Dominquez fell to the ground (VIII, T583). Co-defendant Rosier went outside to see if anyone heard the shot and then came back in and said “let’s go”. Rosier then ran and left the two co-defendants in the house (VIII, T583). Co-defendant Edmonds then took things from the home and she ran out of the house (VIII, T586). After leaving the house, co-defendant Edmonds heard a shot, turned around and saw that the Appellant had shot the victim in the chest (VIII, T586). They all then left the scene (VIII, T586).

If the Court strikes the avoid arrest aggravator as argued above then these facts are more similar 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).

In Terry police responded to Mobil Gas and found the victim dead in the store of area. On the floor of the store, the police found a white knit cap with "Down With O.P.P." printed on it along with a green plastic bag with the words "Foot Action" printed on it. A red ski mask was found two blocks away. Id. *at 957.*

A witness at trial testified that he was in the station's garage area and his wife was in the station's convenience store. Mr. Franco looked up when he heard a voice say, "Don't move or I shoot." A man in a red mask was pointing a small silver gun at him. Mr. Franco heard a scream and thirty seconds later a shot. A second man, who was not wearing a mask, emerged from the office.

The co-defendant Demon Floyd confessed and told police that he and appellant were riding around looking for places to rob and that the appellant had the guns and masks in the green and white "Foot Action" bag. Floyd wore the red mask and had the inoperable .25 caliber gun, and Terry wore the white "O.P.P." mask and used the .38 caliber gun. Floyd held Mr. Franco in the garage while Terry went to rob Mrs. Franco. Id.

The Terry Court agreed that the murder took place during the course of a robbery. However, the Court could not determine the circumstances surrounding the actual shooting. The Court noted that there was evidence that this was a "robbery gone bad" but then went on to say that "in the end, though, we simply cannot conclusively determine on the record before us what actually transpired immediately prior to the victim being shot." Id. at 965.

This is exactly the dilemma in the instant case. In the instant case, no one saw the actual shooting. The motives for the actual shooting are drawn from circumstantial evidence and speculation. Likewise, in *Terry* no one saw that actual shooting either.

Terry also mirrors the instant case when comparing the aggravators and mitigators. As in the instant case, the Terry court found that the capital felony was committed during the course of an armed robbery/pecuniary gain. Id. at 965. The trial court had previously found the statutory aggravator of a prior violent felony or a felony involving the use or threat of violence to the person. However, this aggravator was stricken on appeal leaving only the capital felony was committed during the course of an armed robbery/pecuniary gain as the only remaining aggravator. Id.

In Terry the defendant waived the statutory mitigator found in Fla. Stat. 921.141(6)(a), that the defendant has no significant history of prior criminal activity. Id. Therefore, mirroring what the trial court in the instant case seemed to have finally decided about this statutory mitigator.

In Terry, as in the instant case, the court rejected Terry's age of 21 years as a statutory mitigator because there was no evidence that Terry's mental or emotional age did not match his chronological age and his age, standing alone, was insignificant. *Id.*

In Terry, the trial court found no statutory mitigators and rejected Terry's minimal non-statutory mitigators. Id. This too, closely mirrors the instant case in which the trial court appears to have either rejected all statutory mitigators or at the very least assigned the past criminal history mitigator very little weight. However, in the instant case, the trial court did find 5 non-statutory mitigators even though it assigned little weight to each.

Finally, the Terry court compared that case with Sinclair and Thompson and found that the circumstances were insufficient to support the imposition of the death penalty. Id. at 966. The Terry court concluded that the circumstances of that case did not meet the test laid down in State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), "to extract the penalty of death for only the most

aggravated, the most indefensible crimes" and vacated the sentence of death. *Id.*

In Sinclair Kristine Pellizze was awakened by a loud bang at her home and found that a taxicab had smashed into her garage door. She observed a man slumped over in the driver's seat with his head hanging out the car window. Pellizze called 911 and paramedics found that the man had been shot. Sinclair at 1139.

At trial, Sinclair testified that he summoned a cab to take him to his mother's home. He further testified that he never intended to pay the cab fare and was going to run from the cab. He admitted that he carried a loaded .22 caliber handgun in his pocket to scare the victim as Sinclair left the cab. He admitted to firing the gun in the cab and that the cab driver was shot in the head. Although Sinclair denied taking any money from the driver, other testimony revealed that the driver had collected $61 plus tips and that this money was never found. Id.

As in the instant case, the Sinclair trial court merged as one circumstance the aggravating circumstances of murder committed for pecuniary gain and murder while engaged in the commission of a robbery. Id. at 1143 (footnote 1). And, as in the instant case, the trial court gave little or no weight to the non-statutory mitigators that Sinclair cooperated with the police and that Sinclair was raised without a father. In

addition, the trial court found that Sinclair had a dull, normal intelligence level. Id. (footnote 2).

After making these findings, the Sinclair trial court imposed a sentence of death, which was then vacated by the Florida Supreme Court. In vacating the sentence of death, the Court compared this case to *Thompson* in which the only valid aggravator was that the murder was committed in the course of a robbery. Id. at 1142. The Court noted that the mitigators in *Sinclair* were not as significant as in *Thompson* but found that there were mitigators nonetheless and held that a sentence of death would be a disproportionate sentence. Id.

Finally, in Thompson the defendant walked into a Subway sandwich shop in Pensacola, conversed with the attendant, Carl Lenzo, and then shot him in the head. Marilyn Coltrain was eating a sandwich in her car in front of the shop and saw Thompson enter the shop and converse with the clerk. When Coltrain looked away briefly, she heard a "pop," looked up and saw Thompson standing over the clerk, who had been shot. She and Thompson looked directly at each other and then she started her car and drove away. Thompson at 825.

Another witness, Edward Faulk, walked to within a few feet of the store and saw Thompson come out of the shop carrying a gun. Thompson pointed the gun at Faulk and then ran away.

Thompson was arrested moments after the shooting and $108 was found on his person. Id.

The trial court found the following four statutory aggravators: 1) that Thompson committed the murder while under sentence of imprisonment; 2) that he committed the murder during the course of a robbery; 3) that he committed the murder to eliminate a witness; and 4) that he committed the murder in a cold, calculated, and premeditated manner. Id. at 826.

As mitigators the trial court found the following 7 mitigators: 1) Thompson was a good parent and provider; 2) he had exhibited no violent propensities prior to the killing; 3) he received an honorable discharge from the Navy; 4) he maintained regular gainful employment; 5)he was raised in church; 6) he possessed some rudimentary artistic skills and 7) he had been a good prisoner and has not been a discipline problem.

On appeal the court struck three of the four aggravators including the aggravator that he committed the robbery to eliminate a witness. The Court then went on to say that "having struck three aggravating circumstances, this leaves a single aggravating circumstance to support the death penalty, i.e., the murder was committed in the course of a robbery. 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. The present case, in contrast, involves significant mitigation, as documented in the record." Id. at 827. The court then vacated the sentence of death. Id.

It is not just the circumstances of Terry, Sinclair and Thompson that are similar to the instant case. The aggravators are similar and in some cases the mitigators are strikingly similar as well. To impose a sentence of death in the instant case when it was vacated in these three cases would clearly be disproportional. Therefore, the sentence of death should be vacated in the instant case as well.

ISSUE IV

THE DEATH PENALTY WAS IMPROPERLY IMPOSED BECAUSE FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL

Section 775.082 of the Florida Statutes provides that the Imposition of the death penalty is premised upon the findings of the court. Section 921.141 provides for a penalty phase in which the jury provides an advisory opinion to the court which is not binding on the court. In Ring v. Arizona, 536 U.S. 584 (2002), the United States Supreme Court held the Arizona death penalty statute to be unconstitutional because it is the jury, not the judge, who should impose a death penalty. In Walton v. Arizona, 497 U.S. 639, 648 (1990), the Supreme Court stated '[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona."

The Appellant filed a motion on this issue below (II-R201-03). The trial court denied the motion and the argument was renewed during the penalty phase portion of the trial. The arguments made herein and the precedent relied upon are incorporated herein by reference. Since the statute upon which the Defendant's sentence was imposed is unconstitutional, the death penalty could not properly be imposed. By imposing the death penalty in this case, the Appellant's rights under the Fifth, Sixth, Eight and Fourteenth Amendments to the

Constitution of the United States were violated. Therefore, the sentence of death must be reversed.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities Christopher Dale Jones, Appellant, respectfully requests this Court to grant him relief as follows:

As to Issue I – reversal of conviction with remand for a new trial.

As to Issue II, III and IV – vacate the death sentence and remand for resentencing.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Consiglia Terenzio, Esquire, Assistant Attorney General, 1515 Flagler Drive 9th Floor, West Palm Beach, FL 33402 on this ____ day of November 2005.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12 point font in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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