IN THE SUPREME COURT OF FLORIDA

MARVIN JONES,

Appellant,

vs. CASE NO. SC04-282

STATE OF FLORIDA,

Appellee.
_____/

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The instant appeal arises from the trial court's denial of the Appellant, Mr. Jones's Motion for Post-Conviction Relief. This is a capital proceeding. The record on appeal consists of six volumes, which will be referenced by the use of roman numerals. References to page numbers in the record will be designated as "R" followed by the appropriate page number. The hearing transcripts are not in chronological or numerical order. Volume VI contains the first day of testimony, Volume IV a continuation of the first day of testimony, and Volume V contains the transcripts of the second day of testimony. The parties are the Appellant, Mr. Jones, who will be referred to as the Appellant or Mr. Jones and the Appellee, the State of Florida, who will be referred to as the "State".

STATEMENT OF THE CASE

On March 18, 1993, the Appellant, Marvin Jones, was indicted for the First-Degree Murder of Monique Stow and the Attempted First-Degree Murder of Ezra Stow on March 3, 1993.(I,R7-9) Mr. Jones was convicted of both offenses, as charged, by a jury and a sentence of death as to count 1

and a sentence of life in prison as to count 2 were imposed on May 31, 1994.(I,R126)

Mr. Jones sought direct appellate relief from this court, which affirmed the judgment and sentence on December 26, 1996 in an opinion cited at Jones v. State, 690 So. 2d 568 (Fla. 1996). The United States Supreme Court denied certiorari review on October 6, 1997. See, Jones v. Florida, 522 U.S. 880, 118 S.Ct. 205, 139 L.Ed. 2d 141 (1997).

Mr. Jones was appointed counsel through the attorney registry to represent him in his post-conviction proceedings on September 1, 1998.(I,R17-18) The Office of Capital Collateral Counsel for the Northern Region ("CCC-NR") filed a shell Motion for Post-Conviction Relief on behalf of Mr. Jones on September 17, 1998 due to the late appointment of registry counsel in relation to the one-year deadline and had sought withdrawal from the representation of Mr. Jones.(I,R19-59;III,R532) Counsel for Mr. Jones filed his Notice of Appearance on December 28, 1998. (I,R67;III,R531-532)

On December 3, 2001, defense counsel filed a Notice of Intention to Interview Jurors, wherein counsel advised the court that he had reason to believe that improper juror

conduct may have occurred based upon certain claims made in the Motion for New Trial and Amended Motion for New Trial and the content of juror interview reported in the Florida Times Union on March 12, 1995.(I,R100-107) The State filed their written objection to any juror interviews on December 10, 2001.(I,R108-118) The trial court denied the defendant's request on March 25, 2002.(I,R120-121) The trial court filed a more detailed Memorandum on Ruling on Defendant's Notice of Intention to Interview Jurors on June 3, 2002.(I,R216-223)

An Amended Motion for Post-Conviction Relief was filed on April 29, 2002 (I,R126-200;II,R201-215). The Motion for Post-Conviction Relief alleged 23 grounds upon which relief should be granted. The State filed their response on June 13, 2002. (II,R226-274) The State conceded that an evidentiary hearing was necessary on Grounds1, 13, 14, 15. (II,R226-274;III,R552) The State requested summary denial on all remaining grounds. Following a *Huff* hearing on August 9, 2002 (III,R559-600;IV R601-619),the trial court entered an order granting an evidentiary hearing on grounds 1,3,4,5,6,7,9,10,11,12,13,14,15,16, and 21.(II,R356-358) The remaining grounds (2,8,17,18,19,20,22,and 23) would be

ruled on without a hearing.(II,R358;III,R575)

On August 23, 2002, a Supplement to the Amended Motion for Post-Conviction Relief was filed.(II,R345-355) The Supplement addressed the then-recent holding of the United States Supreme Court in Ring v. Arizona, 122 S.Ct. 2428 (2002). The State response was filed on September 12, 2002. (II,R362-400; III,R401-405).

An evidentiary hearing was conducted from October 21 through October 23, 2002.(IV,V,and VI) A summary of the testimony from the hearing will be presented in the Statement of the Facts. At the onset of the hearing the State agreed to stipulate that a mitigating factor present in this case was the courteous and at all times maintained favorable and positive courtroom behavior and never, at any time, acted in such any way that would have offended the victim's family.(VI,R992-993)

Mr. Jones's written closing argument was submitted to the trial court on December 11, 2003.(III,R412-427)

The trial court issued an order on January 23, 2004 denying the Amended Motion for Post-Conviction Relief. (III,R428-471) The trial court found that on each of the fourteen grounds claiming ineffective assistance of counsel no relief should be granted(1,3,5,6,9,10,11,12,13,14,15) or

that the claim was procedurally barred(grounds 4,7,10,) The trial court denied ground 2 for the reasons set forth previously when the motion to interview jurors was denied. (III,R434) The trial court found he was without authority to address ground 8. (III,R442) Ground 22 was denied for lack of evidence. (III,R 459) Ground 23, a claim of cumulative error was denied based upon the reasons set forth for denying the individual grounds.(III,R459) The Supplemental Grounds arising from the application of Ring and Apprendi were denied based upon rulings from this Court.(III,R460)

A timely Notice of Appeal was filed on February 20, 2004. (III,R472-506)

STATEMENT OF THE FACTS

Attorney Frank Tassone testified that he has practiced law since 1973 in the State of Florida.(VI,R996) He worked as an Assistant State Attorney from 1973 through 1980. (VI,R997) He then worked as a director for FDLE from 1980 through 1982.(VI,R997) In 1982 he entered private practice. He was appointed to represent Mr. Jones in 1993.(VI,R997-998) His private practice was approximately 50% criminal and 50% civil. (VI,R999) As of 1993, Mr. Tassone had been responsible for 10-15 first-degree murder cases as a

defense attorney, of which approximately 50% were death penalty cases.(VI,R999) Of those 15 total cases, maybe 5 had gone to trial. (VI,R1001) Mr. Tassone generally worked alone on these cases and never had the opportunity to work as co-counsel with an experienced defense death penalty attorney. (VI,R1003) Mr. Tassone could not recall if he had attended available death penalty training for attorneys.(VI,R1004)

Mr. Tassone agreed that he would normally retain the records from a capital case in his office.(VI,R1006) On March 21, 1994 a fire in his office destroyed the files and records relating to Mr. Jones.(VI,R1008) All notes, correspondence, research, and investigative documents and notes were destroyed.(VI,R1008-10) The lack of any documents relating to his representation of Mr. Jones made it difficult for him to testify at this proceeding. (VI,R1010)

Mr. Tassone testified that he believed that he had the Florida Public Defender Manual on Trying Capital Cases in Florida in 1994.(VI,R1011) He acknowledged that a large section of that manual was dedicated to jury instructions and that it was crucial in a capital case to preserve legal issues, including issues which have had adverse rulings in

the past.(VI,R1011) Mr. Tassone believed that a defense lawyer's responsibility was to preserve any issue adverse to his client despite adverse rulings on the same issue by an appellate court.(VI,R1012)

Mr. Tassone also agreed that a defense lawyer's job was to try to mitigate or attack the weight of the aggravating factors and to try to raise a reasonable doubt in the minds of the jurors as to the existence of the aggravating factors.(VI,R1058-59) The defense lawyer also has an obligation to present evidence establishing a mitigating factor.(VI,R1059) The defense lawyer must also convince the judge and jury to give the mitigating circumstances great weight.(VI,R1060) For example, a witness who testifies that the defendant is a good brother is more effective if examples of conduct and the basis for that claim are testified to.(VI,R1061)

In Ground X of the Amended Motion for Post-Conviction Relief the claim for relief was predicated upon the giving of a defective jury instruction which Mr. Jones asserted improperly shifted the burden of proof to the defendant in establishing mitigating circumstances.(VI,R1012) Mr. Tassone did not believe that he had asked for any jury instruction to clarify the burden of proof and had not

objected to the standard instruction.(VI,R1012) He could not recall if he was familiar with the recommendation in the Defending Capital Cases Manuel that supplementary special jury instructions should be requested. (VI,R1015-16) He did not ask for any special instructions. (VI,R1016)

Although claiming to have studied and to being familiar with Caldwell v. Mississippi, Mr. Tassone could not provide either the facts or a summary of the holding of that case at the time of his testimony.(VI,R1013) When defense counsel explained that Caldwell held that it was improper to minimize or denigrate the role of the jury in capital cases, Mr. Tassone agreed with that summary. (VI,R1013) Mr. Tassone could not recall if he was familiar with the defense bar challenges to the Florida jury instructions under Caldwell and as outlined in the Defending Capital Cases Manual in existence in 1993. (VI,R1013-14) Mr. Tassone did not believe that he pursued any challenges to the jury instructions under Caldwell, even though Caldwell had been issued in 1985.(VI,R1014)

Mr. Tassone agreed that one aggravator relied upon by the State, which the jury was instructed on, was the prior violent felony aggravating factor.(VI,R1016) It was based

upon the simultaneous attempted first-degree murder charge of Mr. Stow.(VI,R1016A) Mr. Jones had no prior record save that contemporaneous conviction.(VI,R1016A) Mr. Tassone filed no objection use of a contemporaneous felony as an aggravating factor, acknowledging a ruling from the Florida Supreme Court upholding that use of a contemporaneous conviction for use as a prior violent felony.(VI,R1016A)

Mr. Tassone acknowledged that the jury was also instructed that Mr. Jones had no significant criminal history.(VI,R1018) He acknowledged that it would be confusing for a jury to hear that a prior violent felony could serve as an aggravator and that no prior record could serve as a mitigating factor, but did not ask for a special jury instruction to clarify that the contemporaneous conviction could not rebut the no significant criminal history mitigating factor.(VI,R1019)

The aggravating factor of cold, calculated, and premeditated (CCP) was presented to the jury in this case. (VI,R1020) After penalty phase, but before sentencing, the jury instruction for CCP was found unconstitutional by this Court.(VI,R1021) Mr. Tassone acknowledged that the heinous, atrocious, and cruel(HAC) instruction had been found unconstitutional prior to Mr. Jones's trial.(VI,R1021) Mr.

Jones took no action to seek any relief due to the fact that an unconstitutional jury instruction had been given.

The aggravating factor of pecuniary gain was also presented in this case.(VI,R1022) Mr. Tassone stated that he would have made an effort to be familiar with the Florida Supreme Court case law as to what was required in order to support a finding of pecuniary gain.(VI,R1022) Mr. Tassone believed that in 1994 pecuniary gain had to be some type of a necessary and unequivocal step in the course of committing the crime in order to be applied as an aggravator.(VI,R1023) Mr. Tassone agreed that if property was taken as an afterthought, the pecuniary gain aggravator would not apply.(VI,R1024) In this case the standard jury instruction was given and Mr. Tassone did not request a special instruction that would have further explained the after thought aspect of the application of the pecuniary gain aggravator to the jury.(VI,R1024-25) Mr. Jones was not charged with any underlying felonies such as robbery or burglary.(VI,R1027) The jury was not instructed on felony murder.(VI,R1028) Mr. Tassone acknowledged that an attorney must be prepared to combat and rebut aggravating factors. (VI,R1029) Mr. Tassone believed that if the jury rejected a claim of self-defense, that his theory as to the cause of

the crime was that it arose out of anger as a result of difficulties with the car and that the paperwork relating to the car was taken as an afterthought.(VI,R1032) The state's theory was that the crime occurred in order to take property (the car).(VI,R1034) Mr. Tassone acknowledged that he failed to argue his theory of the penalty phase defense to the jury.(VI,R1035)

Ground 9 alleged that victim impact evidence had been impermissibly presented to the jury during penalty phase. (VI,R1036) Mr. Tassone did not recall objecting to the victim impact evidence and could not dispute the contents of the motion.(VI,R1037) Mr. Tassone stated that he in 1993 he was aware of victim impact evidence, but was unaware of any jury instructions to address this evidence.(VI,R1037) Mr. Tassone requested no jury instruction as to the limited admissibility of victim impact evidence.(VI,R1039) Mr. Tassone acknowledged that he was concerned about victim impact, even to the point that he filed a motion for new trial and cited to concerns that the jury was impacted to the point that new trial was warranted.(VI,R1154) Mr. Tassone did not ever recall making this argument in any other case.(VI,R1154) Not only did one witness testify, but another brought a picture of the deceased victim to court

and the jury was continually taken past the deceased victim's family and the surviving victim.(VI,R1154)

In Ground 13 of the Amended Motion for Post-Conviction Relief Mr. Jones alleged that Mr. Tassone had failed to properly investigate mental health issues.(VI,R1042) Mr. Tassone had retained Dr. Miller as a confidential expert and had received a copy of his report in 1993.(VI,R1042-46) Mr. Tassone chose Dr. Miller because he wanted to rule out any issues of competency or insanity.(VI,R1048) He was familiar with Dr. Miller and they had previously worked together. Dr. Miller evaluated Mr. Jones and reported as to his competency to stand trial and his sanity at the time of the offense.(VI,R1050)

Mr. Tassone could not recall if he utilized Dr. Miller as a mental health expert for mitigation purposes. (VI,R1050) Due to his notes having been destroyed in the office fire, Mr. Tassone had nothing to refer to.(VI,R1050) He could not recall ever meeting with Dr. Miller to have penalty phase/mitigation conversations, but if he followed his pattern, Mr. Tassone would have done that.(VI,R1051)

Mr. Tassone did not request Dr. Miller to talk with family members of Mr. Jones in order to develop mitigation. (VI,R1052) Dr. Miller was not called as a mitigation

witness, despite the fact that his report contained a number of non-statutory mitigating circumstances.(VI,R1052) For example, the report stated that Mr. Jones suffers from a compulsive personality disorder which requires predictability in his environment and which was significantly lacking at the time of the offense. Mr. Tassone acknowledged this mitigating psychological factor could have been used to rebut the CCP aggravator and the "Dr. Jekyll/Mr. Hyde" features of the crime.(VI,R1055-56) This would have been especially critical given the great weight usually assigned to the CCP aggravator.(VI,R1145) Dr. Miller's report contained information which could have been used to combat what the judge believed to be deliberate planning to support the CCP aggravating circumstance.(VI,R1145) Mr. Tassone agreed that Dr. Miller's report would have been helpful mitigation evidence and was fairly important.(VI,R1145;1150) Dr. Miller's report was also critical because it presented unbiased evidence of mitigating factors.(VI,R1146) There was nothing damaging to Mr. Jones or his case contained in Dr. Miller's report that would have been necessary to shield from the jury.(VI,R1146-47)

The report also contained facts about the effect of

the crime on Mr. Jones, including depression which required medication and the loss of 40 pounds.(VI,R1057) This evidence of remorse was not presented to the jury as a non-statutory mitigating circumstance.(VI,R1057A) Mr. Tassone believed that Mr. Jones was remorseful.(VI,R1074)

Dr. Miller was available and could have been called as a witness.(VI,R1057A)

Ground 15 alleged that Mr. Tassone was ineffective in failing to call a number of witnesses in mitigation. (VI,R1062) Mr. Tassone could not personally recall speaking to any of the lay witnesses in detail about their testimony or having an investigator do so and he had no notes to refresh his memory.(VI,R1062-64) He generally does talk to witnesses.(VI,R1063) Mr. Tassone did not recall talking with the family in this case. Mr. Tasone did not recall presenting such testimony to the court. Neither did Mr. Tassone recall presenting Mr. Jones's academic record, his musical ability, and leadership qualities to the court.(VI,R1065) Mr. Tassone did not recall presenting in mitigation that Mr. Jones had been a good neighbor.(VI,R1066) This was a case where someone with a very positive background acted in a very atypical manner.(VI,R1068)

Mr. Tassone couldn't really recall exactly who he called as a witness in the penalty phase.(V,R896) The decisions on who to call were made after speaking with Mr. Jones.(V,R896) Mr. Tassone knew he spoke to Mr. Jones' wife, but wasn't sure if he talked with his parents or not. (V,R896) He did introduce Mr. Jones' naval records, which established an exemplary naval career.(V,R897) Mr. Tasssone did not believe that the State had genuinely attacked the home life, growing up life, or naval career.(V,R898) Some of the evidence would have been cumulative.(V,R893) He felt the jury was aware that this was a good man with a good family.(V,R900)

Mr. Tassone believed that Mr. Jones was under stress in his life at the time of the crime.(VI,R1067) Financial stress and stress transitioning from the military to civilian life were present.(VI,R1067) The financial circumstances resulted in a separation from his wife. (VI,R1070) He was having significant problems with Mr. Stow as a result of the car sale, whereby the car was having significant mechanical problems and Mr. Stow was demanding to be paid.(VI,R1072) Issues about the level of respect that Mr. Stow displayed to Mr. Jones were also present.

(VI,R1072) Mr. Tassone agreed that stresses make people more prone to act out in anger.(VI,R1073)

Mr. Tassone believed that Mr. Jones had been a model inmate during pretrial incarceration.(VI,R1075) He found him to be one of the most cooperative clients he had represented.(VI,R1074) He conducted himself with great dignity and proper decorum throughout all court proceedings.(VI,R1075) This type of behavior should have been presented as a mitigating circumstance.(VI,R1075) Mr. Tassone also believed that Mr. Jones would adapt well to prison life and maintain good behavior in prison. (VI,R1076) This could also be considered a mitigating circumstance.(VI,R1076) Mr. Tassone voiced his opinion that he didn't think that this mitigation was that important, but admitted that it could be important to a judge or jury. (VI,R1155-56)

Ground 6 addressed the CCP findings in the sentencing order.(VI,R1085) The trial court had found that the crimes were carefully planned and not lapses in the defendant's usual personality and behavior.(VI,R1086) Mr. Tassone believed just the contrary was true.(VI,R1086) The judge noted the lack of mental health testimony to explain the contrast between the crimes and the regular personality of

Mr. Jones.(VI,R1088) Mr. Tassone acknowledged that a mental health professional such as Dr. Miller could have provided testimony about these factors and have provided insight in the mental state of Mr. Jones at the time of the offense. (VI,R1089) Dr. Miller was not called as a witness to rebut the mental aspects of the aggravating circumstance of CCP and was not called to offer mental health testimony in mitigation.(VI,R1091) Mr. Tassone believed that he got in the mitigation he needed to through family witnesses. (VI,R1124) He did acknowledge that there was much more to Mr. Jones that just a good family man, a good military man, and a good husband.(V,R907)

Mr. Tassone sometimes sought coverage from another attorney for routine court hearings in the case.(VI,R1083) He was, however, solely responsible for the case and did not have co-counsel.(VI,R1083) He believed that this was difficult and felt at least two attorneys should always be appointed in death cases due to the tremendous amount of work and to act as back-up to catch potential things that are missed.(VI,R1083) Mr. Tassone also felt that two attorneys were necessary in cases such as this where the defense at trial (here, self-defense) is rejected by the jury during guilt phase and a second defense must then be

used during penalty phase to combat aggravating circumstances which is in contradiction to the guilt phase defense.(VI,R1143) Mr. Tassone did use the services of a private investigator, Mr. Moncreif.(VI,R1092)

The issue of whether the bathroom door inside the car dealership opened inward or outward was a great source of discrepancy in this case and the discrepancy posed a significant problem.(VI,R1092;1097) Mr. Jones believed that the bathroom door opened in one direction when it in fact opened in the other.(VI,R1093) This was significant because it did not corroborate Mr. Jones.(VI,R1098) Mr. Jones had testified that after an altercation that resulted in the shooting of Mr. Stow, he felt ill and had stumbled down the hall to the bathroom. (V,R892) A movement startled him and the gun went off, killing Monique Stow in the bathroom.(V,R893) At trial the issue of how the door opened was the subject of significant time and attention.(V,R905) A model of the trailer was introduced.(V,R905) A life-sized door and frame was attempted to be introduced by the state.(V,R905) The prosecutor used the jury room door as a demonstration. (V,R908) The viewing of the excluded model door was the

subject of a new trial motion.(V,R905) There was discussion with Mr. Jones about the difference and review of some photographs that were of poor quality as to this question. (VI,R1094) No one ever had Mr. Jones transported to the crime scene to view the door.(VI,R1094) On the other hand, Mr. Tassone did view the crime scene, viewed photographs from discovery, and read all the police reports.(V,R891)

State's Exhibit 1, "San Pablo Motors", depicted the door.(VI,R1095) Mr. Tassone could not recall when he first viewed the exhibit.(VI,R1095) Mr. Jones probably saw it for the first time at trial.(VI,R1090)

Mr. Tassone went over Mr. Jones's testimony with him. (VI,R1090) He did not specifically recall dealing with Mr. Jones and preparing him to deal with physical evidence that would be in direct conflict with physical evidence. (VI,R1090) He did not, during his direct exam, take the issue head on as anticipatory rebuttal, but left Mr. Jones to deal with cross.(VI,R1098) Mr. Tassone acknowledged that he could not have encouraged Mr. Jones to change his testimony or lie.(VI,R1105)

Ground 16 alleged five instances of prosecutorial misconduct that occurred in the penalty phase.(VI,R1100) Mr. Tassone did not have a specific recollection of the

actual comments made by the prosecutor, but agreed that those set forth in the motion should have been objected to or he wasn't sure if an objection should have been made. (VI,R100A-01) After reviewing the closing argument, Mr. Tassone opined that he wasn't sure if the prosecutor had attempted to argue a nonstatutory aggravating factor to the jury.(VI,R1164) It this was done, he should have objected and moved for a mistrial.(VI,R1164) He didn't think there was anything improper, so he didn't object.(VI,R1165) Mr. Tassone acknowledged that the state argued the avoid arrest aggravator to the jury, which had been excluded by the court.(VI,R1165) Mr. Tassone admitted he should have objected and failed to do so.(VI,R1165) Mr. Tassone agreed that the prosecutor improperly argued that but for the actions of the second victim, two persons would have been killed, but again failed to object.(VI,R1166) Subsection D alleged that the prosecutor improperly argued facts not in evidence relating to Mr. Jones's credibility and character. (VI,R1166) Mr. Tassone didn't think this argument was improper, but admitted the safer course would have been to object.(VI,R1166) Mr. Tassone admitted he should have objected to the prosecutor's argument that Mr. Jones failed to take any action to aid the victims.(VI,R1167)

Lee Houston, a resident of Georgia, grew up with Mr. Jones.(IV,R627) Mr. Houston finished high school, served in the military, and became an aviation engineer.(IV,R626) He and Mr. Jones met in sixth grade in band.(IV,R627) They remained friends through high school and kept in contact after high school with occasional visits.(IV,R628)

Mr. Houston described Mr. Jones as a good student and a good musician.(IV,R629) He was very responsible and happy, holding leadership roles in the band.(IV,R629) In high school he was a band section leader, a position of great responsibility.(IV,R631) In his neighborhood Mr. Jones was a good neighbor.(IV,R633) In their community Mr. Jones got along with everybody and did not engage in criminal behavior.(VI,R633) He had a very good reputation in the community for peacefulness and humor.(IV,R634) Mr. Jones was the kind of friend who kept Mr. Houston out of trouble several times.(IV,R631) For example, when the two were teenagers Mr. Jones broke up a fight that erupted between Mr. Houston and three other boys.(IV,R632)

Mr. Houston was aware of the criminal charges Mr. Jones had been convicted of. This incident was completely out of character for him.(IV,R635) No one in their community could believe what had happened.(IV,R636)

Mr. Robert Walker grew up in Georgia with Mr. Jones as well.(IV,R637) He was in the band with Mr. Jones and Mr. Houston.(IV,R638) He currently works with autistic children and coaches junior high athletics.(IV,R638-39) Mr. Jones was like a brother to him.(IV,R649)

Mr. Walker grew up knowing the Jones family and playing with Mr. Jones.(IV,R641) They cooked together and played sports together as children.(IV,R642) Mr. Jones was good with his peers, who often came to him for advice. (IV,R642) Mr. Walker observed that Mr. Jones was always respectful to his parents, siblings, and adults.(IV,R644) He enjoyed a close relationship with his family.(IV,R644) Mr. Jones was not selfish and often helped his younger siblings with chores and homework.(IV,R645)

Mr. Walker knew that Mr. Jones was a good student and an accomplished musician.(IV,R646) He held leadership roles in the band.(IV,R648)

Mr. Jones was the type of person who would go out of his way to help friends and neighbors.(IV,R648) He was always available to his friends to talk about problems. (IV,R649) Mr. Jones was levelheaded and would often ward off trouble.(IV,R650) Mr. Walker never knew Mr. Jones to be violent or engage in anti-social activity.(IV,R651)

Mr. Walker was aware of Mr. Jones's convictions. (IV,R652) He found this to be totally out of character. (IV,R652) Mr. Walker testified very broadly at the original trial.(IV,R654)

Porsha Hernandez grew up in Georgia with Mr. Jones. (IV,R688) She is currently married with a son and teaches middle school math.(IV,R686-688) They remained good friends even after both married.(IV,R6859) Mr. Jones was a good student, a good musician, a jokester, and very lighthearted.(IV,R660) He was very objective in emotional situations.(IV,R661) Mr. Jones was someone people viewed as a leader and wanted to be around.(IV,R662)

Mrs. Hernandez never knew of Mr. Jones behaving in a violent of anti-social manner.(IV,R663) She was aware of the current convictions and found them impossible to believe.(IV,R664) Mrs. Hernandez has visited Mr. Jones since his incarceration.(IV,R666) Mr. Jones was very upset and depressed about what had happened.(IV,R668) Mrs. Hernandez was very concerned for him and thought he might harm himself.(IV,R668) He has expressed great remorse to her.(IV,R670)

No one contacted Mrs. Hernandez during the first trial.(IV,R668) She would have been very willing to testify

for him.(IV,R667)

Mrs. R.D. Jones Harris is currently a teacher in Fernandina Beach, where she resides with her husband and children.(IV,R673) Mrs. Harris is Mr. Jones' younger sister.(IV,R674) She and Mr. Jones got along very well as children.(IV,R674) As they got older, Mr. Jones took her under his wing and became her role model.(IV,R675) Mr. Jones was a good student who never got into trouble. (IV,R676) He was very good in the band.(IV,R677)

Mr. Jones was a very good brother to the younger boys. (IV,R677) He would always look after them and include them in neighborhood games.(IV,R677) Mr. Jones was a good son and obedient.(IV,R678) He was respectful and polite. (IV,R678)

Mr. Jones was well-liked in the neighborhood. (IV,R679) He was a good friend.(IV,R679) Mr. Jones often helped other in the neighborhood.(IV,R680) He would give money to friends or a place to stay.(IV,R680)

Mr. Jones had the reputation for being peaceful. (IV,R681) He did not engage in criminal or anti-social behavior.(IV,R681)

Since his arrest, Mrs. Harris has visited Mr. Jones. (IV,R682) She was completely shocked by what happened and

couldn’t believe it.(IV,R682) Mrs. Harris noted that following the crime, Mr. Jones lost weight, was very depressed and completely changed.(IV,R683) He expressed remorse for what happened.(IV,R684)

Alton Jones went to college on a football scholarship, played professional football, completed the police academy, and is now a police officer in Atlanta.(IV,R689) Mr. Jones is his older brother. (IV,R691) Mr. Jones was his best friend while growing up.(IV,R692) Mr. Jones is eight years older than Alton, but he always took Alton with him and made sure he got to play.(IV,R692) He helped him with his chores and homework.(IV,R693) Mr. Jones gave him music lessons.(IV,R696) Mr. Jones continued a close relationship with Alton after he joined the Navy. (IV,R693) Mr. Jones taught Alton to drive while he was on leave.(IV,R693) Mr. Jones would come to his football games when he could. (IV,R696) Alton respected Mr. Jones a great deal and still had great respect for him.(IV,R694)

Alton testified that Mr. Jones was a good son, very respectful and helpful.(IV,R694) He did not raise his voice in the household.(IV,R694)

Mr. Jones had many friends in the community.(IV,R697) He was very helpful.(IV,R697) He was very loyal and stuck

by his friends.(IV,R698) Mr. Jones had a good reputation in the community, was looked up to, and was viewed as a peaceful man.(IV,R700)

Alton could not believe it when he learned that Mr. Jones was in jail.(IV,R701) Alton described Mr. Jones as depressed, he didn't look the same, and his demeanor was greatly changed.(IV,R703) Mr. Jones was very sorry for what had happened.(IV,R703) Alton and Mr. Jones correspond in writing all the time and visit several times a year. (IV,R704)

Alton did testify at the first penalty phase, with his testimony lasting three pages.(IV,R704)

Arthur Jones is Mr. Jones' father.(IV,R728) After living in New York, he and his wife moved their family back to Georgia to be safer.(IV,R723) In Moultrie, Georgia, he worked as a garment cutter, a bail bondsman, and ran a grocery store.(IV,R723) Mrs. Jones worked at the hospital. (IV,R729)

Arthur felt that Mr. Jones was a great son.(IV,R739) He was always obedient.(IV,R739) Mr. Jones was the second oldest child.(IV,R739) He was a role model for the younger children.(IV,R731) He was a good brother.(IV,R732)

Mr. Jones was a good musician and a good student. (IV,R732) He was well-liked in the neighborhood.(IV,R733) He was generous.(IV,R733)

Arthur Jones was shocked when he heard what had happened.(IV,R734) It was so unlike Mr. Jones.(IV,R735) He went to see Mr. Jones shortly after the incident.(IV,R736) Mr. Jones told him the shooting was an accident, the gun had gone off when he was startled by the noise.(IV,R737) Mr. Jones got ill and threw up when talking abut it. (IV,R737) Mr. Jones was all broken up talking about it. (IV,R737) Arthur thought his son was depressed, he shook and lost weight.(IV,R738)

Arthur Jones testified at the first penalty phase and his testimony covered three pages of transcript.(IV,R740)

Mabel Jones is the mother of Mr. Jones.(IV,R742) Mr. Jones was five years old when the family moved from New York to Georgia.(IV,R744)

Mrs. Jones described her son as very outgoing. (IV,R745) Everyone loved him.(IV,R745) She was very proud of his accomplishments in school and band.(IV,R746) Mr. Jones was never a problem, was respectful and obedient. (IV,R747) Mr. Jones was not violent and never had trouble

with the law.(IV,R748)

Mr. Jones was good in the community and good within his family.(IV,R747) He was a good brother and very helpful.(IV,R747) Mrs. Jones did not believe that Mr. Jones changed after he went into the Navy.(IV,R749) She had frequent contact with him he continued to be helpful and good.(IV,R750)

Mrs. Jones was completely shocked over what had happened.(IV,R750) The crimes were totally out of character for Mr. Jones.(IV,R750) When Mrs. Jones saw Mr. Jones in jail he looked totally different.(IV,R752) Mrs. Jones has continued to see and write her son.(IV,R758)

Mrs. Jones testified at the first penalty phase, her testimony spanned four pages.(IV,R754)

Abigail Taylor met her husband Tracy Taylor while he was in the Navy.(IV,R707) Mr. Jones was Tracy Taylor’s best friend while they were in the navy together.(IV,R709) They remained friends after Mr. Taylor separated from the Navy. (IV,R711) Their families socialized together.(IV,R711) Mr. Jones would encourage Mr. Taylor to be more responsible and helped to counsel them with marital difficulties.(IV,R712) Mr. Jones tried to be a positive influence on Tracy.(IV,R713)

Mrs. Taylor believed that Mr. Jones was well-liked and had a lot of friends.(IV,R714) He didn’t drink or miss work and would try to be a positive influence.(IV,R714)Mr. Jones was very generous and helpful in the military community they lived in.(IV,R714)

At the time of the crime, Mr. Jones and his family were staying with Mrs. Taylor and her family.(IV,R716) The family was planning to move to Pensacola, but had stayed for several weeks with the Taylors.(IV,R716) Mrs. Jones had eventually gone to Pensacola with Mr. Jones remaining in Jacksonville in order to resolve some financial issues.(IV,R717) The family was thus living apart.

Mrs. Taylor knew that Mr. Jones had purchased a Saab automobile.(IV,R717) The car kept breaking down.(IV,R717) The dealer wasn’t fixing it.(IV,R717)

Mrs. Taylor saw Mr. Jones when he came to her house just after the crimes.(IV,R717) She described Mr. Jones as frantic, hysteric, and shocked.(IV,R717) He said he had done something bad but couldn’t talk about it.(IV,R717) Mr. Jones was crying.(IV,718) Mrs. Taylor had never known Mr. Jones to act like this.(IV,R719) Mrs. Taylor saw a newscast about the shooting and recognized the location as where Mr.

Jones had been.(IV,R719)

Mrs. Taylor could not imagine Mr. Jones doing something like that in a million years.(IV,R720) As she observed Mr. Jones later that day talking to her husband she felt he was in a state of shock.(IV,R720)

Mr. Jones testified that he was originally represented by Mr. Tassone.(IV,R757) He sometimes spoke with an investigator as well.(IV,R757) He recalled discussing the door at San Pablo Motors with Mr. Tassone.(IV,R757) They talked about how much the door was open at the time of the incident, but he did not recall discussing with Mr. Tassone the direction (outward or inward) that the door opened.(IV,R579) Mr. Jones first learned of the discrepancy between his recollection and the physical reality during the trial when the state presented their mock-up.(IV,R759-60) Mr. Jones did not realize he erred in his recollection until cross-exam.(IV,R759) He had not seen the model prior to trial.(IV,R759) Mr. Jones lost focus after this became an issue and wasn’t able to answer well.(IV,R761)

Mr. Jones testified that he was raised in a strict manner and in a religious manner.(IV,R761) He always tried to be the best person he could be to be respectful and

responsible in whatever he attempted.(IV,R761) Mr. Jones was devastated by what had happened.(IV,R762) He became very depressed.(IV,R752) He lost weight, couldn’t sleep and suffered nightmares.(IV,R763) He is extremely remorseful. (IV,R753)

Mr. Jones has tried to adapt to living in prison. (IV,R763) It is like a different world.(IV,R763) He has tried to live a positive life while incarcerated.(IV,R764) He has tried to help other inmates, teaching them to read and about the Bible.(IV,R765) He tries to avoid fights and any behavior that might cause a conflict.(IV,R766) He has never received a disciplinary report.(IV,R768)

Mr. Jones often cleaned up the dining hall while in jail.(IV,R767) He would get up early to do this.(IV,R767)

Dr. Carl Miller is a retired professor of psychiatry from the University of Florida College of Medicine.(V,R795) In addition to his academic career, Dr. Miller had maintained an active patient practice and continues to maintain a modified practice in the area of forensic psychiatry.(V,R796) In his forensic capacity Dr. Miller has worked on in excess of 20,000 cases over a 40 year period and believed that he had testified for the prosecution a greater number of times than for the defense.(V,R797)

Dr. Miller performed a clinical evaluation of Mr. Jones for defense counsel in 1993.(V,R800) He interviewed Mr. Jones for about one hour, reviewed information about the offense, and generated a report for defense counsel. (V,R800) In his opinion, Mr. Jones was competent to stand trial and was not insane at the time of the offense. (V,R801) Because he was brought on by the defense attorney, that attorney will largely direct the course of the evaluation and generally structures the areas that are investigated as far as mental health issues.(V,R819) Dr. Miller was not asked by Mr. Tassone to evaluate anything but competency and insanity.(V,R820) Dr. Miller did not recall Mr. Tassone asking him about mitigation or other diagnosis.(V,R820-21

Dr. Miller, in obtaining background information about Mr. Jones, concluded that he had a high school diploma and some college classes, had a satisfactory work history revolving around his Naval service, had difficulty finding a job upon separation from the Navy, and had a stable background with his family, wife, and children.(V,R802) Mr. Jones did not have any alcohol or substance abuse problems.(V,R803) Mr. Jones was estimated to be of normal intelligence.(V,R803) Mr. Jones engaged in positive

recreational activities, including playing musical instruments.(V,R803) He is friendly, outgoing, cooperative, forthright, and goal oriented.(V,R804)

Dr. Miller believed that Mr. Jones had a compulsive personality traits or disorder (OCD).(V,R805) This type of person will become consumed with orderliness, focuses on precision, and wants to have an environment where things are predictable.(V,R805) When things in the environment are out of order, this person will become anxious, less organized in their thinking, and less able to react to their environment with logic and consistency.(V,R805) While not of a malignant nature, this disorder has disadvantages.(V,R805) When confronted with disorder in their life, a person with OCD will attempt to restructure the environment, move to a new environment, and there can be decompensation and abandonment of controls and a resort to different types of problem solving where more primitive emergency emotions come forth and more primitive solution to problems are used. Destructive behaviors emerge.(V,R808) The thinking process can be disrupted.(V,R808) Emotion will tend to lead and control will suffer.(V,R808)

Dr. Miller agreed that the changes and disorder present in Mr. Jones's life as a result of his separation

from the navy, coupled with other factors at the time of the crimes would have had a significant impact on him. (V,R810) Financial difficulties relating to the car and the constant mechanical troubles would be additional stressors. (V,R811) Dr. Miller did not believe that the instant offenses were contrived, logically planned, or thought out, or the product of any reasoning of substance.(V,R811) In Dr. Miller's opinion, the offenses occurred as an emotionally reactive response to a strongly charged interchange.(V,R811) The combination of significant stressors coupled with the OCD placed Mr. Jones in a psychological state of discontrol.(V,R812) There was absolutely no evidence of anti-social behavior or anti-social personality in Mr. Jones.(V,R813)

Dr. Miller found that Mr. Jones was in significant depression when he interviewed him in 1993.(V,R814) This would be a typical reaction for someone of Mr. Jones' character.(V,R814)

Dr. Elizabeth McMahon is a neuropsychologist and a forensic psychologist.(V,R846) She has worked since 1975 in clinical psychology, private practice, through the judicial system with involuntary commitment, and is currently in private practice.(V,R847) She teaches at the University of

Florida in both criminal justice and forensic psychiatry.(V,R847) Her primary work is in the criminal arena.(V,R849) She has testified for both the defense and prosecution.(V,R851)

Dr. McMahon, pursuant to the request of post-conviction counsel, conducted an evaluation of Mr. Jones.(V,R851) She reviewed the previous judicial opinions, the sentencing order, the forensic evaluation done by Dr. Miller, the trial testimony of Mr. Jones, the trial testimony of Mr. Stow, and the portions of the penalty phase testimony. (V,R853) She conducted clinical interviews of Mr. Jones on four occasions, spending 18 1/2 hours with him.(V,R854-55) Dr. McMahon administered a number of neuropsychological tests to Mr. Jones.(V,R854-55)

Dr. McMahon opined that Mr. Jones was of average intelligence and his neuropsychological evaluation was within normal limits.(V,R856) She found no evidence of brain dysfunction or cognitive cortical disfunction. (V,R857) Mr. Jones has good planning ability, good impulse control, and is a cautious individual.(V,R857) Generally, Mr. Jones perceives reality within normal limits and reacts appropriately.(V,R857) However, when there is a distortion in his perception of reality, such as when his anxiety

level is high and he does not recognize this, he is not adaptive.(V,R857)

Mr. Jones primarily deals with anxiety by shutting down.(V,R860) He withdraws and regresses and functions at a less mature level.(V,R860) As he regresses, his ties with reality become fuzzy.(V,R860) He will see things in or hear things in a way that they are not meant and will fail to correctly pick up emotional cues.(V,R860;868) He can misperceive a person's actions.(V,R868) This is pronounced when he believes someone is treating him like a child or telling him that he is not ok, such as stealing from him. (V,R869)

When Mr. Jones is confronted with externally caused anxiety he often feels powerless, impotent and inadequate. (V,R862) He feels overwhelmed.(V,R862) This triggers a unmet affectional response.(V,R863) He will react on a high emotional level rather than with an intellectual or reasoned response.(V,R863)

Mr. Jones has good interactions with people.(V,R864) He shows a great deal of empathy, interest, and sensitivity to others.(V,R864) If his internal perceptions are distorted, such as by high anxiety, he will react in an angry way that seems unprovoked.(V,R866) Mr. Jones is not a

physically violent person and has no history of violence. (V,R866)

Dr. McMahon analyzed the sequence of events on the day of the homicide against the background of the neuropsychological evaluation of Mr. Jones.(V,R571) Continuing difficulty with Mr. Stow over the purchase of a car that was requiring constant repair had led to an exchange between the two where Mr. Jones perceived that he was being treated like a child.(V,R872) Mr. Jones believed he was being put down and was angry that a check for payment had been deposited before the date agreed upon by he and Mr. Stow.(V,R872) Mr. Stow had previously spoken to him in a derogatory manner.(V,R873)

Mr. Jones is very sensitive to being treated in this way and reacts very negatively to such a manner, sometimes leading to that distortion of reality or difference in what the speaker actually intends.(V,R874) Mr. Jones also felt that Mr. Stow was stealing from him in terms of having sold him a defective car and then billing him for the repairs. (V,R875) Mr. Stow was demanding a significant amount of additional money to cover the insufficient funds check. (V,R875) Thus, two out of the three most highly reactive psychological buttons had been pushed for Mr. Jones.

(V,R876-78)

Mr. Jones went to San Pablo Motors with cash to settle the repair bills and to pay the balance of the car. (V,R874) He took his checkbook and a gun, which he always carried.(V,R874)

Mr. Jones clearly perceived that he was acting in self-defense, whether he was in reality or not.(V,R881-2) It is simply not within Mr. Jones' psychological dynamics to just walk in and hurt someone.(V,R881)

Dr. McMahon felt the criminal offense was totally out of character for Mr. Jones.(V,R880)

SUMMARY OF THE ARGUMENT

ISSUE I: Trial counsel was ineffective in failing to adequately investigate, prepare, and present evidence as to the mental state of Mr. Jones at the time of the crimes. The mental state of Mr. Jones was a critical component in the determination of whether or not the aggravating circumstance of cold, calculated, and premeditated (CCP) would apply. As a result of the failure of trial counsel to adequately investigate, substantial evidence negating the existence of CCP was not presented as evidence. Such failure prejudiced Mr. Jones as the trial court found the

lack of such evidence mandated the finding of CCP, to which great weight was given as justification for the imposition of a death sentence. On direct appeal to this Court the use of CCP was affirmed to due a lack of evidence to the contrary and the giving of an unconstitutional jury instruction was also found to be harmless based upon the record devoid of testimony as to the mental state of Mr. Jones.

ISSUE II: Trial counsel was ineffective in failing to present to the jury and trial court significant mitigation in dereliction of his duty to reasonably investigate and present evidence of mitigating circumstances. Trial counsel wholly failed to present mental health evidence of a mitigating nature, evidence as to Mr. Jones' positive and courteous behavior throughout the judicial proceedings and his model behavior while an inmate in the county jail and prison; and failed to adequately and meaningfully present testimony from friends and family members as to Mr. Jones' moral character, his reputation in the community for peacefulness, and his great remorse over the incident.

ISSUE III: The jury instruction for the pecuniary gain aggravator is unconstitutional in that it fails to advise the jury that financial gain must be an integral step in

the motive to murder and it fails to advise the jury that the aggravator will not apply if property is taken as an afterthought. Trial counsel was ineffective in failing to attack the application of this aggravator to the present case by failing to request a special jury instruction which would have cured the constitutional infirmities and in failing to argue to the jury during closing argument his theory of the case that the taking occurred as an afterthought and not as motive for the crime.

ISSUE IV: The trial court erred in denying the defense request to interview jurors based upon the allegations made in the Motion for New Trial in 1994 where trial counsel failed to request a jury interview at that time. Restrictions which prohibit counsel from contacting jurors violate constitutional principles of due process and right to counsel as they unfairly hinder the investigation into issues of juror misconduct.

ISSUE V: Florida's restrictions on the search of public records by capital sentenced defendants is unconstitutional in that it is unduly burdensome, vague, and overbroad. The further lack of records in this case due to the destruction of trial counsel's files by fire renders Mr. Jones' sentence of death violative of due process.

ISSUE VI: Numerous jury instructions given in this case are unconstitutional. The jury instruction on the aggravating factor of prior violent felony is unconstitutional in that it permits a contemporaneous felony to serve as a basis for this aggravator. The presentation of victim impact evidence without an instruction which advises the jury as to the limited purpose of such evidence is unconstitutional. Florida Standard jury instructions impermissibly shift the burden of proof to the defendant in penalty phase by requiring that the defendant establish mitigating factors and then show that they outweigh the aggravating factors; they unconstitutionally minimize and denigrate the role of the jury in the capital sentencing process; and they fail to advise the jury as to the nature, meaning, and effect of mitigation evidence.

ISSUE VII: The sentence of death is disproportionate in this case. Testimony presented at the evidentiary hearing established significant mitigation that was not presented at the penalty phase. Likewise, the inapplicability of the CCP aggravating factors was demonstrated. The remaining aggravating circumstances should be stricken due to unconstitutional jury instructions.

ISSUE VIII: The Florida capital sentencing procedure is unconstitutional because it permits a judge rather than jury to determine sentence.

ISSUE IX: The Florida Death Penalty statute is unconstitutional as it violates the Eighth and Fourteenth Amendments to the United States Constitution.

ISSUE X: Death by lethal injection constitutes cruel and unusual punishment.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN REJECTING APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN INVESTIGATING AND PRESENTING MENTAL HEALTH TESTIMONY TO THE JURY WHICH WOULD HAVE RENDERED INAPPLICABLE THE APPLICATION OF THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR IN THIS CASE.

In Grounds VI, VII and VIII of his Amended Motion for Post-Conviction Relief, Mr. Jones attacked trial counsel's failure to present evidence which would have rendered inapplicable the cold, calculated, and premeditated (CCP) aggravating circumstance to this case. Trial counsel not only failed to present psychological testimony which conclusively rebutted the applicability of this aggravator, this failure led to an affirmance of this factor in the direct appeal, and trial counsel failed to object to the

unconstitutional jury instruction for CCP.

The trial court addressed the CCP aggravating factor in his sentencing order under the following banner "**STARTLING CONTRAST OF CRIMES AND BACKGROUND**". The trial court found that "If the murder and attempted murder had happened on the spur of the moment, then it would appear as a lapse in defendant's usual personality and behavior. However, these were carefully planned crimes- which were pitiless and solely for financial gain. It is difficult to understand how the defendant could be such an entirely different person at different times, yet he was. There was no evidence at trial, in the PSI, or elsewhere, that the defendant suffered any emotional or psychiatric problems. Absent emotional problems, his behavior in planning and carrying out the murder and attempted murder was an intended, deliberate, and calculated departure from his other persona."

The finding of the CCP aggravator was raised in the direct appeal. Also raised in the direct appeal was the giving of the jury instruction on CCP which had been found unconstitutional 70 days prior to sentencing, and roughly 8 weeks after the trial. The giving of the unconstitutional jury instruction was argued as fundamental error due to

trial counsel's failure to object to the unconstitutional version of the jury instruction. This Court affirmed the judgment and sentence, upholding the finding of CCP due to the lack of evidence in the record to the contrary. Likewise, the giving of the unconstitutional CCP jury instruction was also found to be harmless error due to a record devoid of evidence to rebut the application of CCP.

This issue is framed by the trial court's belief that no evidence existed of emotional or psychological issues which could rebut a finding that the murder was intended, deliberate, and calculated and this Court's subsequent affirmance of both the application of CCP and the finding of harmless error regarding the unconstitutional jury instruction on CCP, which cited directly to the trial court's order on this point. Evidence was clearly in existence and available which could have conclusively rebutted and/or rendered inapplicable the finding of CCP but for the ineffective performance of trial counsel. As demonstrated through the testimony of Dr. Carl Miller and Dr. Elizabeth McMahon at the evidentiary hearing, the state of mind of Mr. Jones at the time of the offense was such that the four elements required for a finding of CCP were not present. The penalty phase jury never heard the

testimony of Dr. Miller and Dr. McMahon as to the state of mind of Mr. Jones at the time of the homicide prior to returning their recommendation for death. The trial court, by his clear statement in the sentencing order, had no evidence to rebut to application of CCP because of trial counsel's deficient performance. This Court, due to a woefully inadequate and deficient record, affirmed the judgment and sentence, relying on the trial court's observation that no testimony the record addressed the emotional state of Mr. Jones as applicable to the finding of CCP.

Under Strickland v. Washington, 466 U.S. 668 (1984), a two-prong test is used to determine whether or not counsel rendered legally ineffective assistance of counsel. Under Strickland a defendant must point to specific acts or omissions of counsel that are "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment". Id., at 687. Second, the defendant must also establish prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.,at 694. A reasonable probability has been further defined as a "probability sufficient to

undermine confidence in the outcome". The standard of review utilized by this court is plenary- this Court independently reviews the trial court's legal conclusions and defers to the trial court's findings of fact. Monlyn v. State, 29 Fla. Law Weekly S741 (Fla. December 10, 2004). Trial counsel's failure to investigate and present mental health testimony to rebut the aggravating factor of CCP satisfies both prongs of Strickland.

At the evidentiary hearing the following summary of testimony was presented with respect to this issue:

Dr. Carl Miller was utilized by trial counsel to narrowly focus on the threshold questions of competency and sanity at time of offense. In the course of gathering raw data to formulate an opinion on those issues, Dr. Miller performed a number of evaluations regarding the personality of Mr. Jones and identified a number of stressors present in his life at the time of the homicides which had a profound impact on his ability to functional reasonably. In Dr. Miller's opinion Mr. Jones suffered from a compulsive personality disorder that was significantly aggravated by disorder or stress. At the time of the homicide he was experiencing a number of significant stressors, including lack of employment, separation from

his wife and children due to financial hardship, adjustment to separation from the Navy after eight years, lack of a stable residence, and ongoing and significant difficulties with the victims over a car purchase. Dr. Miller opined that at the time of the confrontation in San Pablo Motors Mr. Jones was in a state of "discontrol" characterized by destructive behavioral responses and more primitive reactions. Dr. Miller testified that he found no evidence to support a conclusion that the instant offenses were "contrived, logically planned or thought out or the product of any reasoning of substance"(V,R811) but were an "emotional response" to a highly charged emotional event. (V,R811)

The testimony of Dr. Elizabeth McMahon further supports a conclusion that the instant offenses were a tragic response to an emotionally charged encounter rather than a calculated and cold plan to kill. Dr. McMahon conducted a clinical evaluation of Mr. Jones, performed extensive neuropsychological testing, and review numerous reports and transcripts from the trial. She summarized her findings that while Mr. Jones is generally able to exercise self-control, a host of factors present at the time of the homicide resulted in an act totally out of character for

him. Dr. McMahon testified that Mr. Jones, when placed under significant stressors, have difficulty perceiving the realities of a situation due to a failure of internal controls. Two significant psychological triggers were in place in the offense: the demeaning attitude that Mr. Stow used with Mr. Jones and the perception that Mr. Stow was trying to steal from him by having sold him a defective car and then seeking to recoup the repair costs as well as a significant fee for a returned check. Mr. Jones, when placed in such a psychological bind, will react negatively with emotion being the controlling force rather than reason. He will not adequately perceive the reality of a situation. Dr. McMahon firmly believed that the intent to go into the store to hurt someone was not within Mr. Jones' psychological dynamics. In her opinion, the instant offense were totally out of character and brought on by significant stressors coupled with Mr. Jones' firm belief that he was acting in self-defense.

Originally, this Court interpreted the CCP aggravator as being simply a heightened form of premeditation. See, Hill v. State, 515 So. 2d 176 (Fla. 1987). In subsequent years earnest attempts have been made to limit the application of the CCP factor. See, Rogers v. State, 511

So 2d 526, 533 (Fla. 1987). In 1994, some seventy days before the sentencing in this case, this Court identified four elements that must be satisfied in order to sustain the application of the CCP aggravator and found the jury instruction for CCP as used in this case to be unconstitutional.

In Jackson v. State, 648 So. 2d 85 (Fla. 1994), this Court delineated four specific elements that must be proven beyond a reasonable doubt before CCP is established. These four factors are that the murder was the product of calm, cool reflection, the product of a careful plan or prearranged design to murder, heightened premeditation was present, and the killing was done without pretense of moral or legal justification. Further, the jury must be given legal guidance in the jury instructions beyond the old jury instruction or there is a risk that a jury is likely to apply CCP in an arbitrary manner. Jackson was issued on April 21, 1994- sentencing did not occur in this case until May 31, 1994. The failure of defense counsel to present evidence to the jury in anticipation of Jackson and to the trial court after Jackson to rebut these four elements constitutes ineffective assistance of counsel under the first prong of Strickland and prejudice is clearly present

to satisfy the second prong.

The state of mind of the perpetrator is critical to an analysis of the evidence for the CCP aggravator. An essential element of CCP is that the killing was the product of calm, cool reflection and not an act prompted by emotional frenzy, panic, or a fit of rage. Id., at 89. Impulsive or panic killings do not qualify for CCP, nor do killings in the heat of an argument absent evidence of a plan to kill the victim before the argument began. Hardy v. State, 716 So. 2d 765 (Fla. 1998); Rodriguez v. State, 753 So. 2d 29 (Fla. 2000).

To qualify for CCP the evidence must also prove beyond a reasonable doubt that the murder was calculated-committed pursuant to "…a careful plan or prearranged design to kill…". Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). Generally, due to this element, CCP is reserved for witness elimination killings, contract killings, or carefully planned homicides. Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987); Mahari v. State, 597 So. 2d 786 (Fla. 1992); Zakrzewski v. State, 717 So. 2d 492 (Fla. 1998). While circumstantial evidence can be used to prove the planning portion of this element, if the evidence can be interpreted to support CCP as well as a reasonable

hypothesis other than a planned killing, the CCP factor has not been proven. Mahn v. State, 714 So. 2d 398 (Fla. 1998); Geralds v. State, 601 So. 2d 1157 (Fla. 1992).

A finding of CCP also requires that heightened premeditation be proved beyond a reasonable doubt. Simply proving that the homicide was a premeditated murder is not enough-greater deliberation and reflection must be established. Walls v. State, 641 So. 2d 381, 388 (Fla. 1994).

In order to support the application of CCP, one of the most serious of the aggravating circumstances, the state must prove the existence of all four elements beyond a reasonable doubt. Larkin v. State, 739 So. 2d 90 (Fla. 1999). When the State makes the mental state of the defendant relative to the proceedings, an adequate psychiatric evaluation of the defendant's state of mind is required. Blake v. Kemp, 758 F.2d 523, 529 (11th Cir.1985). In this regard there exists a "particularly critical interrelation between the expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). Throughout the state's closing argument in the penalty phase, the prosecutor made repeated references to the state

of mind of Mr. Jones at the time of the crime.

The testimony of Drs. Miller and McMahon directly address the first two elements of the CCP aggravating circumstance which turn on the mental state of the defendant- that the homicide was the product of calm, cool reflection and that it was the product of a careful plan or prearranged design to murder. In their unrebutted testimony, both expert witnesses, based upon clinical evaluations of Mr. Jones and exhaustive review of other documentation regarding the offense, conclusively stated that in their opinion, the instant homicide was an emotional response to a highly charged emotional event. Dr. Miller testified that he did not believe that Mr. Jones "contrived, logically planned or thought out… the homicide" or that it was "…the product of any reasoning of substance."(V,R810-811) Dr. McMahon believed the homicide was committed without preplanned intent.

Had this testimony been presented at the penalty phase or to the court prior to the sentencing hearing under the state of the law in May 1994 (the date of Mr. Jones' sentencing), the record on appeal would not have supported a finding of CCP. This Court's finding that the giving of the unconstitutional instruction to be harmless error was

predicated upon a deficient and defective record which did not contain testimony which conclusively rebutted the CCP aggravator. The failure of trial counsel to present evidence in existence at the time of trial (Dr. Miller) or to adequately investigate psychological evidence to rebut the aggravating circumstances (by using Dr. Miller for more than a competency/sanity evaluation and utilizing a neuro-psychologist)and in failing to object to an unconstitutional jury instruction prejudiced Mr. Jones. Mr. Jones was prejudiced at the trial level because the jury and trial judge were not made aware of the underlying psychological testimony which conclusively rebutted the CCP aggravator. The trial judge clearly struggled with the application of CCP, but noted without any evidence of mental health testimony to rebut or explain the mental state of Mr. Jones at the time of the homicide he had no choice by to find the existence of CCP is demonstrable prejudice. Mr. Jones was also prejudiced by trial counsel's error on his direct appeal by the finding of harmless error with regards to the unconstitutional jury instruction. This Court predicated the finding of harmless error on the record before it and quoted the trial court's comments regarding the lack of any mental health testimony

documenting emotional problems of Mr. Jones- a record devoid of any evidence to rebut the CCP aggravator; a record devoid of any evidence as to the state of mind of Mr. Jones; evidence which is critical to a reasoned analysis of this aggravator. The responsibility for deficient and defective record rests solely with trial counsel. Even though Jackson was not issued until after the penalty phase, counsel is charged with the responsibility of staying reasonably informed of developments in the law. Johnson v. State, 796 So. 2d 1227 (Fla. 4th DCA 2001). At the time of Mr. Jones' trial, Jackson was already before this Court. The training literature in 1994 specifically advised counsel to object to the jury instructions for CCP. Trial counsel failed to adequately educate and familiarize himself with current developments in the law and failed to adequately investigate and prepare the penalty phase case under common accepted practice at the time of trial.

After the issuance of Jackson from this Court, sentencing was still more than a month away. Trial counsel failed to present to the trial court mental health testimony prior to sentencing which specifically addressed the Jackson criteria. Trial counsel failed to competently

and effectively prepare for sentencing by investigating the mental health issues raised by Jackson and required for the application of CCP. Trial counsel acknowledged in his testimony that it is the responsibility of counsel to not only present mitigation, but to aggressively attack the state's aggravating circumstances. Counsel who is providing constitutionally adequate effective assistance of counsel would have taken necessary measures in light of Jackson to present evidence to the trial court to combat three factors, particularly when his own beliefs were that the homicide was not planned. Trial counsel failed to take reasonable measures to rebut the State's case for the aggravating factor of CCP to either the jury or to the trial court. Cleary, after the issuance of Jackson, trial counsel was responsible for taking measures to ensure that each of the four elements necessary for CCP were aggressively attacked prior to sentencing. Trial counsel was not "acting as counsel" for Mr. Jones when he failed to take any steps to attack the State's case regarding CCP. This most serious of aggravators went unchallenged before the trial court and on direct appeal because trial counsel failed to present evidence to rebut three of the elements necessary for a finding of CCP.

The trial court's order denying relief on these grounds is faulty. It fails to recognize the interrelationship between an adequate record and the application of the harmless error rule as employed in Mr. Jones' case. Had an adequate record been made in the lower court attacking CCP, the use of the unconstitutional jury instruction would not have been affirmed as harmless error. Neither is this claim subject to procedural bar, as the trial judge found, because it was previously raised on direct appeal. Procedural bar arising from law of the case occurs when a prior court has decided the same issue of law. State v. Owen, 696 So. 2d 715 (Fla. 1997), (on remand), 697 So. 2d 1309 (Fla. 4th DCA), cert. denied, 118 S. Ct. 574, 139 L.Ed 2d 413 (1997). The issues presented in the Amended Motion for Post-Conviction Relief were not litigated in the direct appeal. At issue in the direct appeal was whether or not fundamental error occurred due to the use of the unconstitutional jury instruction. This Court concluded no fundamental error had occurred and any error was harmless *based upon the record before it*. The current proceedings attack the cause of the deficient record and have demonstrated that had counsel rendered effective assistance of counsel by attacking the CCP

aggravator by presenting testimony relative to the mental state of Mr. Jones the record would not have supported the application of the harmless error doctrine. The trial court's legal conclusions are incorrect and subject to reversal.

ISSUE II

THE TRIAL COURT ERRED IN REJECTING APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN INVESTIGATING AND PRESENTING EVIDENCE TO THE JURY OF NUMEROUS AND SIGNIFICANT NON-STATUTORY MITIGATING CIRCUMSTANCES.

In Grounds XIII, XIV, and XV of his Motion for Post-Conviction Relief, Mr. Jones argued that trial counsel was ineffective in failing to investigate and present to the jury non-statutory mitigating evidence. This evidence falls under three main categories: testimony from Dr. McMahon and Dr. Miller concerning Mr. Jones' mental status at the time of the offense; testimony relating to Mr. Jones' positive behavior since his arrest throughout the judicial proceedings and during his incarceration; and meaningful, detailed, and specific testimony from friends and family members as to the character of Mr. Jones, his reputation in the community for peacefulness, and his remorse and sorrow over the homicide.

As stated in Issue I, the standard of review is

plenary- presenting a mixed question of law and fact. State v. Monlyn, supra. The two-pronged test of Strickland applies to this issues- deficient performance by counsel coupled with prejudice to the defendant. In addressing the specific issue of mitigation this Court has held that counsel has an obligation to conduct a reasonable investigation into death penalty mitigating factors. Pietri v. State, 885 So. 2d 245 (Fla. 2004); King v. Strickland, 748 F. 2d 1462 (1984). This Court must consider whether or not counsel's preparation for the penalty phase and his presentation of mitigating evidence was unreasonable under prevailing professional norms. Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000). Nonstatutory mitigating evidence is evidence which tends to "prove the existence of any factor that 'in fairness or in the totality of the defendant's life or character, may be considered as extenuating or reducing the degree of moral culpability for the crime committed or anything in the life of the defendant which mitigates against the appropriateness of the death penalty'". Maxwell v. State, 603 So. 2d 490, 491 n.2 (Fla. 1992)[citing *Waters Dictionary of Florida Law,* 432-33(1991),citing Rogers v. State, 511 So. 2d 526 (Fla. 1987)]. A mitigating circumstance need only be proven by

the greater weight of the evidence. Campbell v. State, 571 So. 2d 415,419(Fla.1990). Trial counsel did not effectively represent Mr. Jones when he failed to properly investigate, prepare, and present the following evidence at the penalty phase:

A. Mental Health Mitigation

The testimony of Dr. Miller and Dr. McMahon at the evidentiary hearing established by the greater weight of the evidence non-statutory mitigating factors regarding the mental health status of Mr. Jones. The evidence from their testimony established that Mr. Jones was under significant emotional stress at the time of the homicide due to financial pressures, difficulties in adjustment to civilian life after eight years in the military, difficulty in finding employment, and separation from his family due to economic pressures. Mr. Jones suffers from a compulsive personality disorder, which is particularly aggravated by a lack of consistency, order and predictability in his environment- at the time of the homicide Mr. Jones lived in an environment substantially different than the ordered and predictable routine of the navy. Dr. McMahon's testimony established that in times of stress, Mr. Jones looses his ability to maintain goal oriented behavior and good

planning skills and to utilize good impulse control. In times of unrecognized anxiety, such as existed at the time of the offense, Mr. Jones will often distort reality and his percepts become distorted (i.e., feeling significant physical threats are imminent when that may not be the case). As stress levels increase and his anxiety level increases, he attempts to maintain control with increasingly rigid self-constraint and a general insensitivity to the emotional impact of his environment. This leads to a breakdown in his perception of reality and his affect becomes more determinative of his behavior than his intellect. Because he is an introverted individual, his perceptions of reality are largely influenced by his “inner determinants”. These inner determinants usually are reality based, except under circumstances when his response is to be regressive (such as during a confrontation) or his initial response is affective (such as anger). When these circumstances are present (as during the time of the offense) his perception is distorted, he responds affectively, and inappropriately.

Abagail Taylor testified as to her observation of the mental state of Mr. Jones just after the incident. (IV,R716) She described him as frantic, hysterical, and

shocked.(IV,R717) He acknowledged that he had done something very bad.(IV,R718) He was pacing and crying. (IV,R719)

This evidence was clearly mitigating in nature and defense counsel failed to investigate, present, and argue to the jury and the trial court its existence.

B. Positive Behavior Exhibited During Judicial Proceedings and Incarceration

A stipulation was entered into between the State and Mr. Jones that during all prior judicial proceedings Mr. Jones had always conducted himself in an exemplary manner. He was always courteous and displayed appropriate courtroom demeanor. He was especially mindful of the victim and the deceased's family during the trial. He was a model inmate in the county jail prior to and throughout the trial. He has been a model prisoner and has never received a DR (disciplinary referral). Each of these factors constitutes mitigating evidence. Campbell,supra. Trial counsel admitted he failed to present evidence or argue for the finding of this mitigation because he didn't think it was that important. He did acknowledge that a judge or jury might differ with his analysis of the significance of this mitigation.

C. Detailed Family and Friends Testimony, Reputation Testimony, Remorse

During the penalty phase defense counsel presented cursory testimony from a few family members and childhood friends of Mr. Jones. Their testimony, as a whole, was brief and perfunctory in nature. For example, the statement was made that Mr. Jones was a good son or a good friend, but no testimony was presented which added depth or breadth to the statements or offered the underlying facts upon which the statement was based. No evidence of Mr. Jones' reputation in the community was presented. No testimony about the remorse Mr. Jones felt was presented. At the evidentiary hearing several family members were called who had testified at penalty phase. However, in contrast to their earlier testimony, each provided specific examples which demonstrated the positive characteristics of Mr. Jones as opposed to simply offering the statement that Mr. Jones was a good father, son, brother, or neighbor. Peers offered testimony about the loyalty and caring they experienced from Mr. Jones over their lives. They offered specific examples of how he positively influenced their lives as they had contact with him from middle school to the present. They spoke of his commitment to music and how

he excelled in musicianship. They chronicled incidents in their lives where he was able to diffuse troubling and confrontational situations. Trial counsel conceded that detailed testimony which utilizes specific examples to illustrate the particular positive character traits are far more compelling than a mere conclusion.(V,R1061).

Several witnesses, in addition to providing detailed background, testified as to the significant remorse than Mr. Jones exhibited over the crimes. Porsha Hernandez was never contacted by defense counsel in 1994, yet she testified to her long-standing friendship with Mr. Jones. She testified that she maintained substantial contact with Mr. Jones after the incident. She testified to the great emotional impact the crimes had on Mr. Jones and the depression that he experienced over his actions. (IV,668-670) R.D. Harris, Mr. Jones' sister echoed the personality changes she observed in Mr. Jones as a result of this incident. She testified to the great remorse that Mr. Jones expressed for what had occurred. (IV,R670-672) Ms. Harris did not testify at the penalty phase.

Ms. Harris, Ms. Hernandez, Mr. Houston, Mr. Walker, and Mr. Alton Jones all testified to the great remorse that Mr. Jones felt about what had occurred. None of these

witnesses testified as to this area at the penalty phase, although two (Mr. Walker and Mr. Alton Jones) had testified briefly in other areas.(IV,R634;650-652;681;699-700;703) Mr. Jones' parents also offered testimony at the evidentiary hearing as to the impact the crimes had on Mr. Jones. (IV,R737-740) Mr. Jones would physically shake when he tried to talk about what happened. (IV,R740) Although both parents gave brief testimony at the penalty phase, neither testified as to remorse.

The mitigating circumstances of remorse, reputation for peacefulness, positive behavior while incarcerated, the mental state of Mr. Jones at the time of the offenses, and other mental health factors were established by the greater weight of the evidence and by stipulation from the State at the evidentiary hearing. Each of these mitigating circumstances was present in 1993. Diligent counsel should have been presented this testimony to both the penalty phase jury and the trial court. Defense counsel failed to adequately investigate and prepare for penalty phase by failing to determine what mitigating circumstances were present in this case and failed to present evidence to support them. These inactions fall below that which is required from defense counsel.

Trial counsel's inaction deprived Mr. Jones of a reliable penalty phase proceeding. Asay v. State, 769 So. 2d 974, 985 (Fla. 2000). Under the prevailing professional norms in existence in 1993, as acknowledged by Mr. Tassone, and as contained in the training materials of the time, Mr. Tassone's failure to investigate, prepare, and present this mitigation evidence was ineffective. Even though defense counsel had sought the assistance of Dr. Miller, he used Dr. Miller only for pre-trial evaluations of competency and sanity. The trial court mistakenly relies upon both Asay and Davis v. State, 28 Fla. Law Weekly S835 (Fla. 2003) in rejecting this claim. In both instances trial counsel had sought the assistance of mental health experts prior to trial. In Asay the report was unfavorable and no testimony was presented. In post-conviction proceedings a more favorable expert was secured. Counsel was not ineffective in failing to secure a more favorable expert prior to trial. In this case the report of Dr. Miller was not unfavorable to the defense and certainly not for penalty phase. There would have been no tactical reason to exclude Dr. Miller's observations from evidence. Further, in this case when a full psychological evaluation was obtained from Dr. Miller and Dr. McMahon, it was again favorable to Mr.

Jones and established several mitigating circumstances. This case is distinguishable from Asay where the failure was to continue to search for mental health testimony in light of a negative analysis, the issue in this case is the failure to present helpful testimony and to fully investigate the mental health testimony.

In Davis defense counsel presented the testimony of three mental health experts at the penalty phase. The post-conviction claim centered on the failure of defense counsel to have called more mental health professionals. This Court found counsel was not ineffective in failing to present cumulative testimony. In contrast, defense counsel in this case failed to use the favorable testimony he had and failed to investigate additional, non-cumulative mental health testimony from the neuropsychologist. In this case the error was the failure was to present any evidence, not cumulative evidence.

Counsel also wholly failed to present the mitigation evidence of Mr. Jones' positive behavior in jail, prison, and during court proceedings, his appropriate adjustment to incarceration, and that there was little danger of future dangerousness from him. The trial court found that this presentation wasn't necessary because the state didn't

offer argument that Mr. Jones was not a model prisoner. This reasoning overlooks the fact that not only does trial counsel have a duty to defend against aggravating circumstances (the lack of good behavior in prison would not be admissible as an aggravating circumstance), but trial counsel has an affirmative duty to present mitigation under Caldwell. Each of these facts is clearly mitigating under Caldwell and would have been presented to the jury and court by an effective defense attorney.

Mr. Jones was prejudiced by the failure of defense counsel to present this mitigation. It cannot be said that the jury recommendation would not have been affected by this additional mitigation or that the trial court would have reached a different determination at sentencing.

The prejudice to Mr. Jones from trial counsel's failure to investigate and present mitigating evidence also extends to the direct appeal. Mr. Jones was significantly prejudiced by the lack of this evidence when the Court considered whether or not the sentence of death was proportionate in this case. The absence of significant mitigation in the record precluded this Court from having the necessary facts to perform proportionality review. In performing proportionality review, this Court evaluates the

totality of the circumstances and compares the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). Under prevailing norms for effective representation in 1993 (as evidenced by Tillman) defense counsel was charged with the responsibility of ensuring that this Court was fully advised of the totality of the circumstances- which includes all the mitigation reasonably discoverable-in order to ensure that proportionality review was appropriately performed. Counsel's failure to ensure the record contained demonstrable evidence which was mitigating as outlined above deprived Mr. Jones of a full and fair review by this Court. Mr. Jones is entitled to a new penalty proceeding before a new jury, wherein he truly represented by counsel.

ISSUE III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO ADEQUATELY CONTEST THE APPLICATION OF THE PECUNIARY GAIN AGGRAVATING FACTOR TO THIS CASE.

During the penalty phase charge conference defense counsel argued that the pecuniary gain aggravating factor jury instruction should not be given based upon case law

which holds that this factor does not apply where the defendant's motive is not for financial gain, but for some other motive. Defense counsel argued to only the judge that in a case such as this, where it appeared that property was taken as an afterthought, is should not apply. In addressing the jury during his closing argument defense counsel failed to state this argument to the jury. Defense counsel failed to present another motive to the jury, telling them only that the motive for the crimes was unknown to all save Mr. Jones. Defense counsel told the jury that "…there is proof to the contrary, and I'll get to that, that something happened in that trailer between Marvin Jones, Monique Stow." Defense counsel failed follow through by arguing any theory and never argued proof to the contrary, despite his promise to the jury to do so. Defense counsel's failure to effectively contest the applicability of this aggravating factor to this case was ineffective assistance of counsel. Mr. Jones was prejudiced by this error, not only in the penalty phase, but on direct appeal as well. The Court affirmed the pecuniary gain aggravator based upon a record that failed to establish another motive and without the benefit of the argument of counsel as to that motive.

Ample evidence of a motive other than pecuniary gain existed and is consistent with the testimony of the mental health experts at the evidentiary hearing. One likely motive was that the crimes were committed out of anger due to the major problems arising from the repeated inoperable condition of the car and the attempt by Mr. Stow to obtain increasingly greater amounts of money for a defective vehicle. This motive was acknowledged by the State in the closing argument.(T1320) Revenge was another possible motive, again acknowledged by the State during the charge conference. (T1292)

Defense counsel's failure to argue to the jury that the paperwork on the car was taken as an afterthought was ineffective because it was a reasonable theory in this case. It was entirely reasonable that Mr. Jones grabbed the paperwork as he fled because it's presence on the top of the desk might have led to his discovery as the perpetrator. The paperwork might have been observed only after the crimes- the thought of a financial gain formed after the crimes as opposed to being the driving force behind them.

The trial court's conclusion that this failure by counsel was not ineffective is incorrect. Under Strickland,

defense counsel failed to take appropriate action to combat an aggravating factor and failed to cast reasonable doubt as to its existence. Trial counsel acknowledged that both actions are necessary in adequately defending a case. Neither does a tactical basis exist for the omission. Trial counsel would have no tactical reason to argue to the trial court the inapplicability of the aggravator and then fail to challenge it before the jury.

Once the trial court had determined that the jury would be instructed as to the pecuniary gain aggravator, trial counsel failed to object to the standard jury instruction and to submit an instruction which adequately advised the jury when the pecuniary gain aggravator should apply.

The jury instruction read in this case states:

> And two, that the crime for which the defendant is to be sentenced was committed for financial gain.

This cursory instruction is unconstitutional in that it is vague and overbroad in violation of the Eight and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. The standard instruction fails to advise the jury that the murder must have been an “integral step in obtaining some

sought-after specific gain". Hardwick v. State, 521 So. 2d 1071, 1076 (Fla. 1988). The jury instruction fails to advise the jury that it does not apply where the defendant's motive was not financial gain, but some other motive or where the property was taken as an afterthought. See, Scull v. State, 533 So. 2d 1137 (Fla. 1988); Clark v. State, 609 So.2d 514 (Fla. 1993). Penalty phase jury instructions which fail to fully and properly advise the jury as to the applicability of the aggravating factor are constitutionally vague and overbroad. See, Jackson, supra.,(CCP instruction vague and overbroad); Espinosa v. Florida, 112 S.Ct. 2926 (1992) (HAC instruction vague and overbroad). This Court's previous finding that this instruction is not unconstitutionally vague in Kelly v. Dugger, 597 So. 2d 262 (Fla. 1992) should be reviewed.

Not only did the jury in this case received inadequate guidance from defense counsel during closing arguments, the error was compounded by the continued inadequate guidance then provided by the standard jury instruction. The jury's recommendation is unconstitutionally predicated on error.

ISSUE IV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO CONDUCT JUROR INTERVIEWS IN ORDER TO DETERMINE THE

EXISTENCE OF JUROR MISCONDUCT.

During the lower court proceedings, defense counsel filed a Notice of Intention to Interview Jurors. (I,R100-107) As grounds for the motion, defense counsel stated that their existed reasons to believed that the verdict was subject to legal challenge due to allegations raised in the Motion for New Trial filed in 1994 relating to jury deliberations, improper viewing of a photo of the victim, Monique Stow, improper viewing of evidence that had been excluded from evidence, and improper contact between jurors and the surviving victim and members of the family. (I,R100-102) Although these grounds were raised in the Motion for New Trial, defense counsel failed to seek to interview the jurors. Several jurors had, however, given interviews to the press. Their comments appeared in an article printed approximately nine months after sentencing. Comments reported in the news article included beliefs by the jurors that Mr. Jones might kill again, feeling that the judge knew more of the case than they did and that the decision regarding sentence was up to the judge, the belief that the sentence was the judge’s responsibility, and that the jury perceived it’s role in voting for death as sending

a message to the community.(I,R103-107)

The state opposed the juror interviews, asserting procedural bar predicated upon trial counsel's failure to request juror interviews in 1994 and that any area of dispute inhered in the verdict.(I,R110-112)

The trial court denied the request to interview jurors.(I,R120-121) In a written memorandum the trial court stated that the issues raised in the Motion for New Trial should have been raised on direct appeal and counsel was not ineffective in failing to pursue juror interviews. (II,R218) The trial court found that all matters sought in the interviews arising from the published comments of the jury were all matters that inhered in the jury verdict and would not warrant a juror interview.(II,R220)

The trial court's refusal to permit juror interviews is raised as Ground II in the Amended Motion for Post-Conviction Relief.(I,R130). The trial court denied Mr. Jones' claim, citing to the previous order and memorandum. (III,R479)

Mr. Jones renews his assertion that Rule 4-3.5(d)(4), which prohibits counsel from contacting the jurors is in constitutional conflict with Mr. Jones' rights under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to

the Untied States Constitution. These restrictions unconstitutionally burden the exercise of these fundamental rights. Rule4.4.5(d)(4) is further in violation of Article I, Section 21 of the Florida Constitution because it denies Mr. Jones access to the courts. Because Mr. Jones is represented by counsel, his attorney is prohibited from contacting jurors in order to determine if any overt acts of misconduct took place or if the jurors were impermissibly subject to extraneous or outside influences which may have affected them.

The bar against communication with jurors by a lawyer raises significant constitutional questions. It appears to act as a prior restraint on counsel's First Amendment right to free speech and association. See, Rapp v. Disciplinary Board of Hawaii Supreme Court, 916 F. Supp. 1525 (D. Hawaii 1996).

By prohibiting juror contact, Florida has created a rule which denies due process to defendants such as Mr. Jones. It erects a barrier to the investigation and presentation of legitimate claims for post-conviction relief. Trial by jury is an essential element of due process. Scruggs v. Williams, 903 F.2d 1430, 1434-35 (11th Cir. 1990)(citing Duncan v. Louisiana, 301 U.S. 145

(1968)). Implicit in the right to a jury trial is the right to an impartial and competent jury. Tanner v. United States, 483 U.S. 107, 126 (1987). However, a defendant in Florida who attempts to prove that members of his jury were incompetent or otherwise unqualified to serve has an almost impossible task under current Florida law.

While it is clearly recognized that overt acts of juror misconduct violate a defendant's right to a fair trial, an investigations by counsel into the impartiality of the jury and equal protection of the law as guaranteed by the United States and Florida constitutions are prohibited. See, Powell v. Allstate Insurance Co., 652 So. 2d 354 (Fla. 1985). Based upon the facts alleged in the Motion for New Trial, good cause exists for investigation into whether or not the jury was unduly influenced by outside sources/evidence in this case.

Studies addressing jury conduct have found that capital jurors in Florida fail to apply the statutory sentencing directives in the manner required by Florida law, due process, and the Eighth Amendment to the United States Constitution. See, William s. Geimer &Jonathan Amsterdam, Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases, 15 Am. J. Crim.

L.(1988). Existing research indicates that at least some of the jurors in Mr. Jones' case would have committed any of several overt acts that would invalidate his conviction and sentence. Studies show that jurors at times contemporaneous with Mr. Jones' trial mislead counsel and court during voir dire, considered extraneous matters and extrinsic influences, believed in a mandatory death sentence in cases such as this, and failed to follow the requirements of Sec. 921.141, Fla. Stat., in finding Mr. Jones eligible for the death penalty.

The role of juries in the capital sentencing process must conform to the doctrines applying the Eighth Amendment's prohibition on cruel and unusual punishment to regulate the imposition of the death penalty. Espinosa v. Florida, 112 S.Ct.2926 (1992); Thomas v. State, 403 So. 2d 371 (Fla. 1981). This is especially critical where the jury acts as the co-sentencer. Espinosa, supra., Walls v. State, 641 So. 2d 381 (Fla. 1994).

The integrity of the process by which the jury renders a death sentence is also subject to the strictures of due process. Spalding v.. Dugger, 526 So. 2d 71 (Fla. 1988); Porter v. Singletary, 14 F.3d 554 (11th Cir. 1994). The Due Process Clause of the Fourteenth Amendment further requires

that a juror participating in capital sentencing deliberation must be able to perform his duties as a juror in accordance with his instructions and his oath. Morgan v. Illinois, 112 S.Ct. 2222, 2229 (1992). If even one juror is inpaneled who cannot comply with what is required in the instructions or could draw a conclusion from the instruction that would result in the erroneous death verdict, the sentence cannot stand. Morgan, supra.; Mills v. Maryland, 108 S.Ct. 1860 (1988) The evidence that Florida juries frequently and to a shocking degree consider factors extrinsic to the verdict and engage in overt prejudicial acts warrants the interview of jurors in this case in order to assess the degree to which Mr. Jones may have been prejudiced.

The Sixth Amendment to the United States Constitution guarantees the right of counsel and due process requires that counsel not be prevented from investigating legitimate claims for relief. Porter v. Singletary, 14 F. 3d 554, 557 (11th Cir. 1994). The comments made by the jurors who served on Mr. Jones' jury as reported the newspaper coupled with the previously cited study on capital jurors raises a substantial probability that the verdict in this case was compromised and fails to meet the requirements of the

Eighth and Fourteenth Amendments. Preventing counsel from interviewing jurors in this case deprived Mr. Jones of his right to counsel, due process and meaningful access to the courts.

In this case the Motion for New Trial filed in 1994 outlined specific areas where trial counsel believed that jurors were subject to undue influences or misconduct. In light of counsel's claims in 1994, the failure of counsel at that time to request jury interviews was ineffective assistance of counsel under Strickland. No strategic rationale was provided by counsel for his failure to follow through on the claims made in the Motion for New Trial. Mr. Jones has suffered prejudice as a result of trial counsel's failures in that the failure to request jury interviews virtually guaranteed that the Motion for New Trial would be denied. Counsel, by failing to request the interviews, failed to preserve for direct appellate review any of the alleged errors relating to juror misconduct as an incomplete record was available upon which to raise these claims.

ISSUE V

APPELLANT HAS BEEN DENIED ADEQUATE ACCESS TO PUBLIC RECORDS THROUGH STATE RESTRICTION AND AS A RESULT OF A FIRE WHICH DESTROYED

TRIAL COUNSEL'S FILES AND RECORDS OF THIS CASE.

Access to public records for capital defendants is governed by Section 119.19, Florida Statutes and Fla. R. Crim. P. 3.852. Mr. Jones is required to demonstrate that he has made his own search for the records from sources other than the agencies subject to his public record demands (e.g.,the records repository maintained by the Secretary of State), are relevant to his post-conviction proceedings, and that his requests are not overly broad or unduly burdensome. Requiring Mr. Jones to demonstrate that a public records demand is not overly broad or unduly burdensome violates public policy designed to ensure free access to public records and the rights of citizens to examine the actual records and not merely copies. Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990); Davis v. Sarasota County Public Hosp. Bd., 480 So. 2d 203 (Fla. 2d DCA 1985), rev. denied, 488 So. 2d 829 (Fla. 1987).

Further restrictions imposed by Section 27.208, Florida Statutes (2000), which prohibit counsel for a capital sentenced defendant from seeking public records by means other than those detailed in Section 119.19 and Fla. R. Crim. P. 3.852 violate Article I, Section 24 of the

Florida Constitution by impermissibly restricting the defendant's access to public records through counsel. Requiring Mr. Jones to demonstrate that a public records demand is not "overly broad or unduly burdensome violate the due process rights of Mr. Jones under the Fifth and Fourteenth Amendments to the United States Constitution as well as the due process guarantees of the Florida Constitution. The terms as used are so vague that counsel is forced to guess at the meaning. See, State v. Gray, 435 So. 2d 816, 819 (Fla. 1983). The means required by these statutes sweep too broadly into an area of constitutionally protected freedom under Article I, Section 24 of the Florida Constitution which requires that exemptions to public records shall "be no broader than necessary."

The restrictions, which hinder the discovery in capital post-conviction proceedings, unconstitutionally hinder the defendant in the preparation of his defense and investigation of valid claims.

In this case, the defense was further hindered in the investigation of claims of ineffective assistance of counsel due to the destruction of all files and records maintained by defense counsel due to a fire at counsel's office. Through no fault of his own, Mr. Jones was severely

prejudiced in his ability to investigate and present claims of ineffective assistance of counsel due to the loss of this critical component in post-conviction investigations. As a result, Mr. Jones' rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9,16,and 17 of the Florida Constitution have been violated.

ISSUE VI

FLORIDA'S DEATH PENALTY IS UNCONSTITUTIONAL DUE TO NUMEROUSE JURY INSTRUCTIONS WHICH FAIL TO ENSURE THAT DEATH IS NOT IMPOSED ARBITRARILY.

The Florida death penalty sentencing scheme is constitutionally infirm. It is predicated upon numerous unconstitutional jury instructions:

A. The Prior Violent Felony Aggravating Factor Which Permits the Use of a Contemporaneous Conviction is Unconstitutional.

During penalty phase the jury was instructed on the prior violent felony aggravator as follows:

> One, that the defendant had previously been convicted of another offense or of a felony involving the use of or the threat of violence to some person. I advise you that the crime of attempted first degree murder of Ezra Harold Stow is a felony involving the use of or threat of violence to another person.

Trial counsel did not request a jury instruction to the contrary. In the sentencing order the trial court found

that the prior violent felony aggravating factor based on the contemporaneous conviction for the attempted first degree murder of Ezra Harold Stow.(R325).

The use of a contemporaneous conviction as a prior violent felony aggravating factor should not be allowed in Florida because it violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution as a matter of law. While recognizing the previous rulings of this Court that do not support this argument, it is appropriate for this Court to reconsider these previous decisions. Francis v. State, 808 So. 2d 110, 136 (Fla. 2002). The use of the contemporaneous felony amounts to the application of an automatic aggravator, which violates the Eight and Fourteenth Amendments of the United States Constitution as it fails to narrow the class of persons for whom death is an appropriate sentence, fails to channel the discretion of the sentencer, and results in the arbitrary imposition of the death penalty.

Especially confusing in this case was the fact that the statutory mitigating factor of no significant history of prior criminal activity was also applicable to Mr. Jones. The use of the prior violent felony jury instruction

was misleading and confusing to the jury due to clear inconsistency between the mitigating circumstance and this aggravating factor. The jury instructions as given inevitably led to the rejection of the mitigating factor in favor of the aggravating factor. At minimum, the jury should have been given an additional instruction that if they found that the aggravating factor of prior violent felony was proven beyond a reasonable doubt, this did not negate the no significant prior criminal history mitigating factor. The trial court's ultimate finding of the mitigating factor does not relieve the error in the lack of a specific jury instruction, nor does it relieve the duty of trial counsel to make sure that the jury had received specific guidance as to the apparent inconsistency. The jury recommendation is infirm as a result of the lack of special instruction and by the use of the standard instruction which directs the jury that a contemporaneous conviction satisfies the prior violent felony aggravator.

B. Victim Impact Evidence is Unconstitutionally Permitted Without a Jury Instruction.

During the penalty phase in this case the state was permitted to present victim impact evidence over the objection of defense counsel. In Ground IX of the Amended Motion for Post-Conviction Relief Mr. Jones argues that the

failure of defense counsel to request a limiting instruction was ineffective assistance of counsel. By law, witnesses who provide victim impact testimony are limited to testimony which addresses the victim's uniqueness and the loss of the victim to the community. See, Section 921.141(8), Florida Statutes (1994). They cannot provide opinions and characterizations about the crime. Payne v. Tennessee, 501 U.S. 808 (1991); Windom v. State, 656 So. 2d 432 (Fla. 1995). The lack of an instruction converts victim impact evidence into a non-statutory unconstitutional aggravating factor. The lack of an instruction to the jury as to the limitations of such testimony violates Mr. Jones' Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and Article I, Sections 9,16,and 17 of the Florida Constitution.

C. The Penalty Phase Jury Instructions Improperly Shift the Burden of Proof to the Defendant to Establish Mitigating Factors and Then Show That the Mitigating Factors Outweigh the Aggravating Factors in Violations of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, and 17 of the Florida Constitution.

Under Florida law a capital sentencing jury must be told that:

> …the state must establish the existence of one or

> more aggravating circumstances before the death penalty could be imposed…
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances out-weighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973); Mullaney v. Wilbur, 421 U.S. 684 (1975). This straightforward standard was never applied to the sentencing phase of Mr. Jones' trial. The jury instructions in this case were inaccurate and provided misleading information as to whether a death recommendation or a life sentence should be returned. In Ground X of the Amended Motion for Post-Conviction relief Mr. Jones asserted that defense counsel rendered ineffective assistance of counsel by failing to object to these errors. See, Murphy v. Puckett, 893 F. 2d 94 (5th Cir. 1990). The instructions shifted to Mr. Jones the burden of proving whether he should live or die by instructing the jury that it was their duty to render an opinion on life or death by deciding "whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, this Court addressed the question of whether the standard jury instructions shifted the burden

to the defendant as to the question of whether he should live or die. The Hamblen opinion reflects that these claims should be addressed on a case-by-case basis. In failing to object to these errors, defense counsel rendered ineffective assistance of counsel. See, Murphy v. Puckett, supra..

The jury instructions given in this case required that the jury impose death unless mitigation was not only produced by Mr. Jones, but also unless Mr. Jones proved that the mitigation outweighed and overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Jones to death. This standard obviously shifted the burden to Mr. Jones to establish that life was the appropriate sentence and limited consideration of the mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The standard jury instruction given to this jury violated Florida law. This jury was precluded from "fully considering" and "giving full effect to" mitigating evidence. Penry v. Lynaugh, 109 S.Ct. 2934, 2951 (1989). This burden shifting resulted in an unconstitutional restriction upon the jury's consideration of any relevant circumstance that it could use to decline the imposition

of the death penalty. McClesky v. Kemp, 481 U.S. 279, 306 (1987); Lockett v. Ohio, 438 U.S. 586 (1978); and Hitchcock v. Dugger, 481 U.S. 393 (1987).

> The unconstitutional burden shifting violates the principals of the Eighth Amendment and Florida law. A death sentence which results from erroneous instructions is arbitrary and capricious. McKoy v. North Carolina, 110 S.Ct. 1227, 1239 (1990), [Kennedy, J., concurring]. Mr. Jones was forced to prove to the jury that he should live. This violated the Eighth Amendment and due process under Mullaney. The effect of these jury instructions is for the jury to conclude that it need not consider mitigating factors unless they are sufficient to outweigh the aggravating factors and from evaluating the totality of the circumstances as required under Dixon. Counsel's failure to object to these erroneous instructions is deficient performance under the principles of Harrison v. Jones., 880 F.2d 1277 (11th Cir. 1989).

D. The Penalty Phase Jury Instructions Improperly Minimize and Denigrate the Role of the Jury in the Penalty Phase In Violation of *Caldwell v. Mississippi,* and Trial Counsel's Failure to Object Constitutes Ineffective Assistance of Counsel.

In Ground XI of the Amended Motion for Post-Conviction Relief Mr. Jones challenged defense counsel's failure to

object to jury instructions as given in this case as being in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Caldwell prohibits the giving of any jury instruction which denigrates the role of the jury in the sentencing process in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. The penalty phase jury instructions in Florida violate not only Caldwell, but also Article I, Sections 9, 16, and 17 of the Florida Constitution. The decision of this Court in Thomas v. State, 838 So. 2d 535 (Fla. 2003), and others rejecting this claim should be reversed.

By repeated reference to the jury that their verdict is only advisory and a recommendation and being told that the decision as to sentence rests solely with the court, the jury is not adequately and correctly informed as to their role in the Florida sentencing process. The jury instructions suggest that the decision of deciding the appropriateness of a death sentence rests with the court and not them. These instructions minimize the jury's sense of responsibility for determining the appropriateness of a death sentence.

The juror comments reported in the press in this case demonstrate that the role of the jury in this case was

improperly minimized and denigrated. Juror Harold Rooks, who recommended death commented “I’m just sitting there saying the guy is guilty or he’s not guilty. I’m not saying that he’s going to be electrocuted or anything like that. That’s got to be the judge’s decision because he could give him life or whatever. I think the judge probably knows more than we do, even though we’re sitting there listening to it, because he’s got all the other documents. It’s good to have that other opinion, that other person, because none of us are perfect.” Clearly Juror Rooks did not understand the weight afforded to a jury recommendation in the State of Florida.

Juror Stanley Jefson, who also recommended death, observed that “Of course in this case, the sentence was left up to the judge, and I think that helped people a lot by making sure that the jurors understood that what they said was not the result.” Juror Jefson and all the other jurors who believed that what they said would not be the result clearly did not understand the significant role the jury plays in the sentencing of a man to death. Trial counsel rendered performance below acceptable standards for capital counsel when he failed to object to the jury instructions as given.

E. The Penalty Phase Jury Instructions Fail to Properly Instruct the Jury Regarding the Nature, Meaning, and Effect of Mitigation In Violation of the Fifth, Eighth, and Fourteenth Amendments to the Untied States Constitution and Article I, Sections 9,16, and 17 of the Florida Constitution; Trial Counsel's Failure to Object to These Instructions was Ineffective Assistance of Counsel.

The standard jury instructions in penalty phase proceedings fail to instruct the jury regarding the nature, meaning, and effect of mitigation in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and of Article I, Sections 9, 16, and 17 of the Florida Constitution. The jury instructions fail to instruct the jury that mitigation evidence must be considered under Eddings v. Oklahoma, 455 U.S. 104, 114-115 (1982)("The sentencer …may determine the weight to be given to the relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from [its] consideration.")"The Eighth and Fourteenth Amendment require that the sentencer not be precluded from considering, as a mitigation factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death…. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to

consider, as a matter of law, any relevant mitigating evidence… It is not enough to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." Penry, 492 U.S. 302.

Florida jury instructions fail to adequately define for the jury what mitigation is. The court in Spivey v. Zant, 661 F. 2d 464, 471 (5th Cir. 1981) offered a definition of mitigating evidence and what its' function should play in jury deliberations. Spivey advises that the jury should be told that mitigating circumstances do no justify or excuse the offense, but should in fairness or mercy, be considered as extenuating or reducing the degree of moral culpability and punishment. The United States Supreme Court has adopted similar language in defining mitigating circumstances in Woodson v. North Carolina, 428 U.S. 280, 304 (1976) as "anything about the defendant or the crime which, in fairness and mercy, should be taken into accounts in deciding punishment. Even where there is no excuse or justification for the crime, our law requires consideration of more than just the bare facts of the crime; therefore, a mitigating circumstance may stem from any of the diverse frailties of human kind." This Court has

approved the giving of an expanded jury instruction patterned after both Woodson and Spivey in Jones v. State, 652 So. 2d 346, 351 (Fla. 1995). Trial counsel was ineffective in failing to request an expanded jury instruction as to the nature, meaning and effect of mitigating circumstances in the death sentencing process.

Florida jury instructions also fail to advise the jury that unanimity is not required as to mitigating factors. Unanimity requirements have been stricken in other states. See, Mills v. Maryland, at 486 U.S. 367 and McKoy v. North Carolina, at 494 U.S. 433. Since no standard juryinstruction exists for this issue, trial counsel was ineffective in failing to draft and request a special instruction on this issue under the principles of Harrison v. Jones, at 880 F. 2d 1277 (11th Cir. 1989).

ISSUE VII

A SENTENCE OF DEATH IS NOT APPROPRIATE IN THIS CASE

A defendant is entitled to relief for constitutional errors which result in a death sentence when he can show innocence of the death penalty. Sawyer v. Whitley, 112 S.Ct. 2514 (1992) Innocence of the death penalty constitutes a valid claim for post-conviction relief. Scott v. Dugger, 604 So. 2d 465 (Fla. 1992).

In this case the trial court relied upon three aggravating factors to support a death sentence: [1] CCP; [2] Prior Violent Felony; and [3] Pecuniary Gain. The jury was given unconstitutionally vague and overbroad jury instructions on two of the three factors relied upon by the judge to support a death sentence: CCP and Pecuniary Gain. As demonstrated by testimony at the evidentiary hearing, there was insufficient evidence to support these aggravating factors. As a result, two of the three factors cannot be relied upon to support a death sentence. Contradictory jury instructions on the prior violent felony aggravator and no significant criminal history mitigator led to jury confusion. As a result, this aggravating factor should not be relied upon.

Substantial mitigation evidence is present that was not presented at the penalty phase. Significant testimony about the mental state of Mr. Jones at the time of the crimes is now present in this record.

Trial counsel's performance was deficient as to each of these errors as previously argued in this Brief. Mr. Jones suffered prejudice because of trial counsel's failures to attack aggravation and present mitigation when

this court determined that a death sentence was proportional based upon an inadequate and factually incorrect record on direct appeal.

A review of the mitigation evidence presented at the evidentiary hearing combined with the removal of the aggravating factors renders the death sentence in this case disproportionate. Thus, Mr. Jones is ineligible for the death penalty. This Court's prior finding as to proportionality is subject to reversal because it was based upon a deficient record. Manifest injustice would occur should it become law of the case. State v. Owen, 696 So. 2d 715 (Fla. 1997), on remand, 697 So. 2d 1309 (Fla. 4th DCA), cert. denied, 118 S.Ct. 574, 139 L. Ed. 2d 413 (1997); White Sands, Inc., v. Sea Club V Condominium Ass'n., Inc., 591 So. 2d 286 (Fla. 2nd DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992).

ISSUE VIII

FLORIDA'S CAPITAL SENTENCING PROCEDURE IS UNCONSTITUTIONAL BECAUSE THE JUDGE RATHER THAN JURY DETERMINES SENTENCE.

Florida's capital sentencing procedure is unconstitutional under the holdings of the United States Supreme Court in Ring v. Arizona, 122 S. Ct. 2428 (2002). The Court, in Ring, struck the death penalty statute in

Arizona because it permitted a death sentence to be imposed by a judge who made the factual determination that an aggravating factor existed. Absent the presence of aggravating factors, a defendant would not be exposed to the death penalty. While recognizing that this position has not been ruled upon favorably by this Court in Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 123 S. Ct. 657 (2002) and other cases, Mr. Jones asserts that the Florida capital sentencing statute suffers from the same flaws that led to Ring and would urge that this Court adopt, at minimum, the reasoning expressed in the dissenting opinions of Justices Anstead and Pariente, which would require unanimous death recommendation by the jury. Under Florida law, a defendant cannot be sentenced to death unless the judge- not jury- makes the ultimate findings of fact as to the aggravators and mitigators. The jurors in Mr. Jones' case certainly grasped this conclusion as evidenced by their comments to the press. Because Florida requires fact finding by the judge, it is unconstitutional under Ring. The use of the advisory jury recommendation does not change this analysis. The Florida capital sentencing procedure is unconstitutional.

ISSUE IX

FLORIDA'S CAPITAL SENTENCING STATUTE IS UN-CONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUION AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE FLORIDA CONSITITUTION.

Florida's capital sentencing scheme denies Mr. Jones his right to due process of law and constitutes cruel and unusual punishment on its face and as applied. Florida's death penalty statute is constitutional only if it prevents the arbitrary imposition of the death penalty and narrows the application of death to only the worst offenders. See, Profitt v. Florida, 428 U.S. 242 (1976) Florida's death penalty statute fails to meet these constitutional guarantees and is therefore unconstitutional.

Florida's death penalty statute fails to provide any standard of proof for determining that aggravating factors "outweigh" mitigating factors (Mullaney v. Wilbur, at 421 U.S. 684) and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating factors listed in the statute. Aggravating factors are applied in a vague and inconsistent manner and the jury receives unconstitutionally vague instructions on the

aggravating factors. See , Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to an arbitrary and capricious imposition of the death penalty, as in Mr. Jones' case, and thus violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating factors as envisioned in Profitt v. Florida, at 428 U.S. 242.

Florida law creates a presumption of death where even only one aggravating factor applies. This creates a presumption of death in every felony murder case and in almost every premeditated murder case. Once a single aggravating factor is present, Florida law presumes that death is the appropriate punishment and that it can only be overcome by mitigating evidence strong enough to outweigh the aggravating factor. The systematic presumption of death cannot be squared with the Eighth Amendment requirement that death be applied only to the worst offenders. See, Richmond v. Lewis, 113 S.Ct. 528 (1992); Furman v. Georgia, 408 U.S. 238 (1972). To the extent trial counsel failed to preserve this issues, defense counsel rendered

prejudicially deficient assistance.

CONCLUSION

Based upon the foregoing arguments, citations of law, and other authorities, the sentence death must be set aside, a new penalty phase conducted, or a sentence of life in prison be imposed.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the type font used in this brief is 12 Point, Courier New.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, Assistant Attorney General Charmaine Millsaps, The Capital, Tallahassee, FL 32399, this ___ day of January, 2005.

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