No. _____

IN THE

Supreme Court of the United States

RANDALL SCOTT JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

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Appendix A

Florida Supreme Court opinion affirming the lower court's denial of *Hurst* relief. *Jones v. State*, 259 So. 3d 803 (Fla. 2018).

259 So.3d 803
Supreme Court of Florida.

Randall Scott JONES, Appellant,
v.
STATE of Florida, Appellee.

No. SC18-1098
|
December 13, 2018

Synopsis

Background: Following affirmance of conviction of murder and sentence of death, 612 So.2d 1370, petitioner sought postconviction relief. The Circuit Court, Putnam County, No. 541987CF001695CFAXMX, Patti Ann Christensen, J., denied motion. Petitioner appealed.

The Supreme Court held that decision of Florida Supreme Court in *Hurst v. State*, in which Court ruled that jury must unanimously recommend sentence of death, did not apply retroactively.

Affirmed.

Pariente, J., concurred in result and filed opinion.

Canady, C.J., concurred in result.

An Appeal from the Circuit Court in and for Putnam County, Patti Ann Christensen, Judge - Case No. 541987CF001695CFAXMX

Attorneys and Law Firms

Maria E. DeLiberato, Capital Collateral Regional Counsel, and Maria Christine Perinetti, Lisa Marie Bort, and Adrienne Joy Shepherd, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida, for Appellant

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Opinion

PER CURIAM.

We have for review Randall Scott Jones's appeal of the postconviction court's order denying Jones's motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

***804** Jones's motion sought relief pursuant to the United States Supreme Court's decision in *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and our decision on remand in *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). Jones responded to this Court's order to show cause arguing why *Hitchcock v. State*, 226 So.3d 216 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017), should not be dispositive in this case.

After reviewing Jones's response to the order to show cause, as well as the State's arguments in reply, we conclude that Jones is not entitled to relief. Jones was convicted of two counts of first-degree murder and sentenced to death on both counts following the jury's recommendation for death for both murders by a vote of 10-2. [1] Jones's sentences of death became final in 1993. *Jones v. Florida*, 510 U.S. 836, 114 S.Ct. 112, 126 L.Ed.2d 78 (1993). Thus, *Hurst* does not apply retroactively to Jones's sentences of death. *See Hitchcock*, 226 So.3d at 217. Accordingly, we affirm the postconviction court's order denying relief.

The Court having carefully considered all arguments raised by Jones, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

LEWIS, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.

PARIENTE, J., concurs in result with an opinion.

CANADY, C.J., concurs in result.

PARIENTE, J., concurring in result.
I concur in result because I recognize that this Court's opinion in *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d

396 (2017), is now final. However, as I have continuously explained, I would apply *Hurst* [2] retroactively to cases like Jones's. *See Hitchcock*, 226 So.3d at 220-21 (Pariente, J., dissenting). Applying *Hurst* to Jones's case, I would grant a new penalty phase based on the jury's nonunanimous recommendation for death by a vote of 10-2. Per curiam op. at 804 & note 1.

All Citations

259 So.3d 803, 43 Fla. L. Weekly S621

Footnotes

1 This Court's opinion on direct appeal after resentencing does not state the jury's votes for recommending death. *Jones v. State*, 612 So.2d 1370, 1372 (Fla. 1992), *cert. denied*, 510 U.S. 836, 114 S.Ct. 112, 126 L.Ed.2d 78 (1993); *see Jones v. State*, 569 So.2d 1234 (Fla. 1990) (remanding for resentencing). However, the postconviction court's order and Jones's Response to this Court's order to show cause in this case both state that the jury recommended death by a vote of 10-2 on both counts. Order Denying Def.'s Successive Mot. Vacate J. Conviction & Sentence Death Pursuant Fla. Rule Crim. Pro. 3.851, *State v. Jones*, No. 87-1695-CF (Fla. 7th Cir. Ct. May 15, 2017), at 2; Resp. at 3.

2 *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017); *see Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016).

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Appendix B

Final Order of the Seventh Judicial Circuit Court in and for Putnam County, Florida, denying relief on Mr. Jones's successive motion to vacate death sentence.
Circuit Court Case No. 87-001695-CF-M (May 15, 2017).

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
PUTNAM COUNTY, FLORIDA

CASE NO: 87-1695-CF

STATE OF FLORIDA,
Plaintiff,
vs.

RANDALL SCOTT JONES,
Defendant.
_____/

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

THIS MATTER came before the Court on Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence of Death pursuant to Florida Rule of Criminal Procedure 3.851, filed with the Clerk's Office on January 10, 2017. The State's Answer was filed on February 17, 2017. A case management conference was held on March 21, 2017 where arguments were heard.

Procedurally, Defendant was charged by indictment on August 22, 1987 with two counts of first-degree murder (victims Mathew Paul Brock and Kelly Lynn Perry), one count of armed robbery, one count of burglary of a conveyance while armed, one count of shooting into an occupied vehicle, one count of grand theft in the second degree, and one count of sexual battery. On March 25, 1988 the jury returned a verdict of guilty on all counts. On March 28, 1988 the jury recommended a death sentence for each murder count by an 11-1 vote with no specific determinations noted as to aggravating circumstances. The Trial Court found two aggravating circumstances: that the murders were for pecuniary gain and were committed in a cold, calculating, and premeditated fashion. No finding of mitigating circumstances was noted. The Trial Court sentenced Defendant to death on May 3, 1988 and filed the judgment and sentence on the same day.

On direct appeal, the Florida Supreme Court vacated Defendant's two death sentences based on improper arguments and evidence considered during the penalty phase and remanded

the case for a new sentencing determination. See Jones v. State, 569 So.2d 1234 (Fla. 1990). On March 13, 1991 after Defendant's second penalty phase, the jury recommended death sentences for the murders of Kelly Lynn Perry and Mathew Paul Brock by a 10-2 vote on both counts. The Trial Court sentenced Defendant to death on May 28, 1991 and filed the judgment and sentence accordingly.

On direct appeal, the Florida Supreme Court affirmed the two death sentences imposed by the Trial Court. See Jones v. State, 612 So.2d 1370 (Fla. 1992). The United States Supreme Court denied Defendant's Writ of Certiorari on October 4, 1993. See Jones v. State, 114 S.Ct. 112 (1993).

Rule 3.851 Motions for Post Conviction Relief were filed and denied by the Court, appealed, and the Florida Supreme Court affirmed the denial. See Jones v. State, 845 So.2d 55 (Fla. 2003). Defendant filed a Federal Writ of Habeas Corpus that was denied and affirmed. See Jones v. Secretary, Dept. of Corrections, 644 F.3d 1206 (11th Cir.), cert denied, 132 S.Ct 590 (2011).

ARGUMENT

Defendant through Counsel argues that his death sentence is unconstitutional under Hurst v. Florida, 136 S.Ct. 616 (2016), (hereinafter Hurst I); and the Florida Supreme Court ruling in Hurst v. State, 202 So.3d 40 (Fla. 2016), hereinafter Hurst II.

In Hurst I, the United States Supreme Court held that Florida's capital sentencing scheme is unconstitutional because the judge, and not the jury, makes the necessary findings of fact to impose the death sentence. 136 S.Ct. at 619. In Hurst II, the Florida Supreme Court held:

> *before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.*

202 So.3d at 57. In Mosely v. State, the Florida Supreme Court concluded that the Hurst rulings apply to all defendants whose sentences were not yet final when the United States Supreme Court issued its opinion in Ring v. Arizona, 536 U.S. 584 (2002)(foot note omitted).

Mosely v. State, SC14-2108, 2016 WL 7406506, at 25 (Fla. Dec. 22, 2016), reh'g denied, SC 14-2108, 2017 WL 510491 (Fla. Feb. 8, 2017). Ring was issued on June 24, 2002. Defendant's conviction became final in 1993. Specifically, Defendant's Petition for Writ of Certiorari was denied by opinion of the United States Supreme Court issued October 4, 1993. Jones v. Florida, 612 So.2d 1370 (Fla. 1992), cert. denied, 510 U.S. 836 (1993).

At hearing, Capital Collateral Counsel acknowledged that Defendant's conviction became final in 1993 and was considered "pre-Ring," and thus Hurst II did not apply retroactively. Counsel argued in **Claim I,** citing Mosely v. State, 2016 WL 7406506 (Fla. Dec. 22, 2016), that Defendant raised a Ring claim at every possible stage in his case from trial to post-conviction, and fundamental fairness requires a retroactive application of Hurst II.

However, the State argued that any case in which the Death Sentence was final before Ring was decided would not receive relief based on Hurst II. Bogle v. State, 217 WL 526507 (Fla. Feb. 9, 2017); Gaskin v. State, 2017 WL 224772 (Fla. Jan. 9, 2017); Assay v. State, 2016 WL 7406538 at 13 (Fla. December 22, 2016) ("we have now held in Assay v. State that Hurst does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in Ring").

Defendant's death sentence became final in 1993 well before Ring, which was decided in 2002. At hearing, Capital Collateral Counsel made a strong argument for retroactivity based on principles of fundamental fairness, why one death row inmate gets an opportunity for resentencing and the other does not. The Florida Supreme Court has made it clear through controlling precedent, Hurst II is not retroactive to the case. The Assay Court clearly issued a holding, not a suggestion, and this Court is legally bound to follow that decision, State v. Herring, 76 So.3d 891, 897 (Fla. 2011). For these reasons, **Claim I is untimely and is subject to**

summary denial.

On **Claim II**, Defendant claims that his Death Sentence violated the Eighth Amendment, which prohibits cruel and unusual punishment, because the jury's recommendation of death was not unanimous. However, this claim is not supported by controlling law. The United States Supreme Court has never held that the Eighth Amendment requires a unanimous jury recommendation. In Spaziano v. Florida, 468 U.S. 447, 463-64 (1984), the United States Supreme Court held that the Eighth Amendment is not violated in a Capital case when the ultimate responsibility of imposing death rests with the judge. Spaziano was subsequently overruled in Hurst v. Florida, 136 S.Ct 616 (2016). The United States Supreme Court analyzed the case pursuant to Sixth Amendment grounds and overruled Spaziano to the extent that it allows a sentencing judge to find aggravating circumstances independent of a jury's fact finding. Hurst v. Florida, 136 S. Ct. at 618. The Court did not address the issue of any possible Eighth Amendment violation. Spaziano was overruled on Sixth Amendment grounds. While the Florida Supreme Court initially included the Eighth Amendment as a consideration for warranting unanimous jury recommendations in its Hurst II decision, the Court's decision and holding was based squarely on the Sixth Amendment, not the Eighth Amendment. Due to controlling precedent, this Court cannot extrapolate a Constitutional remedy for Defendant based on the Eighth Amendment. Florida has a conformity clause in its State Constitution that requires the State Courts to interpret Florida's prohibition on cruel and unusual punishments in conformity with the United States Supreme Court's Eighth Amendment jurisprudence. Art I, Section 17, Fla. Const. Defendant claims that "cruel and unusual" punishment should be considered in light of evolving standards in the community. It is true that perceptions of the community as well as the courts have changed regarding the death penalty, but currently the death penalty is an authorized

punishment for capital crimes designated by the legislature. Art I, Section 17, Fla. Const. Claim II is procedurally barred and without legal legal support. **Claim II is denied.**

Therefore, in consideration of the foregoing, it is hereby,

ORDERED AND ADJUDGED that:

(1) Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 is **Denied.**

(2) Defendant has thirty (30) days in which to appeal this order.

DONE this 15 day of May, 2017, in Chambers in Palatka, Putnam County, Florida.

PATTI A. CHRISTENSEN
Circuit Judge

Copy furnished to:
Reuben A. Neff, Asst. CCRC-M, Law Office of Capital Collateral Regional Counsel, Middle Region, 12973 North Telecom Parkway, Temple Terrace, FL 33637

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Appendix C

Florida Supreme Court opinion affirming Mr. Jones's convictions for first-degree murder and the convictions for armed robbery, burglary of a conveyance, and shooting into an occupied vehicle, but reversing the conviction for sexual battery, and remanding for a new sentencing determination. *Jones v. State*, 569 So. 2d 1234 (Fla. 1990).

569 So.2d 1234
Supreme Court of Florida.

Randall Scott JONES, Appellant,
v.
STATE of Florida, Appellee.

No. 72461.
|
Sept. 13, 1990.
|
Rehearing Denied Nov. 15, 1990.

Synopsis

Defendant was convicted in the Circuit Court, Putnam County, Robert R. Perry, J., of first-degree murder, armed robbery, burglary of conveyance, shooting into occupied vehicle, and sexual battery. Defendant was sentenced to death, and he appealed. The Supreme Court, Barkett, J., held that: (1) guilt phase identification of victims by their siblings created risk of arbitrary, capital-sentencing decision; (2) fact that defendant would be removed from society for at least 50 years if he received life sentences for two murders could be argued to and considered by jury as mitigating factor; and (3) evidence and argument about defendant's lack of remorse were improper.

Affirmed in part, reversed in part, and remanded.

McDonald, J., concurred with conviction and concurred in result with sentence.

Attorneys and Law Firms

***1235** James B. Gibson, Public Defender, and Larry B. Henderson, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., and Pamela D. Cichon, Asst. Atty. Gen., Daytona Beach, for appellee.

Opinion

BARKETT, Justice.

Randall Scott Jones appeals two convictions for first-degree murder and the sentence of death imposed for each. [1] He also appeals convictions and sentences received for four noncapital felonies. [2] We affirm the two capital convictions, but because of cumulative errors affecting the penalty phase, we vacate the sentences and remand for a new sentencing proceeding before a jury. We reverse the conviction for sexual battery and affirm the convictions in the remaining noncapital felonies.

During the evening of July 26, 1987, Jones and his codefendant, Chris Reesh, went target shooting with a 30–30–caliber rifle near Rodman Dam in Putnam County. Jones's car became stuck in the sand pits. At about midnight, they flagged down a fisherman who was leaving the area and asked if he could pull them out. The fisherman indicated that he could not but told them to seek help from the driver of a Chevrolet pickup truck parked in the parking lot. Inside the cab of the pickup Matthew Paul Brock and Kelly Lynn Perry were sleeping.

Between 12:30 and 1:30 a.m., a twelve-year-old boy who was camping at the Rodman Dam Campground awoke to the sound of three gunshots fired in rapid succession. Later that morning, a Rodman Dam concession worker noticed cigarette packets, broken glass, and blood in the parking lot. She followed a trail of blood and drag marks across the parking lot for about 160 yards to a wooded area where she discovered Brock's body lying in the underbrush. She called the Putnam County Sheriff's Office. During the search of the area, deputies discovered Perry's partially ***1236** clothed body about twenty-five feet deeper into the underbrush.

At trial, Dr. Bonofacia Flora, a forensic pathologist, testified that Brock died instantly from two wounds to the head from a high-powered rifle. Perry died from a single shot to the forehead, also caused by a high-powered rifle.

Matthew Brock's brother and sister-in-law testified to having seen the victim's pickup, while in Jones's possession, parked at a convenience store in Green Cove Springs at approximately 7 a.m. on July 27. They observed bullet holes in the windshield and a 30–30–caliber rifle inside. Richard Brock confronted Jones, who was a stranger to him, and asked him where he got the truck. Jones told him he had just purchased the truck for $4,000 and drove away.

On August 16, Jones was arrested in Kosciusko, Mississippi, by the Mississippi Highway Patrol for

possession of a stolen motor vehicle. The next day, Detective David Stout and Lieutenant Chris Hord of the Putnam County Sheriff's Office interviewed Jones in Mississippi. Lieutenant Hord testified that after advising Jones of his *Miranda* rights,[3] Jones gave a statement implicating himself at the scene but blaming Reesh for having shot both victims. Jones admitted driving the pickup to Mississippi, where he planned to get rid of it. In addition to signing a waiver-of-rights form, Jones also signed a consent to search the trailer in which he had been living at the Lighthouse Children's Home in Mississippi. In the trailer, Detective Stout recovered pay stubs from Perry's employer in Palatka bearing her fingerprint. A calendar bearing Perry's name was also recovered from the bottom of a nearby dumpster.

On August 20, Jones was transported from Mississippi to Florida. Lieutenant Hord testified that at the outset of the trip, he reminded Jones that his *Miranda* rights were still in effect. Jones then volunteered a second statement which was reduced to writing and signed after their arrival at the Putnam County jail. In this statement, Jones admitted that his earlier statement was true, except that he had reversed his and Reesh's roles in the murder.

The state's case was completed with the testimony of Rhonda Morrell, who was Jones's ex-fiancee. She testified that Jones had told her that he had taken her father's rifle for target shooting and that "he had shot those two people. He didn't remember doing it, but he had done it." She also testified that Jones had told her that he had pawned the rifle, and she identified Jones's signature on a pawn ticket dated August 19, 1987. The rifle was retrieved from a Jacksonville gun and pawn shop.

Jones offered no evidence during the guilt phase. The jury returned guilty verdicts on all charges.

During the penalty phase, Jones presented the testimony of Dr. Harry Krop, a forensic psychologist, who diagnosed Jones as having a borderline personality disorder. He testified that Jones's stepmother described Jones as "almost like an animal." At the age of eleven, Jones was hospitalized for three weeks for psychiatric treatment. He was diagnosed as a borderline schizophrenic due to his difficulty dealing with reality and his environment. After his release from the hospital, a court adjudicated Jones dependent, later delinquent, and finally referred him to a children's home.

The court instructed the jury on three aggravating[4] and three mitigating circumstances,[5] and the jury recommended the death sentence for both murders by a vote of eleven to one. As to each murder, the trial court found two aggravating circumstances ***1237** — that the murders were committed for pecuniary gain and committed in a cold, calculated, and premeditated manner. The court found no mitigating circumstances and sentenced Jones to death.

Guilt Phase

Jones raises five claims of error in the guilt phase of his trial. As his initial claim, Jones contends that the trial court should have suppressed the statements which he gave to Lieutenant Hord on August 17 and 20 because the state denied his request for counsel.

We agree with Jones that if he requested counsel, his subsequent statements to the police authorities must be suppressed. However, the necessary factual basis for relief has not been established. Jones testified at the suppression hearing that he requested counsel when he was arrested in Mississippi by Trooper Haldeman, and again on two subsequent occasions—when he was questioned by Mississippi Investigator Edwards concerning the warrant on the pickup and when he was first interviewed by the Putnam County officers. This testimony conflicts with the testimony of Trooper Haldeman, Detective Stout, and Lieutenant Hord.[6] It also conflicts with Jones's written statements of August 17 and 20, wherein he represented that he neither requested advice from, nor the presence of, an attorney during or at any time before he made the statement. In addition, Jones had the opportunity to review his statements after they were typed. Although he initialed thirty-six changes in the two statements, he made no changes to his stated waiver of counsel. The trial court denied the motion to suppress, specifically finding that whether Jones requested counsel was a question of credibility which it resolved in favor of the state. Based on the totality of this record, the trial judge did not abuse his discretion, and we find no error on this point.

Second, Jones claims error because he was not present during all the voir dire proceedings. He argues that the record fails to demonstrate that he effectively waived

his presence during counsel's exercise of peremptory challenges at side-bar conferences. Although there is no indication that Jones was in attendance at the side-bar, the record demonstrates that the court gave defense counsel the opportunity to confer with Jones prior to every side-bar and that Jones had the opportunity to decide which jurors would be stricken from the panel. *See Turner v. State,* 530 So.2d 45, 49–50 (Fla.1987) (following remand), *cert. denied,* 489 U.S. 1040, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989). We find no error. Likewise, we reject the claim that Jones should have been present during the court's inquiry into a conversation between Juror McKinney and a bailiff. [7]

Jones's third point on appeal is that the conviction for sexual battery must be reversed because a victim of sexual battery must have been alive at the time of the assault to support the elements of this crime. We agree. *See Owen v. State,* 560 So.2d 207, 212 (Fla.1990) (the victim must be alive at the time the offense commences), *petition for cert. filed,* No. 90–231 (U.S. July 31, 1990). The evidence here clearly establishes that the acts constituting sexual battery occurred after the victim's death. Thus, Jones's conviction for sexual battery must be reversed. Jones does not argue and we do not find that the conviction on this count affected the guilty verdicts on the murder counts.

Fourth, Jones challenges the admission of DNA identification testimony as lacking an adequate predicate. At trial, counsel objected to the testimony of an expert who, ***1238** through DNA sampling, identified Jones as the individual who sexually assaulted Perry. Even if it could be said that such testimony was improperly admitted, we find beyond a reasonable doubt that the error would not have affected the verdict and is harmless. Of course, the sexual battery charge is being reversed on other grounds.

Finally, we find no merit to Jones's claim that reversal is mandated because the trial judge failed to comply with section 921.241(1), Florida Statutes (1987), which requires the judge to affix the defendant's fingerprints to a judgment of guilt.

For the reasons expressed, we affirm Jones's two convictions for first-degree murder and convictions on Counts III, IV, and V. We find that each is supported by competent substantial evidence. We reverse the conviction for sexual battery.

Penalty Phase

Jones asserts several errors pertaining to the imposition of the death penalty. First, Jones contends that section 921.141(2), Florida Statutes (1987), and the federal constitution require jurors to use a special verdict form and to unanimously agree upon the existence of the specific aggravating factors applicable in each case. We have previously decided this question adversely to Jones's position. *James v. State,* 453 So.2d 786, 792 (Fla.), *cert. denied,* 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984); *Alvord v. State,* 322 So.2d 533, 536 (Fla.1975), *cert. denied,* 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976).

Similarly, Jones's contention that the death penalty statute is unconstitutional because it is arbitrarily applied has been consistently rejected by the Court. *See Remeta v. State,* 522 So.2d 825, 829 (Fla.), *cert. denied,* 488 U.S. 871, 109 S.Ct. 182, 102 L.Ed.2d 151 (1988), and cases cited therein.

We likewise reject Jones's argument that the trial court improperly found two aggravating factors—that the murders were committed for pecuniary gain [8] and in a cold, calculated, and premeditated manner. [9] We are satisfied that this record supports the conclusion beyond a reasonable doubt that Jones murdered for the specific purpose of taking Brock's pickup and did so in a cold, calculated, and premeditated manner. Prior to the murder, as the victims slept, Jones discussed killing the victims for the purpose of obtaining the pickup. Jones's statement of August 20 admits that he and Reesh "hung out talking about waking them up for about a half hour.... [W]e walked up the road ... [and] walked back down. Five or ten minutes went by and we went and got the gun [from behind a log where it was hidden]." We find adequate support for the trial court's finding that these two aggravating factors existed.

However, we agree with Jones that the trial court erred by instructing the jury that the murder was especially heinous, atrocious, or cruel. [10] The record reflects no evidentiary support for this instruction. We are mindful that the trial court did not make a factual finding of this factor in his sentencing order. In many cases, this

would obviate any error. However, here we must consider this instruction in tandem with the erroneous charge of sexual battery. Acts performed on a dead body cannot be considered in determining whether the aggravating factor of heinous, atrocious, or cruel applies. Events occurring after death are irrelevant to the atrocity of the homicide, regardless of their depravity and cruelty. *Pope v. State,* 441 So.2d 1073, 1078 (Fla.1983); *see also State v. McCall,* 524 So.2d 663, 665 n. 1 (Fla.1988); *Halliwell v. State,* 323 So.2d 557, 561 (Fla.1975). In this case, the jury heard evidence and argument that after Jones killed Perry, he sexually abused the corpse. The jury could have believed that such an act was sufficient to find that the killing was heinous, atrocious, or cruel and ***1239** thus supported the death penalty. We cannot say under these facts that the error was harmless under the standard announced in *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986).

Sixth, Jones contends that the trial court allowed family members to identify the victims in violation of *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *Welty v. State,* 402 So.2d 1159 (Fla.1981), and for that reason he seeks a new sentencing recommendation. In *Booth,* the United States Supreme Court held invalid, as violative of the eighth amendment, a Maryland statute which required consideration of victim impact statements by the capital sentencing jury. *Booth* recognized that the presentation of an emotionally charged opinion expressing grief and anger is inconsistent with the requirement for individualized sentencing and reasoned decisionmaking. *Booth,* 482 U.S. at 504, 107 S.Ct. at 2533. The personal characteristics of the victim and emotional trauma suffered by the victim's family are wholly unrelated to the defendant's blameworthiness and thus create an impermissible risk of an arbitrary capital-sentencing decision. *Id.* at 502–03, 107 S.Ct. at 2532–33.

These same concerns were addressed by this Court on the issue of guilt well before *Booth* in *Welty. Welty* reasserted the well-established rule that "a member of the deceased victim's family may not testify for the purpose of identifying the victim where nonrelated, credible witnesses are available to make such identification." *Welty,* 402 So.2d at 1162; *see also Lewis v. State,* 377 So.2d 640 (Fla.1979); *Rowe v. State,* 120 Fla. 649, 163 So. 22 (1935); *Ashmore v. State,* 214 So.2d 67 (Fla. 1st DCA 1968); *Hathaway v. State,* 100 So.2d 662 (Fla. 3d DCA 1958). Although the testimony here is somewhat different from that which occurred in *Booth,* [11] we conclude that the guilt phase identification of the victims by Brock's sister and brother and Perry's sister, in violation of *Welty,* created an equal risk of an arbitrary capital-sentencing decision.

A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented.

Here, none of the relatives' testimony was necessary to establish the identity of the victims. It is apparent that such testimony was impermissibly designed to evoke the sympathy of the jury. We find that the trial court abused its discretion by denying Jones's objections to this testimony.

Seventh, Jones contends that the trial court improperly prevented him from arguing that he could be sentenced to two consecutive minimum twenty-five-year prison terms on the murder charges should the jury recommend life sentences. The state argues that this claim was speculative because the actual sentencing decision is purely within the province of the court, not the jury.

The standard for admitting evidence of mitigation was announced in *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The sentencer may not be precluded from considering as a mitigating factor, "any aspect of a 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." *Id.* at 604, 98 S.Ct. at 2965. Indeed, the Court has recognized that the state may not narrow a sentencer's discretion to consider relevant evidence "that might cause it to *decline to impose* the death sentence." *McCleskey v. Kemp,* 481 U.S. 279, 304, 107 S.Ct. 1756, 1773, 95 L.Ed.2d 262 (1987) (emphasis in original; footnote omitted). Counsel was entitled to ***1240** argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences on each of the two murders. The potential sentence is a relevant consideration of "the circumstances of the offense" which the jury may not be prevented from considering.

We likewise find merit in Jones's contention that the state improperly commented on his lack of remorse. During closing argument in the guilt phase, the prosecutor impermissibly asked the jury, "Did you see any remorse?" This argument was augmented and highlighted during the penalty phase when the state called a Sheriff's Department officer for the express purpose of testifying that Jones showed no remorse. In each instance, defense counsel's objections were overruled.

This Court has repeatedly stated that lack of remorse has no place in the consideration of aggravating circumstances. *Robinson v. State,* 520 So.2d 1, 6 (Fla.1988); *Pope,* 441 So.2d at 1078; *McCampbell v. State,* 421 So.2d 1072, 1075 (Fla.1982). We emphatically held in *Pope* that lack of remorse should have no place in the consideration of aggravating factors. *Pope,* 441 So.2d at 1078. We again urge the state to refrain from injecting an issue that this Court has unequivocally determined to be inapplicable, causing us to vacate sentences in the past.

In summary, we have found that the trial court erred by instructing the jury that the murder was especially heinous, atrocious, or cruel; by admitting testimony in violation of *Booth;* by preventing the jury from considering the potential sentence of imprisonment; and by permitting the state to introduce evidence of lack of remorse. We conclude that these penalty phase errors require a new sentencing hearing before a new sentencing jury. Accordingly, we find it unnecessary to reach Jones's ninth claim, that the trial court improperly denied defense counsel's request to withdraw during the penalty phase due to a conflict of interest.

Finally, Jones raises a claim of double jeopardy, arguing a violation of *Carawan v. State,* 515 So.2d 161 (Fla.1987). Jones argues that two crimes, burglary of a conveyance while armed and/or with an assault and shooting or throwing a deadly missile into an occupied vehicle, seek to punish the same evils as robbery and murder. He concludes that separate sentences for the burglary of a conveyance and shooting into an occupied vehicle cannot be countenanced because each arose out of a single act, and to separately punish him for those crimes offends the principles announced in *Carawan.*

Carawan construed section 775.021, Florida Statutes (1985), and determined that there could not be multiple convictions for attempted manslaughter and aggravated battery when they were predicated on a single shotgun blast. The state contends, in part, that *Carawan* is inapplicable because the legislature overruled that decision when it enacted section 775.021, Florida Statutes (Supp.1988). However, we conclude that *Carawan* ' s "same evil" analysis is applicable because this case was in the pipeline when *Carawan* became final. [12]

We find that there is no impediment under *Carawan* to sentencing Jones for the two murders and for shooting into an occupied motor vehicle. Jones fired three shots, each of which was a separate act. One shot killed Brock and another killed Perry. The third shot would support the conviction and sentence for shooting into the vehicle and consequently may be punished as an evil separate from the murders. Moreover, we find that there is no violation for sentencing Jones for armed robbery and burglary of a conveyance with intent ***1241** to commit either murder or robbery. Jones twice entered the pickup truck while armed. On the first occasion he removed the victims. On the second, he took the vehicle. We conclude that the offenses in question are predicated on multiple underlying acts, and that Jones may be sentenced on each. *Carawan,* 515 So.2d at 170.

Accordingly, for the reasons expressed, we affirm the two convictions for first-degree murder and the convictions for armed robbery, burglary of a conveyance, and shooting into an occupied vehicle. We reverse the conviction for sexual battery, vacate the two sentences of death, and remand for a new sentencing determination before a new jury.

It is so ordered.

SHAW, C.J., and OVERTON, EHRLICH, GRIMES and KOGAN, JJ., concur.

McDONALD, J., concurs with conviction, and concurs in result only with the sentence.

All Citations

569 So.2d 1234, 15 Fla. L. Weekly S604

Footnotes

1 Our jurisdiction is mandatory. Art. V, § 3(b)(1), Fla. Const.

2 Count III, armed robbery (nine-year term of imprisonment to run concurrent with Count VII); Count IV, burglary of a conveyance while armed and/or with assault (seven-year term of imprisonment to run concurrent with Count VII); Count V, shooting or throwing a deadly missle into occupied vehicle (three-and-one-half-year term of imprisonment to run concurrent with Count VII); and Count VII, sexual battery (seventeen-year term of imprisonment).

The state elected to proceed on Count III (armed robbery) and not the lesser included Count VI (grand theft in the second-degree).

3 *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

4 The murders were committed during the commission of a robbery and/or burglary, the murders were especially wicked, evil, atrocious, or cruel, the murders were committed in a cold, calculated, and premeditated manner.

5 The jury could consider that the defendant had no significant history of prior criminal activity, the defendant's age, and any other aspect of the defendant's character.

6 Trooper Haldeman testified at trial that he read Jones his *Miranda* rights at the scene of the stop. Upon asking Jones if he wished to talk, the trooper indicated that Jones "didn't say anything."

7 After it became necessary to move Juror McKinney from a position as alternate to a full member of the jury, the judge informed both counsel that Juror McKinney had told the bailiff that she might have known Detective Stout and some of the victims' relatives. The judge summoned Juror McKinney and counsel to a side-bar conference. There is no record evidence that Jones objected at trial to Juror McKinney's service on the panel or was precluded from conferring with his counsel or the court.

8 § 921.141(5)(f), Fla.Stat. (1987).

9 § 921.141(5)(i), Fla.Stat. (1987).

10 § 921.141(5)(h), Fla.Stat. (1987).

11 In *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), the victim impact statements were introduced during the penalty phase and related to impact of the crimes upon the surviving family members. Here, the testimony occurred during the guilt phase and was directed largely toward identity of the victims.

12 In *State v. Smith,* 547 So.2d 613, 617 (Fla.1989), this Court held that the legislature overruled *Carawan v. State,* 515 So.2d 161 (Fla.1987), by enacting chapter 88–131, section 7, Laws of Florida. That section became effective on July 1, 1988. However, *Carawan* continued to apply from December 10, 1987, when rehearing was denied, until July 1, 1988. Thus, *Carawan* controls this case because the notice of appeal was filed on May 19, 1988. *See Dougan v. State,* 470 So.2d 697, 701 n. 2 (Fla.1985), *cert. denied,* 475 U.S. 1098, 106 S.Ct. 1499, 89 L.Ed.2d 900 (1986); *State, Department of Transp. v. Knowles,* 402 So.2d 1155, 1157 (Fla.1981).

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No. _____

IN THE

Supreme Court of the United States

RANDALL SCOTT JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix D

Florida Supreme Court opinion affirming Mr. Jones's death sentences. *Jones v. State,* 612 So. 2d 1370 (Fla. 1992) (Barkett, C.J. dissenting as to the death sentences and would remand for a new sentencing determination, Kogan, J. concurs in the dissent).

612 So.2d 1370
Supreme Court of Florida.

Randall Scott JONES, Appellant, Cross–Appellee,
v.
STATE of Florida, Appellee, Cross–Appellant.

No. 78160.
|
Dec. 17, 1992.
|
Rehearing Denied Feb. 17, 1993.

Synopsis

Defendant was convicted in the Circuit Court, Putnam County, Robert R. Perry, J., of first-degree murder, armed robbery, burglary of conveyance, gunshot into occupied vehicle, and sexual battery. Defendant was sentenced to death, and he appealed. The Supreme Court, 569 So.2d 1234, affirmed in part, reversed in part, and remanded. On remand, defendant was again sentenced to death, and he appealed. The Supreme Court held that: (1) defendant was not entitled to dismissal of public defender; (2) trial court's ruling on motion to suppress is presumed to be correct; (3) trial court did not commit fundamental error by stating that prior witness' testimony corroborated that of codefendant; and (4) defendant opened door to testimony through defense expert's reliance on defendant's background.

Affirmed.

Barkett, C.J., dissented and filed opinion in which Kogan, J., concurred.

Attorneys and Law Firms

***1372** Gilbert A. Schaffnit of the Law Offices of Gilbert A. Schaffnit, Gainesville, for appellant/cross-appellee.

Robert A. Butterworth, Atty. Gen. and Barbara C. Davis, Asst. Atty. Gen., Daytona Beach, for appellee/cross-appellant.

Opinion

PER CURIAM.

Randall Scott Jones appeals the death sentences imposed on him on resentencing. We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution, and affirm the sentences.

Seeking to steal Brock's truck, Jones shot and killed Matthew Brock and Kelly Perry while they slept in the truck. [1] A jury convicted him of two counts of first-degree murder, among other things, and recommended that he be sentenced to death, which the trial court did. On appeal we vacated the death sentences because of errors in the penalty phase and ordered that Jones be resentenced. His new jury recommended death for each victim's murder, and the trial court agreed with those recommendations.

Prior to the resentencing proceeding, Jones filed a pro se motion asking that his counsel, Howard Pearl, be dismissed because: 1) Pearl's being an honorary deputy sheriff constituted a conflict of interest; and 2) Pearl's assistance was ineffective because he "only does just enough to maintain appearances" and at Jones' first sentencing proceeding called only one mental health expert to testify and refused to call any of unspecified "numerous character witnesses." This motion did not ask for a hearing on the matter, but sought the dismissal of Pearl and the public defender's office, the appointment of private counsel, and more time. After Jones filed this motion, Pearl moved for permission to withdraw, claiming that Jones' motion and allegations had created an irreconcilable conflict that destroyed the attorney/client relationship. The trial court heard all the parties on these motions and denied Jones' motion because Pearl's "former" status [2] did not create a conflict of interest [3] and held that the claim of ineffective assistance had no merit. The court recognized that Pearl and Jones were having difficulty getting along but denied Pearl's motion to withdraw because the court had never known Pearl to compromise his integrity and because substitute counsel could not match Pearl's knowledge and familiarity with the case. The day the resentencing proceeding began Jones filed a second motion to dismiss counsel, and the trial court summarily denied it. On appeal Jones argues that the court conducted an inadequate inquiry on his motion. We disagree.

In *Hardwick v. State,* 521 So.2d 1071 (Fla.), *cert. denied,* 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988), we approved the procedure for dealing with motions to

dismiss counsel as set out in *Nelson v. State,* 274 So.2d 256, 258–59 (Fla. 4th DCA 1973):

> [W]here a defendant, before the commencement of trial, makes it appear to the trial judge that he desires to discharge his court appointed counsel, the trial judge, in order to protect the indigent's right to effective counsel, should make an inquiry of the defendant as to the reason for the request to discharge. If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant.

Jones did not seek to represent himself; he only wanted the court to appoint someone else to represent him. He based much of his claimed dissatisfaction on Pearl's ***1373** having been an honorary deputy. He also claimed that Pearl had been ineffective in the trial and prior sentencing, but made no assertion as to Pearl's effectiveness in the current proceeding.

"Without establishing adequate grounds, a criminal defendant does not have a constitutional right to obtain different court-appointed counsel." *Capehart v. State,* 583 So.2d 1009, 1014 (Fla.1991), *cert. denied,* 502 U.S. 1065, 112 S.Ct. 955, 117 L.Ed.2d 122 (1992). We agree with the trial court that Jones did not establish adequate grounds. The complaint about Pearl's being an honorary deputy had been resolved because Pearl had resigned that position. Jones' complaints about Pearl's handling of the prior sentencing proceeding do not provide a legal basis for challenging his prospective performance in the resentencing. [4]

We hold that the court conducted a sufficient inquiry into Jones' complaints and Pearl's concerns. The state argued that Pearl was a good attorney, and the trial judge pointed out Pearl's extensive trial experience and stated that he had never known Pearl to compromise his advocacy over a period of thirty years. We find that the refusal to dismiss Pearl was within the court's discretion and that no error occurred.

Jones made two statements to the authorities and moved to suppress them prior to his original trial. We affirmed the trial court's denial of that motion because Jones had not established that he had been denied a request for counsel. *Jones v. State,* 569 So.2d 1234, 1237 (Fla.1990). He again moved to suppress those statements prior to resentencing, arguing that documentary evidence shows that a public defender had been appointed to represent him on an unrelated charge and that the statements should not have been taken in the absence of that counsel. The trial court denied the motion to suppress.

A trial court's ruling on a motion to suppress is presumed to be correct. *Owen v. State,* 560 So.2d 207 (Fla.), *cert. denied,* 498 U.S. 855, 111 S.Ct. 152, 112 L.Ed.2d 118 (1990); *Medina v. State,* 466 So.2d 1046 (Fla.1985). The document Jones relies on to make this claim also shows that Jones pled to the unrelated charge and the court imposed sentence twelve days before Jones committed these murders and more than a month before he made the challenged statements. Invoking one's right to counsel for one crime does not invoke that right for future crimes. *Durocher v. State,* 596 So.2d 997 (Fla.1992); *see Traylor v. State,* 596 So.2d 957 (Fla.1992). Thus, there is no merit to this claim.

In the original appeal we summarily rejected several claims challenging, among other things, the constitutionality of Florida's death penalty statute and not requiring jurors to use a special verdict form. 569 So.2d at 1238. Jones raises these same claims now, and we reject them again.

Jones' codefendant testified against him at resentencing, and Jones now complains that the judge referred to this witness by his first name and that the judge improperly commented that a prior witness' testimony corroborated that of the codefendant. The following exchange occurred on direct examination when the witness used a map to describe the murder scene:

> Q. [by prosecutor] Chris, does this look at all in any way familiar to you with regard to the layout of Rodman Dam? Can you locate yourself on that map?

> A. Back over this way [where] the bathrooms were. I believe I was—I believe that's the bathrooms?
>
> The Court: That's correct, according to the previous witness, Mr. Stout.

It is error for a judge to comment on the evidence in the jury's presence. *Raulerson v. State,* 102 So.2d 281 (Fla.1958). The contemporaneous objection rules applies to such comments, however, and an appellate court will not reverse in the absence of an objection unless the comment is so prejudicial as to be fundamental error. *Ross v. State,* 386 So.2d 1191 (Fla.1980). Here, Jones did not object to the ***1374** court's comment, which pertained only to a minor detail of the codefendant's testimony. Neither this comment nor calling the witness by his first name[5] prejudiced Jones or deprived him of a fair trial, and there is no merit to this claim.

During closing argument, the prosecutor said:

> I believe a suggestion was made to you that, perhaps, this homicide was not so terrible in the overall scheme or plan of things. As you weigh that and you consider that, ladies and gentlemen, I want you to go back there and think about the effect that period of five seconds (the time period for the firing of three shots) has had on Mr. Jones' life, on Chris Reesh's life [codefendant], on Paul Brock's life [victim]—"

Jones objected to the reference to the codefendant and one of the victims and moved for a mistrial. The trial court denied that motion, and Jones now argues that the comment constituted improper victim-impact evidence and that the prosecutor committed reversible misconduct in making this statement. We disagree.

This is not impermissible victim-impact evidence. *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). Even if we assumed, without deciding, that the prosecutor erred in making the statement, no relief would be warranted. The standard for appellate review of prosecutorial misconduct "is whether 'the error committed was so prejudicial as to vitiate the entire trial.' " *State v. Murray,* 443 So.2d 955, 956 (Fla.1984), *quoting Cobb v. State,* 376 So.2d 230, 232 (Fla.1979). This comment did not vitiate the entire trial nor did it "inflame the minds and passions of the jurors so that their verdict reflect[ed] an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." *Bertolotti v. State,* 476 So.2d 130, 134 (Fla.1985). Thus, there is no merit to this claim.

The defense called a mental health expert who testified that he had considered Jones' juvenile, psychiatric, and psychological history in diagnosing Jones as having a borderline personality disorder. On cross-examination the prosecutor questioned the expert about Jones' background and the materials reviewed by the expert and asked him to go through the criteria for antisocial behavior. In response to that questioning, the expert stated that there were references in the record to Jones' skipping class, lying, and stealing. The expert also admitted that the records disclosed that Jones had set his house on fire and that, at Boy Scout camp, he had threatened another camper with a hatchet. Jones now argues that the cross-examination improperly exposed the jury to inflammatory information about his background.

As we have previously stated, "it is proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis." *Parker v. State,* 476 So.2d 134, 139 (Fla.1985); *Johnson v. State,* 608 So.2d 4 (Fla.1992); *see McCrae v. State,* 395 So.2d 1145 (Fla.1980) (one of the objects of cross-examination is to elicit the whole truth of matters that are not fully explained on direct examination), *cert. denied,* 454 U.S. 1041, 102 S.Ct. 583, 70 L.Ed.2d 486 (1981). The defense opened the door to this testimony through the expert's reliance on Jones' background, and the court did not err in admitting this testimony. Because admitting it did not constitute fundamental error, Jones' failure to object during cross-examination means that the issue is waived.

On the original appeal this Court held that the facts did not support finding the heinous, atrocious, or cruel aggravator. 569 So.2d at 1238–39. At resentencing the prosecutor questioned the medical examiner about whether a wound on the female victim's finger could

have been a defensive wound, and defense counsel cross-examined the examiner extensively about the finger wound. The state did not argue the applicability of the heinous, atrocious, or cruel aggravator, and the court did not instruct the jury on that factor. Jones ***1375** argues that the testimony about the finger wound was inflammatory and irrelevant, but has demonstrated no abuse of discretion in the trial court's admitting this testimony, and we therefore reject his claim.

The trial court found the following aggravators for Brock's murder: previous conviction of a violent felony (Perry's murder and the other crimes committed against her); committed during an armed robbery combined with committed for pecuniary gain as a single aggravator; and committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. For Perry's murder the court found prior violent felony (Brock's murder and the other crimes committed against him), committed during a burglary, and committed in a cold, calculated, and premeditated manner. The court found that no statutory mitigators had been established. After conscientiously considering the nonstatutory mitigating evidence as to Jones' childhood, his suffering a disorder that impairs his coping skills, and his capability for rehabilitation, the court concluded that it presented little mitigation value. Jones now argues that the court erred in finding cold, calculated, and premeditated and for pecuniary gain in aggravation and improperly doubled the aggravators and that the court erred in refusing to instruct on the statutory mental mitigators and specific nonstatutory mitigators.

As we did on the first appeal, 569 So.2d at 1238, we again find the evidence sufficient to support the cold, calculated, and premeditated and pecuniary gain aggravators. The record shows that Jones coldly and dispassionately decided to kill the victims in order to steal the truck. There is no merit to Jones' argument that he had a pretense of moral or legal justification for the killings because he perceived the victims as part of a world that was rejecting him. *Compare Williamson v. State,* 511 So.2d 289 (Fla.1987) (stabbing fellow inmate where victim had made no threatening acts toward defendant, no pretense of justification), *cert. denied,* 485 U.S. 929, 108 S.Ct. 1098, 99 L.Ed.2d 261 (1988), *with Christian v. State,* 550 So.2d 450 (Fla.1989) (colorable claim of self-defense gave pretense of justification), *cert. denied,* 494 U.S. 1028, 110 S.Ct. 1475, 108 L.Ed.2d 612 (1990); *Banda v. State,* 536 So.2d 221 (Fla.1988) (same), *cert. denied,* 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989). Contemporaneous convictions for crimes against multiple victims support finding previous felony conviction in aggravation. *Zeigler v. State,* 580 So.2d 127 (Fla.), *cert. denied,* 502 U.S. 946, 112 S.Ct. 390, 116 L.Ed.2d 340 (1991); *Tafero v. State,* 561 So.2d 557 (Fla.), *cert. denied,* 495 U.S. 925, 110 S.Ct. 1962, 109 L.Ed.2d 324 (1990); *LeCroy v. State,* 533 So.2d 750 (Fla.1988), *cert. denied,* 492 U.S. 925, 109 S.Ct. 3262, 106 L.Ed.2d 607 (1989). Moreover, the court did not improperly double the felony murder/robbery and pecuniary gain aggravators, but, rather, considered them as a single factor. Any error in the jury instructions, including not telling the jury to merge the pecuniary gain and felony-murder factors if found, is harmless beyond a reasonable doubt. *See Suarez v. State,* 481 So.2d 1201 (Fla.1985), *cert. denied,* 476 U.S. 1178, 106 S.Ct. 2908, 90 L.Ed.2d 994 (1986).

The defense's mental health expert specifically testified that Jones did not meet the criteria for the statutory mitigators of substantially impaired capacity or extreme emotional disturbance. That expert also testified that Jones was of at least average intelligence and appreciated the criminality of his actions. Neither alcohol or drug use contributed to these murders. Thus, the record contains competent substantial evidence supporting the trial judge's refusal to instruct the jury on and his refusal to find the statutory mental mitigators. *Ponticelli v. State,* 593 So.2d 483 (Fla.1991), *reversed on other grounds* 506 U.S. 802, 113 S.Ct. 32, 121 L.Ed.2d 5 (1992); *Sireci v. State,* 587 So.2d 450 (Fla.1991), *cert. denied,* 503 U.S. 946, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992). Finally, the standard jury instruction on nonstatutory mitigators is sufficient, and there is no need to give separate instructions on individual items of nonstatutory mitigation. *Randolph v. State,* 562 So.2d 331 (Fla.), *cert. denied,* 498 U.S. 992, 111 S.Ct. 538, 112 L.Ed.2d 548 (1990); *Jackson v. State,* 530 So.2d 269 (Fla.1988), *cert. denied,* ***1376** 488 U.S. 1050, 109 S.Ct. 882, 102 L.Ed.2d 1005 (1989).

Therefore, finding no reversible error, we affirm the two death sentences imposed on Jones on resentencing. [6]

It is so ordered.

OVERTON, McDONALD, SHAW, GRIMES and HARDING, JJ., concur.

BARKETT, C.J., dissents with an opinion, in which KOGAN, J., concurs.

BARKETT, Chief Justice, dissenting.
I dissent because I believe the trial judge failed to appropriately inquire into Jones's ineffectiveness of counsel allegation.

One month before Jones's resentencing hearing, Jones filed a motion to dismiss counsel. His public defender, Howard Pearl, responded by filing a motion to withdraw. In addition to alleging conflict of interest, Jones's motion generally challenged his counsel's effectiveness and specifically charged that counsel refused to contact or call character witnesses for evidence of mitigation. Pearl, in arguing his motion to withdraw, expressed in no uncertain terms his view that he could no longer serve as an effective advocate for Jones because of Jones's allegations:

> [T]o say merely that I am offended or that my feelings are hurt doesn't begin to describe my reaction to it. It is far deeper than that. I want nothing further to do with Mr. Jones.... I cannot quantify the damage that may have been done to me subconsciously or what I might fail to do for him without realizing that I was doing it, that might, in fact, hurt him during the re-trial of this case without intending to or wanting to. But, I feel that Mr. Jones and I, at this stage, very badly need a divorce.

The trial court denied both Jones's and Pearl's motions with virtually no inquiry into the allegations in Jones's motion or his basis for dissatisfaction. The record is devoid, for example, of *any* reference to Jones's allegations that Pearl failed to contact or call character witnesses. The trial court instead talked at length about how the case was on a "fast track" and how it would be impossible to appoint another attorney who could quickly become prepared. The only inquiry made of Jones by the trial court was whether Jones wished to add anything to his written motion. When Jones responded that he had only forty-five minutes notice of the hearing and had not had a chance to review Pearl's motion to withdraw, the trial judge stated that he intended to rule on the motion and would not consider a continuance.

Jones's second motion to dismiss counsel, which made clear that Jones was challenging Pearl's continuing ineffectiveness, also was denied, and again, the trial judge did not specifically inquire into the allegations in the motion; he only expressed his confidence that Pearl would serve as an effective advocate and would not be compromised. Pearl once again noted that his representation of Jones might not be ideal: "I hope that I haven't, in some way, been impaired in my advocacy in a manner that I, myself, am not aware of."

Finally, at sentencing Pearl *again* stated that he believed the case may have been infected by a conflict between himself and Jones that "may well have affected its outcome, although I cannot quantify the extent of the damage."

As the majority notes, this Court has explicitly adopted the procedure set forth in *Nelson v. State,* 274 So.2d 256, 258–59 (Fla. 4th DCA 1973), when assertions such as Jones's are made:

> If incompetency of counsel is assigned by the defendant ... the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation,

> the trial court should so state on the record and advise the defendant ***1377** that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.

Hardwick v. State, 521 So.2d 1071, 1074–75 (Fla.), *cert. denied,* 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988) (quoting *Nelson,* 274 So.2d at 258–59). This procedure clearly was not followed in this case.

Jones's motions raised a number of issues that warranted deliberate inquiry by the trial court. Specifically, the allegation that counsel failed to contact or call character witnesses is relevant considering that no such witnesses were called in the resentencing. In light of Jones's assertions and Pearl's comments, I cannot find that the trial judge adequately addressed the defendant's allegations of ineffectiveness as is required by *Hardwick.* I would remand for a new sentencing determination before a new jury.

KOGAN, J., concurs.

All Citations

612 So.2d 1370, 18 Fla. L. Weekly S11

Footnotes

1 The facts are set out fully in our opinion on Jones' first appeal. *Jones v. State,* 569 So.2d 1234 (Fla.1990).
2 By the time of resentencing Pearl had resigned as an honorary deputy sheriff.
3 See *Harich v. State,* 573 So.2d 303 (Fla.1990), *cert. denied,* 499 U.S. 985, 111 S.Ct. 1645, 113 L.Ed.2d 740 (1991).
4 Allegations as to Pearl's effectiveness at resentencing should be addressed in a motion for postconviction relief. *Ventura v. State,* 560 So.2d 217 (Fla.), *cert. denied,* 498 U.S. 951, 111 S.Ct. 372, 112 L.Ed.2d 334 (1990).
5 The prosecutor and defense counsel, as well as the judge, called the codefendant by his first name, and defense counsel even called him “son.”
6 Due to this affirmance, we do not address the issues raised on cross-appeal.

No. _____

IN THE

Supreme Court of the United States

RANDALL SCOTT JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix E

Florida Supreme Court opinion affirming the lower court's denial of Mr. Jones's initial postconviction motion. *Jones v. State*, 845 So. 2d 55 (Fla. 2003).

845 So.2d 55
Supreme Court of Florida.

Randall Scott JONES, Appellant,
v.
STATE of Florida, Appellee.
Randall Scott Jones, Petitioner,
v.
James V. Crosby, Jr., etc., Respondent.

Nos. SC00-1492, SC01-2424.
|
Feb. 13, 2003.
|
Rehearing Denied May 2, 2003.

Synopsis

Following affirmance of his convictions for first-degree murder and other offenses, 569 So.2d 1234, and affirmance of two death sentences imposed upon resentencing, 612 So.2d 1370, defendant filed motion for postconviction relief. The Circuit Court, Putnam County, A.W. Nichols, III, J., denied motion. Defendant appealed, and he filed petition for writ of habeas corpus. The Supreme Court held that: (1) evidence did not show that trial judge improperly delegated his sentencing authority to state or failed to engage in required independent weighing of aggravators and mitigators; (2) various challenged actions of trial counsel did not amount to ineffective assistance; (3) defendant was not entitled to an evidentiary hearing on his claim that his *Ake* rights of access to competent mental health professional were violated; (4) state did not commit *Brady* violation; and (5) defendant's claim that death sentence violated his Eighth Amendment rights was not ripe for review.

Affirmed; petition denied.

Anstead, C.J., specially concurred with an opinion.

Attorneys and Law Firms

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Opinion

PER CURIAM.

Randall Scott Jones appeals the denial of his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. Jones also petitions this Court for a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const. For the reasons set forth below, we affirm the trial court's order denying Jones's motion for postconviction relief and deny Jones's petition for a writ of habeas corpus.

FACTS AND PROCEDURAL HISTORY

In 1988, Jones was convicted and sentenced to death for the first-degree murders of Matthew Paul Brock and Kelly Lynn Perry. [1] The underlying facts were detailed in this Court's opinion in Jones's first direct appeal: [2]

> During the evening of July 26, 1987, Jones and his codefendant, Chris Reesh, went target shooting with a 30-30-caliber rifle near Rodman Dam in Putnam County. Jones's car became stuck in the sand pits. At about midnight, they flagged down a fisherman who was leaving the area and asked if he could pull them out. The fisherman indicated that he could not but told them to seek help from the driver of a Chevrolet pickup truck parked in the parking lot. Inside the cab of the pickup Matthew Paul Brock and Kelly Lynn Perry were sleeping.
>
> Between 12:30 and 1:30 a.m., a twelve-year-old boy who was camping at the Rodman Dam Campground awoke to the sound of three gunshots fired in rapid succession. Later that morning, a Rodman Dam concession worker noticed cigarette packets, broken glass, and blood in the parking lot. She followed a trail of blood and drag marks across the parking lot for about 160 yards to a wooded area where she discovered Brock's body lying in the underbrush. She called the Putnam County Sheriff's Office. During the search of the area, deputies discovered Perry's

partially clothed body about twenty-five feet deeper into the underbrush.

At trial, Dr. Bonofacia Flora, a forensic pathologist, testified that Brock died instantly from two wounds to the head from a high-powered rifle. Perry died from a single shot to the forehead, also caused by a high-powered rifle.

Matthew Brock's brother and sister-in-law testified to having seen the victim's pickup, while in Jones's possession, parked at a convenience store in Green Cove Springs at approximately 7 a.m. on July 27. They observed bullet holes in the windshield and a 30-30-caliber rifle inside. Richard Brock confronted Jones, who was a stranger to him, and asked him where he got the truck. ***61** Jones told him he had just purchased the truck for $4,000 and drove away.

On August 16, Jones was arrested in Kosciusko, Mississippi, by the Mississippi Highway Patrol for possession of a stolen motor vehicle. The next day, Detective David Stout and Lieutenant Chris Hord of the Putnam County Sheriff's Office interviewed Jones in Mississippi. Lieutenant Hord testified that after advising Jones of his *Miranda* [*v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)] rights, Jones gave a statement implicating himself at the scene but blaming Reesh for having shot both victims. Jones admitted driving the pickup to Mississippi, where he planned to get rid of it. In addition to signing a waiver-of-rights form, Jones also signed a consent to search the trailer in which he had been living at the Lighthouse Children's Home in Mississippi. In the trailer, Detective Stout recovered pay stubs from Perry's employer in Palatka bearing her fingerprint. A calendar bearing Perry's name was also recovered from the bottom of a nearby dumpster.

On August 20, Jones was transported from Mississippi to Florida. Lieutenant Hord testified that at the outset of the trip, he reminded Jones that his *Miranda* rights were still in effect. Jones then volunteered a second statement which was reduced to writing and signed after their arrival at the Putnam County jail. In this statement, Jones admitted that his earlier statement was true, except that he had reversed his and Reesh's roles in the murder.

The state's case was completed with the testimony of Rhonda Morrell, who was Jones's ex-fiancee. She testified that Jones had told her that he had taken her father's rifle for target shooting and that "he had shot those two people. He didn't remember doing it, but he had done it." She also testified that Jones had told her that he had pawned the rifle, and she identified Jones's signature on a pawn ticket dated August 19, 1987. The rifle was retrieved from a Jacksonville gun and pawn shop.

Jones offered no evidence during the guilt phase. The jury returned guilty verdicts on all charges.

During the penalty phase, Jones presented the testimony of Dr. Harry Krop, a forensic psychologist, who diagnosed Jones as having a borderline personality disorder. He testified that Jones's stepmother described Jones as "almost like an animal." At the age of eleven, Jones was hospitalized for three weeks for psychiatric treatment. He was diagnosed as a borderline schizophrenic due to his difficulty dealing with reality and his environment. After his release from the hospital, a court adjudicated Jones dependent, later delinquent, and finally referred him to a children's home.

The court instructed the jury on three aggravating [Note 4] and three mitigating circumstances, [Note 5] and the jury recommended the death sentence for both murders by a vote of eleven to one. As to each murder, the trial court found two aggravating circumstances-that the murders were committed for pecuniary gain and committed in a cold, calculated, and premeditated manner. The court found no mitigating circumstances and sentenced Jones to death.

> [Note 4] The murders were committed during the commission of a robbery and/or burglary, the murders were especially wicked, evil, atrocious, or cruel, the murders were committed in a cold, calculated, and premeditated manner.

***62** [Note 5] The jury could consider that the defendant had no significant history of prior criminal activity, the defendant's age, and any other aspect of the defendant's character.

Jones I, 569 So.2d at 1235-37 (footnote 3 omitted). [3]

In Jones's new penalty phase, the jury voted ten to two for a recommendation of death with regard to each murder. We upheld the two sentences of death imposed upon resentencing. *See Jones II,* 612 So.2d at 1376. [4]

Jones's amended initial 3.850 motion, filed in 1997, is the subject of this appeal. Jones's motion contained thirty claims. [5] ***63** After a *Huff* [6] hearing, the postconviction judge granted an evidentiary hearing on claim XXIX (whether the trial judge impermissibly delegated his sentencing authority to the State). After an evidentiary hearing, relief was denied for claim XXIX. Relief as to all other claims was summarily denied. Relief was denied because (1) Jones failed to plead his claims properly; (2) Jones failed to establish prejudice; and (3) Jones's claims were procedurally barred. Jones appeals the denial of relief as to twenty-five claims. [7]

3.850 APPEAL

In his first issue, [8] Jones asserts that the trial judge improperly delegated his sentencing authority to, and engaged in improper *ex parte* contact with, the State. Jones contends that the trial judge allowed the State to write the sentencing order [9] and did not engage in the required independent weighing of aggravating and mitigating circumstances. Moreover, Jones argues that on the whole the evidence produced at the evidentiary hearing on this claim establishes that the trial judge engaged in improper contact with the State during the sentencing proceeding. We disagree. As noted by the postconviction judge, [10] Jones produced no direct evidence that the prosecutor in his resentencing, and not the trial judge, wrote the sentencing order. Jones's assertion that the trial judge engaged in improper contact with the State is also unsupported.

While evidence presented at the evidentiary hearing [11] established that the prosecutor in Jones's initial sentencing proceeding, Mac McLeod, wrote the sentencing order without substantial input from the trial judge, the prosecutor in Jones's resentencing, Richard Whitson, testified without qualification that he did not write the sentencing order when Jones was resentenced. Moreover, Whitson provided a plausible explanation as to why he possessed, and had made a marginal comment on, a copy of a proposed sentencing order: The trial judge had likely circulated drafts of the proposed order to both the State and defense, seeking their comments. [12] Such a circumstance is not the ***64** same as allowing one side to write the sentencing order and does not, without more, constitute evidence of improper *ex parte* contact. Jones's assertions with regard to these points are ultimately based on speculation. Postconviction relief cannot be based on speculative assertions. *See Maharaj v. State,* 778 So.2d 944, 951 (Fla.2000).

The denial of relief was also proper with regard to the involvement of the trial judge's law clerk in Jones's resentencing proceedings. The law clerk, Pamela Koller, testified at the evidentiary hearing that she produced an initial draft of portions of a sentencing order during Jones's resentencing proceedings, and that she might have used as a "starting point" portions of the order [13] originally entered after Jones's initial sentencing proceeding. Jones claims that Koller's involvement in drafting portions of a sentencing order conclusively establishes that the trial judge did not engage in the required independent weighing of aggravating and mitigating circumstances. As further support, he notes the similarities between the sentencing orders for his initial and resentencing proceedings and contends that they buttress the conclusion that the trial judge did not engage in the required independent weighing. We disagree as to both points.

Jones failed to offer competent evidence that the trial judge did not engage in independent weighing of aggravators and mitigators. The draft version of the order in the resentencing proceeding, drafted initially by Koller at the instruction of the trial court, is not identical to the version signed and entered by the original trial judge. Most important, the sentencing order signed by the trial judge pursuant to Jones's resentencing in 1991 differs significantly from the order signed after Jones's initial sentencing proceeding in 1988. For instance, the 1988 order, with regard to the murder of victim Brock, finds only pecuniary gain as an aggravating factor; the 1991 order discusses both pecuniary gain and armed robbery as aggravating factors and subsequently merges them into a single aggravator. Moreover, the 1988 order does not contain the discussion of specific nonstatutory mitigating circumstances which is present in the 1991 order. Given these significant dissimilarities between the two orders, we determine that the postconviction judge did not err in

concluding that the trial judge independently considered the aggravating and mitigating factors in Jones's case. *See Morton v. State,* 789 So.2d 324, 332-35 (Fla.2001) (noting that distinctions between initial sentencing order issued by one judge and subsequent order issued by different judge in resentencing provided sufficient indicia that judge in resentencing proceeding undertook independent weighing of aggravators and mitigators despite presence of some similarities between initial sentencing order and resentencing order). [14] One would reasonably expect that orders relating to the same or similar evidence would, of necessity, be somewhat similar. ***65** However, the similarities in the orders in the instant case are not such that relief should be granted. We also determine that the trial judge did not err in concluding that Koller did not engage in improper *ex parte* communication with the State. Jones's assertions with regard to Koller are based on nothing more than speculation. No relief is warranted. *See Maharaj,* 778 So.2d at 951.

The next issue [15] Jones presents is that his counsel was ineffective for failing to confer with the court-appointed confidential mental health expert, Dr. Krop, with regard to Jones's competency to waive his *Miranda* [16] rights and his right to an extradition hearing. Jones further argues that his defense counsel should have consulted with Dr. Krop with regard to Jones's competency to give consent for the search of his trailer in Mississippi, where police seized inculpatory evidence. [17] We disagree and determine that the trial judge did not err in denying an evidentiary hearing. Jones's defense counsel was not ineffective with regard to these matters.

Pursuant to *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a successful assertion of ineffective assistance of counsel must satisfy two prongs. Under the first prong, the defendant must show that counsel was deficient, i.e., "the defendant must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing professional norms." *Ragsdale v. State,* 798 So.2d 713, 715 (Fla.2001). Under the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* To be entitled to an evidentiary hearing on a claim of ineffective assistance, the defendant must allege specific facts that are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant. *See Roberts v. State,* 568 So.2d 1255, 1259 (Fla.1990). A mere conclusory allegation of ineffective assistance is insufficient to warrant an evidentiary hearing. *See Kennedy v. State,* 547 So.2d 912, 913 (Fla.1989). Reasonable strategic decisions of trial counsel should not be second-guessed by a reviewing court. *See Strickland,* 466 U.S. at 689-91, 104 S.Ct. 2052.

To the extent that Jones asserts the ineffectiveness of his trial counsel on this issue, the postconviction judge's determination that a procedural bar existed as to the relevant claims is incorrect. The ineffectiveness of Jones's counsel at his resentencing was not considered or determined on direct appeal. [18] Nevertheless, ***66** the record refutes Jones's contention that he was entitled to an evidentiary hearing. In response to questions from Jones's counsel during direct examination in the resentencing phase, Dr. Krop (the confidential mental health expert) testified as follows:

> JONES'S COUNSEL: I think that certain things should be made clear. Is it not true that Randy Jones, at the date of the commission of the offense, was not insane, as that term is legally understood?
>
> DR. KROP: That's right. He knew right from wrong.
>
> JONES'S COUNSEL: And, from that day to this, he has not suffered from an incompetence, mental incompetence, to stand trial, to understand the proceedings which have been brought against him?
>
> DR. KROP: That's right.

Jones's trial counsel had no reason to challenge the waiver of rights on competency grounds. Dr. Krop had considered and determined Jones's competency from the time he perpetrated the killings and at all points thereafter, which necessarily included the time at which Jones waived his *Miranda* and other rights. [19] There is no reason to even suspect that competency was an issue based on the expert conclusions. Therefore, trial counsel's decision not to challenge the waiver based on Jones's competency was not unreasonable. [20]

The record does demonstrate that trial counsel did challenge Jones's waiver of his rights based on the lack of voluntariness. The record establishes that counsel

filed a motion to suppress Jones's inculpatory statements along with evidence from a search (to which Jones had consented) of a trailer in Mississippi where incriminating evidence was found. Trial counsel also deposed Jones's primary interrogators to explore the voluntariness of his statements, requested and received a suppression hearing at which he again questioned Jones's interrogators, and subsequently moved after formal trial proceedings had begun to suppress incriminating statements and physical evidence. The trial court denied the motions to suppress. It appears that, in the end, Jones's claim of ineffective assistance of counsel is an expression of frustration concerning the result of his trial. Such frustration is not a viable basis for granting postconviction relief. *See Teffeteller v. Dugger,* 734 So.2d 1009, 1019-20 (Fla.1999). In *Teffeteller,* we determined that no evidentiary hearing was warranted on the alleged failure of counsel to litigate properly the issue of suppression of the defendant's inculpatory ***67** statements (made after waiving *Miranda* rights) and physical evidence obtained after the defendant consented to a police search of his vehicle. We noted

> that trial counsel filed several motions to suppress Teffeteller's statements and the evidence obtained from the search of his vehicle ..., that a hearing was conducted on the motions, and that counsel objected to the introduction of [this] evidence at trial. Thus, trial counsel vigorously litigated these issues and his performance was not deficient in this regard.

Id. (footnote omitted). Circumstances similar to *Teffeteller* obtain in the instant case. Based on *Teffeteller,* the assistance rendered by counsel in the instant case was not deficient.[21] The postconviction judge properly denied an evidentiary hearing.

Jones next claims that his counsel was ineffective during voir dire for not preventing the State from making overly prejudicial comments and for not moving for a mistrial.[22] Specifically, he contends that the prosecutor informed prospective jurors that they were required to recommend a sentence of death if they found Jones guilty of murder. Our review of the record fails to confirm that the prosecutor engaged in such conduct. The strongest phraseology employed by the prosecutor was his line of questioning in which he asked prospective jurors whether they could vote to recommend the death penalty "if the facts, circumstances, and the law warrant it." This line of questioning is not a significant deviation from the standard jury instructions.[23] Moreover, during voir dire the trial judge properly instructed prospective jurors that their role was to "decide whether or not to recommend one of two available sentences," one being "the death penalty, which is a recommendation, the second [being] life imprisonment with a minimum of twenty-five years." Jones's counsel was not ineffective during voir dire, nor did Jones suffer any prejudice. No evidentiary hearing was warranted. We further note that the postconviction judge properly determined that Jones's claim that the prosecutor engaged in misconduct during voir dire was procedurally barred because it should have been presented on direct appeal.

Jones also asserts that his rights under *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), were ***68** violated.[24] *Ake* requires that a defendant have access to a "competent psychiatrist [or other mental health professional] who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* at 83, 105 S.Ct. 1087. This Court has stated that one of the most compelling indications for granting an evidentiary hearing on an *Ake* claim occurs when one or more of a defendant's mental health experts "ignore[s] clear indications of either mental retardation or organic brain damage." *State v. Sireci,* 502 So.2d 1221, 1224 (Fla.1987). In *Mann v. State,* 770 So.2d 1158 (Fla.2000), the appellant (Mann), who had been sentenced to death for a capital murder, claimed that he was entitled to an evidentiary hearing on his postconviction *Ake* claim. In upholding the denial of the evidentiary hearing, we stated:

> The record reveals that Carbonel [Mann's confidential mental health expert] performed an extensive evaluation of Mann that included neuropsychological testing based on his history of serious alcohol and substance abuse and his history of head injury. Carbonel testified that, in addition to interviewing Mann, she reviewed numerous documents including affidavits from family members, Mann's childhood

health records, records from correctional institutions, hospital records, and expert testimony from prior proceedings. Carbonel also testified that she did a lengthy psychological evaluation of Mann and conducted various tests including a Minnesota Multiphasic Personality Inventory (MMPI) and a Wechsler Adult Intelligence Scale test, among others. Based on this evaluation, Carbonel was able to testify to the existence of the two statutory mental mitigators.

> The record demonstrates that Mann's expert performed all the essential tasks required by *Ake.* Thus, Mann's request for an evidentiary hearing was properly denied.

Id. at 1164. The mental health evaluation detailed above is substantially the same as that provided Jones in the instant case. Specifically, Dr. Krop testified during Jones's resentencing that he administered a battery of tests similar to those detailed in *Mann.* [25] Equally important, Dr. Krop related not only that Jones suffered from no severe brain damage, but also that brain damage did not contribute to his actions on the day of the murders. Furthermore, he stated that Jones has an IQ of 107. Thus, the record refutes any suggestion that Dr. Krop ignored the type of serious brain damage or mental retardation we detailed in *Sireci.* An evidentiary hearing on this portion of the *Ake* claim was properly denied.

Jones further presents the related argument that his rights under *Ake* were violated due to his trial counsel's ineffectiveness in failing to provide Dr. Krop with necessary background information required for a competent mental health examination. [26] We disagree. The ***69** record establishes that Dr. Krop had access to copious amounts of information concerning Jones's background [27] and that he thoroughly reviewed this information and detailed it for the jury during Jones's resentencing. We also note that Jones's counsel consulted with Dr. Krop as to what information he required to perform a thorough mental health examination, and that counsel assisted in garnering the required information. We therefore cannot conclude that Jones's counsel was deficient in this regard. Moreover, we cannot agree with Jones's assertion that trial counsel's failure to call his sister, Trudy, as a witness during the resentencing phase constituted ineffective assistance. Jones avers that during the first four or five years of his life, Trudy (who had barely reached adolescence) was his primary caregiver, due to the neglect visited upon him by his mother while he was in her custody. He fails to note, however, that Dr. Krop related to the jury his diagnosis of Jones as having borderline personality disorder, and that he incorporated and included in his analysis Jones's memories of being very unhappy when he lived with his mother and of spending a lot of time, unsupervised, in the street. Dr. Krop testified that Jones's "emotionally deprived and neglectful early environment ... set a pattern for the rest of his life," and that in his subsequent years Jones had trouble "compensat[ing] for that early neglect." Moreover, Dr. Krop stated that although "behavior problems" were a constant theme in Jones's life, his tendencies toward "animalistic" or "primitive" behavior [28] "improved somewhat" when Jones was placed in the custody of his father and stepmother around age five or six. Thus, the jury was not uninformed about Jones's life before the age of five. We determine that the testimony of his sister, Trudy, would not have changed the ten-to-two recommendation of a death sentence for Jones. [29] Our ***70** confidence in the outcome of the penalty phase is not undermined. Therefore, no relief is warranted. [30]

We consider next the issue presented by Jones as to whether his trial counsel was ineffective during the guilt phase closing argument because he allegedly conceded Jones's guilt on charges of premeditated murder without first subjecting those charges to an adversarial testing and, most important, without obtaining Jones's consent. [31] We note that the record clearly refutes Jones's contention that his trial counsel conceded guilt to charges of premeditated murder. When he addressed the jury, Jones's counsel did state that "the evidence prove[d] beyond a reasonable doubt that Randy Scott Jones killed Kelly Lynn Perry and Matthew Paul Brock." However, trial counsel proceeded to argue that the trial judge would "define ... the crimes involved and their lesser, what are called lesser included offenses." Jones's counsel then stated:

> Let me read to you, if I may, the definition of *second degree murder* from those instructions, which you will hear from the Judge.... "A person commits *second degree murder* by an act imminently dangerous to another and evincing a depraved mind regardless of human life." Ladies and Gentlemen, I submit to you that beyond doubt at the time and place where these killings occurred and the other lesser crimes were committed that Randy Jones did in fact evince a

depraved mind regardless of human life and his conduct throughout the episode indicates a depraved and evil intent and inability to understand the feelings of other people, an inability to relate with other people, *but I think that specifically blueprints this crime as second degree murder.*

(Emphasis supplied.) Taken in its whole context, the above argument is nothing more than a "concession ... made to a lesser crime than charged ... after a meaningful adversarial testing [32] of the State's case." ***71** *Atwater v. State,* 788 So.2d 223, 231 (Fla.2001). Jones's counsel conceded guilt to second-degree murder as "a trial strategy intended to save [Jones's] life." *Id.* at 232. Jones's argument would require counsel to present arguments with no credibility and contrary to fact to satisfy his theory of representation. We decline to follow such a path. We have previously determined that:

"[t]o be effectual, trial counsel should be able to do this without express approval of his client and without risk of being branded as being professionally ineffective because others may have different judgments or less experience."

Id. at 230 (quoting *McNeal v. State,* 409 So.2d 528, 529 (Fla. 5th DCA 1982)). We therefore conclude that "the trial court properly denied [Jones's] claim that defense counsel was ineffective for making certain concessions without [Jones's] consent." *Atwater,* 788 So.2d at 232.

Jones next claims that his counsel was ineffective because he labored under conflicts of interest which prevented him from rendering impartial advice. [33] Specifically, Jones contends that both his counsel's status as an honorary deputy sheriff [34] and counsel's motion to withdraw from representation affected the quality of representation that he received to the point that it became substandard. We addressed much of this issue in the direct appeal of Jones's resentencing, noting that Jones's counsel had resigned from his position as an honorary deputy sheriff before the resentencing proceeding commenced. [35] We determined that counsel was not ineffective in his representation at points prior to the resentencing proceeding. *See Jones II,* 612 So.2d at 1372-74. Furthermore, we noted that Jones could allege ineffectiveness of counsel in the resentencing phase in a motion for postconviction relief. No error occurred in the postconviction judge's decision to deny an evidentiary hearing on this matter. Jones could not establish the requisite prejudice under *Strickland* because his counsel had resigned from the honorary deputy sheriff position before resentencing proceedings had begun. Nor did counsel's representation during the resentencing "f[a]ll below an objective standard of reasonableness" based on "prevailing professional norms." *Ragsdale v. State,* 798 So.2d 713, 715 (Fla.2001). No relief is warranted on this issue. [36]

In his next issue, Jones asserts violations of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). [37] Jones contends that the State violated *Brady* by failing to disclose that it had ***72** made a deal with witness Eddie Tipton, who testified during Jones's initial sentencing phase but not during Jones's resentencing. The postconviction judge denied the claim as insufficiently pled. This decision was not erroneous.

Jones presented no reliable evidence in his 3.850 motion that the State made a deal with Tipton either before or during Jones's trial. The only "evidence" Jones presents of a deal between the State and Tipton is a July 1988 letter from the state attorney's office to the trial judge in an unrelated case in which Tipton was a defendant. Jones's trial had concluded before this letter was written. The letter recommended a reduced sentence for Tipton due to his favorable testimony in Jones's case. Tipton stated under oath at Jones's initial sentencing phase, after being questioned both by Jones's counsel and by the State, that he did not have a deal with the State to provide favorable testimony in Jones's case. Jones also received a new sentencing phase at which Tipton did not even testify. Moreover, during Jones's resentencing it was his trial counsel who asked Dr. Krop, the mental health expert, about Tipton's previous testimony in an attempt to shed the most mitigating light on Jones's mental state at the time of the murders. Given these facts, it is clear that Jones cannot establish prejudice under *Brady* and that he is entitled to no relief.

Jones's other *Brady* issue requires little discussion. He contends that the State violated *Brady* by failing to disclose its knowledge of Jones's possible substance abuse. This claim is entirely misplaced because no one was in a better position to know if Jones had a substance abuse problem than Jones himself. "[A] *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant." *Occhicone v. State,* 768 So.2d 1037, 1042 (Fla.2000). We further reject Jones's contentions of

ineffective assistance with regard to the *Brady* issue as lacking in merit.

With regard to many of the remaining claims Jones presents, the postconviction judge correctly determined that they were procedurally barred. [38] Jones contends that ineffective assistance of counsel occurred with regard to a few of these claims, and we briefly address that aspect. Jones first asserts that his counsel was ineffective for not challenging the jury instructions with regard to the aggravators of cold, calculated, and premeditated (CCP), commission in the course of a robbery, and pecuniary gain. [39] For each of these aggravating circumstances, the instruction given to the jury conformed to the approved standard jury instruction. No relief is due because "[c]ounsel cannot be deemed ineffective for failing to prevail on a meritless issue." *Teffeteller,* 734 So.2d at 1020. Moreover, trial counsel was not ineffective for failing to raise the issue of possible burden shifting in the penalty phase jury instructions. [40] Those instructions also conformed to the approved standard jury instructions. Jones further contends that his trial counsel was ineffective for not litigating the issue of the constitutionality of the murder in the course of a ***73** felony aggravator. [41] The merits of this claim have been "repeatedly denied." *Mills v. State,* 786 So.2d 547, 551 (Fla.2001). Therefore, counsel was not ineffective for failing to raise the issue. Jones also avers that his trial counsel was ineffective for not litigating the issue of whether the trial court impermissibly considered a statement, from the mother of one of the victims, that appeared in the presentence investigation (PSI) report. [42] Given the thorough consideration that the trial judge gave to the aggravators and mitigators in Jones's case, there is no reasonable probability that the trial judge's sentencing decisions hinged to any degree on the referenced material in the PSI report. Our confidence in the outcome of the penalty phase is not undermined.

Finally, Jones contends that his trial counsel was ineffective for failing to prevent the prosecutor from informing the jury that it was required to recommend the death penalty. [43] Jones alludes to the closing argument made by the prosecutor in the penalty phase:

> There's no doubt in this record, when Judge Perry instructed you, as a matter of law that this man had been convicted of the things for which he's being sentenced now, those convictions insofar as Brock's conviction is concerned, relates directly to the conviction establishing the aggravator on Kelli [sic] Lynn Perry.
>
> Crimes of violence include the crimes of robbery, burglary and robbery, established as a matter of law in this case and about those things there can be no dispute. Those are established. Those are the aggravating circumstances for the two first ingredients. The cap felony was committed for pecuniary gain. I think the term is going to be defined as financial gain, when you are finally instructed on this case, ladies and gentlemen, and certainly, there's no dispute in this record and any evidence about the reason why Randy Scotty Jones executed Paul Brock and Kelly Perry the night that he did. He wanted to take the truck.

The above argument did nothing more than review the evidence as to the relevant aggravating circumstances in Jones's case. It did not, as Jones contends, contain any implication that the jury was required to recommend the death penalty. Counsel was not ineffective for failing to object to these comments or to move for a mistrial.

PETITION FOR WRIT OF HABEAS CORPUS

Jones presents three issues in his petition for writ of habeas corpus. The first is that his appellate counsel was ineffective for failing to raise the issue that Jones's trial counsel impermissibly conceded guilt to charges of premeditated murder. [44] We determined *supra* that Jones's trial counsel merely presented a legitimate closing argument directed to the lesser charge of second-degree murder in an attempt to spare Jones's life. Therefore, this issue is meritless. Appellate counsel cannot be ineffective for failing to raise a meritless issue. *See Johnson v.* ***74** *Singletary,* 695 So.2d 263, 266-67 (Fla.1996).

Jones's other two claims require little discussion. Jones contends that his Eighth Amendment rights have been violated because he may be incompetent at the time he is executed. Jones concedes that this claim is made simply to preserve it for review in the federal court system, and that the claim is not ripe for review because Jones has not yet been found incompetent and a death warrant has not yet been signed. No relief is warranted. *See Hall v. Moore,* 792 So.2d 447, 450 (Fla.2001) (stating that it is premature

for a death-sentenced individual to present a claim of incompetency or insanity, with regard to his execution, if a death warrant has not been signed).

Finally, Jones asserts that Florida's death penalty is unconstitutional under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This Court addressed the contention that Florida's capital sentencing scheme violates the United States Constitution under *Apprendi* and *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), in *Bottoson v. Moore,* 833 So.2d 693 (Fla.2002), *cert. denied,* 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and *King v. Moore,* 831 So.2d 143 (Fla.), *cert. denied,* 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), and denied relief. We find that Jones is likewise not entitled to relief on this claim. Additionally, two of the aggravating circumstances present here were that Jones had been convicted of a prior violent felony, and that the instant murder was committed while Jones was engaged in the commission of a robbery and burglary, both of which were charged by indictment and found unanimously by a jury.

CONCLUSION

After careful consideration of all of Jones's claims, we determine that he is entitled to no relief. Accordingly, we affirm the denial of Jones's motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We also deny his petition for writ of habeas corpus.

It is so ordered.

WELLS, PARIENTE, LEWIS, and QUINCE, JJ., and SHAW and HARDING, Senior Justices, concur.

ANSTEAD, C.J., specially concurs with an opinion.

ANSTEAD, C.J., specially concurring.
I concur in the majority opinion in all respects except for its discussion of the decision in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

All Citations

845 So.2d 55, 28 Fla. L. Weekly S140

Footnotes

1 Jones was also convicted of armed robbery; burglary of a conveyance while armed or with an assault or both; shooting or throwing a deadly missile into an occupied vehicle; and sexual battery.

2 Due to the cumulative effect of errors in the penalty phase of his original trial, Jones received relief in the form of a new penalty phase. *See Jones v. State,* 569 So.2d 1234, 1239-40 (Fla.1990) (*Jones I*). Jones's direct appeal of his resentencing is presented in *Jones v. State,* 612 So.2d 1370 (Fla.1992) (*Jones II*).

3 Jones's convictions of the noncapital felonies were affirmed, with the exception of the sexual battery conviction, which was reversed.

4 The trial court in Jones's new penalty phase found the following aggravators for Brock's murder: previous conviction of a violent felony (Perry's murder and the other crimes committed against her); commission during an armed robbery combined with commission for pecuniary gain as a single aggravator; and commission in a cold, calculated, and premeditated (CCP) manner without any pretense of moral or legal justification. For Perry's murder the court found prior violent felony (Brock's murder and the other crimes committed against him), commission during a burglary, and commission in a cold, calculated, and premeditated manner. The court found that no statutory mitigators had been established. After conscientiously considering the nonstatutory mitigating evidence as to Jones's childhood, his suffering a disorder that impairs his coping skills, and his capability for rehabilitation, the court concluded that these factors "presented little mitigation value." *Jones II,* 612 So.2d at 1375.

5 Those claims are: (I) a lack of funding prohibited Jones's capital collateral representative from preparing an adequate postconviction motion on Jones's behalf and impaired Jones's right to effective representation; (II) state agencies withheld access to files and records, thereby hampering effective presentation of Jones's postconviction motion; (III) the State violated Jones's rights under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); (IV) ineffective assistance of counsel due to trial counsel's failure to investigate mitigating circumstances; (V) ineffective assistance of counsel due to trial counsel's laboring under a conflict of interest; (VI) ineffective assistance of counsel due to trial counsel's concession of Jones's guilt of first-degree murder; (VII) the jury was improperly instructed on the

cold, calculated, and premeditated (CCP) aggravator, and trial counsel was ineffective in litigating the issue; (VIII) the jury was improperly instructed on the prior violent felony aggravator; (IX) the trial judge erred by failing to find certain mitigating circumstances; (X) the penalty phase jury instructions impermissibly diminished the jury's role; (XI) the jury was improperly instructed on the pecuniary gain and robbery aggravators, and trial counsel was ineffective in litigating the issue; (XII) the penalty phase jury instructions impermissibly shifted the burden to Jones to prove that death was not the appropriate penalty, and trial counsel was ineffective in litigating the issue; (XIII) Jones was denied his right under *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), to a competent mental health exam; (XIV) cumulative errors occurred throughout Jones's trial such that the results of the proceedings are not reliable; (XV) newly discovered evidence establishes that DNA evidence used against Jones was unreliable; (XVI) the prosecutor in Jones's trial made inflammatory and overly prejudicial comments to the jury in the penalty phase; (XVII) ineffective assistance of counsel due to trial counsel's cross-examination of witnesses; (XIX) the murder in the course of a felony aggravator is unconstitutional, and trial counsel was ineffective for not litigating the issue; (XX) ineffective assistance of counsel due to trial counsel's failure to prevent improper comments by the prosecutor during voir dire; (XXI) the rule prohibiting Jones's trial counsel from interviewing jurors is unconstitutional; (XXII) jury misconduct occurred in the guilt and penalty phases of Jones's trial; (XXIII) ineffective assistance of counsel due to trial counsel's failure in litigating the violation of Jones's *Miranda* rights and related issues; (XXIV) Jones's right to counsel was violated due to police misconduct; (XXV) ineffective assistance of counsel due to trial counsel's failure in litigating the violation of Jones's *Miranda* rights and related issues; (XXVI) ineffective assistance of counsel due to trial counsel's failure to present an insanity defense; (XXVII) the trial judge improperly considered victim impact evidence, and trial counsel was ineffective in litigating the issue; (XXVIII) Jones's sentences for capital murder lack proportionality; (XXIX) the trial judge improperly delegated his sentencing authority to the State; and (XXX) Florida's death penalty statute is unconstitutional.

6 *See Huff v. State,* 622 So.2d 982 (Fla.1993).

7 Jones appeals the denial of relief for claims III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXIII, XXIV, XXV, XXVI, XXVII, XXIX, and XXX.

8 This issue is related to claim XXIX in Jones's amended initial 3.850 motion.

9 These allegations in Jones's claim generally refer to sentencing proceedings undertaken upon remand to the trial court after this Court determined that Jones was entitled to a new penalty phase.

10 Circuit Judge Robert R. Perry presided over the guilt-innocence phase of Jones's trial, as well as the initial sentencing and resentencing. Circuit Judge A.W. Nichols, III, presided over Jones's postconviction proceedings.

11 Three witnesses testified at the evidentiary hearing. All three were presented by Jones.

12 The trial judge and Jones's defense counsel could not testify at the evidentiary hearing because both predeceased it. We decline to consider Jones's argument that testimony given by his defense counsel in another case, to the effect that defense counsel declined to prepare or comment on a proposed sentencing order, must be considered in the instant case. Jones did not offer evidence as to this argument at the evidentiary hearing, nor did he attempt to supplement the record in the instant case with defense counsel's testimony in the other case.

13 This was the order which Mac McLeod, the prosecutor in Jones's guilt-innocence and initial sentencing phases, testified that he wrote without substantial input from the trial judge.

14 Jones's reliance on *State v. Riechmann,* 777 So.2d 342 (Fla.2000), is unavailing. In *Riechmann,* the prosecutor testified at the evidentiary hearing on the motion for postconviction relief that he wrote the relevant sentencing order with no substantial input from the trial judge. *See id.* at 352. Conversely, the prosecutor in Jones's resentencing proceeding testified unequivocally that he did not write the resentencing order.

15 Jones addressed this issue, with varying levels of specificity, in claims IV, XXIII, XXIV, and XXV in his postconviction motion. The postconviction judge denied relief as to claim IV due to Jones's failure to establish prejudice. He found the remainder of the claims to be procedurally barred.

16 *See Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

17 This evidence included pay stubs from victim Kelly Lynn Perry's employer. The pay stubs bore Perry's fingerprint. *See Jones I,* 569 So.2d at 1236.

18 In the direct appeal of Jones's resentencing, we noted that the trial judge had addressed certain claims of ineffectiveness that Jones had lodged against his trial counsel. However, these claims primarily concerned the effectiveness of his trial counsel in the previous sentencing phase, and whether Jones's counsel was seriously conflicted due to his previous status as an honorary deputy sheriff. *See Jones II,* 612 So.2d at 1372-73. Because we did not specifically address the alleged ineffectiveness of Jones's counsel in failing to consult with Dr. Krop with regard to Jones's competency to waive

Miranda and other rights, we address that allegation here. The status of Jones's counsel as an honorary deputy sheriff is discussed *infra.*

19 Jones does not aver that another mental health expert would have offered a different opinion with regard to his competency to waive his rights.

20 We further note, but do not decide, that under these facts an attempt to exclude Jones's confession and other inculpatory statements solely on the basis of his purported incompetency would likely have been unavailing. In a case decided approximately two years prior to Jones's trial, the United States Supreme Court determined that with regard to a waiver of *Miranda* rights, a defendant's mental state is properly considered when the government (typically as represented by the police) knowingly manipulates that defendant's mental instability. *See Colorado v. Connelly,* 479 U.S. 157, 163-167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Jones makes no allegation that the police representatives who questioned him had reason to suspect that he might be mentally incompetent or attempted to manipulate him in any way.

21 The same logic applies concerning the effectiveness of Jones's counsel with regard to the extradition issue. Jones's counsel secured a hearing on the validity of Jones's extradition and relied on Mississippi law for support. The main Mississippi case on which Jones relied in his postconviction proceeding states that an incarcerated person has a right to an extradition hearing, when applicable, unless he voluntarily waives that right. There is no indication that Jones did not voluntarily waive this right. The trial testimony of his confidential mental health expert indicates that he was competent at all times to do so.

Furthermore, we determine that trial counsel was not ineffective in his cross-examination of witnesses during his attempt to suppress Jones's inculpatory statements to police and relevant physical evidence. Finally, we conclude that Jones's claims with regard to the violation of his right to counsel on this issue are meritless.

22 This issue corresponds to issue XX in Jones's amended initial 3.850 motion.

23 Those instructions include the following language:

> The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

Fla. Std. Jury Instr. (Crim.) 7.11.

24 This assertion primarily involves claims IV and XIII in Jones's amended initial 3.850 motion.

25 Dr. Krop administered the following tests: Minnesota Multiphasic Personality Inventory (MMPI) (administered twice-updated version in 1991, before Jones's resentencing), Wechsler Adult Intelligence, Prescott Attitude Survey, Beck Depression Inventory, Bender Gestalt, Wechsler Memory, Tennessee Self-Concept Scale, and Malin Clinical Multi-Axial Inventory. Dr. Krop described this battery of tests as “psychological and neuropsychological.” He did not engage in testing based on alcohol or drug abuse because he saw no indications of a substance abuse problem.

26 This argument is related to claims IV and XIII in the amended initial 3.850 motion.

27 Dr. Krop reviewed information from Jones's father and stepmother, who assumed custody of Jones when he was approximately five or six years old. He also reviewed Jones's school records (elementary through high school), his military records, and his psychiatric records (except those from Jones's service in the Army, which he could not obtain, save for the information that Jones was treated for a chemical deficiency during his service). Furthermore, Dr. Krop reviewed records pertaining to Jones's stays at two facilities which provided care for troubled adolescents and teens. He also interviewed two people at one of these facilities (Rodeheaver Boys' Ranch) who were very familiar with Jones's stay there. Finally, Dr. Krop reviewed information from state juvenile-protection authorities and information concerning Jones's behavior during incarceration. Attempts to contact Jones's relatives for interviews were generally unavailing. Jones's mother had passed away before Dr. Krop became involved in Jones's case.

28 This behavior included Jones's problems with bowel and bladder control and his inability to display table manners or to consume or digest his food in an acceptable fashion.

29 We also conclude that the jury's recommendation would not have changed if the issue is analyzed under the newly discovered evidence standard. Furthermore, Jones is not entitled to relief based on the asserted ineffectiveness of his counsel in failing to object to the trial judge's refusal to instruct the jury on the statutory mitigating circumstance of extreme emotional disturbance. During direct examination, Dr. Krop specifically stated that at no time did he conclude that Jones was under an extreme emotional disturbance. Trial counsel was not ineffective for failing to raise this meritless issue.

Ineffective assistance also cannot be attributed to the decision of Jones's counsel not to call Dr. Krop during the guilt-innocence phase to aid in the presentation of an insanity defense. As indicated *supra,* Dr. Krop analyzed Jones's mental state at the time of the murders and determined that he was not insane. Moreover, Dr. Krop's assistance with a defense of second-degree murder would have been marginal at best, because expert opinion with regard to a defendant's

generally diminished lack of capacity, short of insanity, is not admissible in Florida to prove lack of premeditation. *See Chestnut v. State,* 538 So.2d 820, 821-24 (Fla.1989).

Finally, we reject Jones's assertion that his trial counsel was ineffective for failing to call a DNA expert during the guilt-innocence phase, and that his rights under *Ake* were violated. *Ake* pertains to rights with regard to a competent mental health examination, and does not encompass the possible prejudicial effect of opinions rendered by non-mental health experts. Moreover, DNA evidence was presented against Jones with regard to the charge of sexual battery. Jones's counsel engaged in extensive voir dire and vigorous cross-examination of the State's DNA expert, and was not deficient in his performance. Most important, Jones's conviction on sexual battery was reversed on direct appeal and the testimony of the State's DNA expert did not work further prejudice against Jones.

30 Nor can we specifically conclude that Jones's trial counsel rendered ineffective assistance in the manner in which he investigated the existence of evidence that would mitigate against a sentence of death. The voluminous background material which Dr. Krop reviewed, and which trial counsel helped to secure, obviates such a claim. Moreover, with the exception of his allusion to the testimony that could have been provided by his sister, Trudy, Jones's assertions that there were other witnesses available who could have provided mitigating evidence are entirely conclusory and fail to establish how Jones was prejudiced. Denial of an evidentiary hearing was proper.

31 This issue is related to claims VI and XVII in Jones's amended initial 3.850 motion.

32 Despite Jones's contentions to the contrary, we conclude that his counsel subjected the State's case to an adversarial testing. We disagree with Jones that his trial counsel's cross-examination of witnesses was ineffectual, and conclude that trial counsel properly held the State to its burden of proof and did not abdicate his adversarial role.

33 This issue is related to claim V in Jones's amended initial 3.850 motion.

34 During oral argument in the instant case, Jones's postconviction counsel stated that the issue of the trial judge's possible status as an honorary deputy sheriff was not asserted at the *Huff* hearing. Jones made the briefest of allusions to this point in his amended initial 3.850 motion.

35 Further, we agree with the trial court's determination that the quality of representation rendered by Jones's counsel was not affected by counsel's entirely ceremonial title of “honorary deputy sheriff.” The trial court noted that counsel was a veteran public defender and that it “had never known [him] to compromise his integrity.” *Jones II,* 612 So.2d at 1372.

36 We also determine that the postconviction judge did not err in denying an evidentiary hearing on the claim of ineffectiveness and conflict of interest with regard to State witness Eddie Tipton. Jones cannot establish the requisite prejudice under *Strickland* with regard to this issue. Tipton testified only during Jones's first sentencing phase, not during the resentencing. Therefore, no further relief is warranted.

37 This issue is related to claim III in Jones's amended initial 3.850 motion.

38 Procedural bar was correctly determined with regard to the following claims, because they should have been or were raised on direct appeal: VII, VIII, IX, X, XI, XII, XIV, XVI, XVIII, XIX, XX, XXVII, and XXX.

39 See claims VII and XI in Jones's amended initial 3.850 motion.

40 See claim XII in Jones's amended initial 3.850 motion.

41 See claim XIX in Jones's amended initial 3.850 motion.

42 See claim XXVII in Jones's amended initial 3.850 motion.

43 See claim XVI in Jones's amended initial 3.850 motion.

44 Allegations of ineffectiveness with regard to appellate counsel are properly raised in a petition for writ of habeas corpus. *See Freeman v. State,* 761 So.2d 1055, 1069 (Fla.2000).

End of Document

No. _____

IN THE

Supreme Court of the United States

RANDALL SCOTT JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix F

Motion for Use of Special Verdict Form for the Unanimous Jury Determination of Statutory Aggravating Circumstances. Circuit Court Case No. 87-001695-CF-M (March 25, 1988).

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
PUTNAM COUNTY, FLORIDA

CASE NO. 87-1695-CF-M

STATE OF FLORIDA,

Plaintiff,

vs.

RANDALL SCOTT JONES,

Defendant.

MOTION FOR USE OF SPECIAL VERDICT FORM
FOR THE UNANIMOUS JURY DETERMINATION OF
STATUTORY AGGRAVATING CIRCUMSTANCES

RANDALL SCOTT JONES, by and through the undersigned, hereby moves this Court to require the jury, during the penalty phase, to use a special verdict form to unanimously determine the presence of each statutory aggravating circumstance sought to be proved by the state, and in support thereof respectfully states the following:

1. Randall Scott Jones (hereafter Jones) is guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9, 16 and 22 of the Florida Constitution (1976) unanimous jury determination of all essential elements of the offense for which he is to be punished. Mullaney v. Wilbur, 421 U.S. 685 (1975); In Re Winship, 397 U.S. 358 (1970); Duncan v. Louisiana, 391 U.S. 145 (1969); Patterson v. New York, 432 U.S. 197 (1977); Williams v. State, 386 So.2d 538 (Fla. 1980).

2. The statutory aggravating circumstances set forth in Section 921.141(5), Florida Statutes are essential elements of the offenses in Florida that are punishable by death. The aggravating circumstances set forth in Section 921.141(5), Fla. Stat. are substantive elements that actually define the crimes in Florida for which the death penalty may be imposed. Vaught v. State, 410 So.2d 147 (Fla. 1982); State v. Dixon, 283 So.2d 1 (Fla. 1973).

3. It is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. State v. Overfelt, 457 So.2d 1385 (Fla. 1984). Notwithstanding the jury's function in issuing a recommendation to this Court as to the appropriate sentence to be imposed, Jones remains entitled to unanimous determination by the jury of the existence vel non of the statutory aggravating circumstances as essential factual elements of the crime for which he is to be punished.

WHEREFORE, this Court is hereby requested to require the jury to unanimously determine, by use of a special verdict form during the penalty phase, the existence of any statutory aggravating circumstances that apply to this case.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

HOWARD B. PEARL
ASSISTANT PUBLIC DEFENDER
Putnam County Courthouse
Room 202
Palatka, Fla. 32077
904-329-0301

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail/delivery to Assistant State Attorney Robert R. McLeod, III, 410 St. Johns Avenue, Palatka, Florida 32077 on this 25 day of March, 1988.

HOWARD B. PEARL
ASSISTANT PUBLIC DEFENDER

No. _____

IN THE

Supreme Court of the United States

RANDALL SCOTT JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix G

Motion to Declare Florida Statutes 775.082(1) and 921.141 Unconstitutional.
Circuit Court Case No. 87-001695-CF-M (March 7, 1991).

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
PUTNAM COUNTY, FLORIDA

CASE NO. 87-1695

STATE OF FLORIDA,

Plaintiff,

vs.

RANDALL SCOTT JONES,

Defendant.

FILED AND RECORDED
IN OFFICIAL RECORDS
OF PUTNAM COUNTY, FLA.
91 MAR 7 P4:06

MOTION TO DECLARE FLORIDA STATUTES
775.082(1) AND 921.141 UNCONSTITUTIONAL

The Defendant, RANDALL SCOTT JONES, by and through his undersigned attorney, moves this Court to declare Florida Statutes 775.082(1) and 921.141 unconstitutional and as grounds therefore states the following:

1. The defendant is charged by indictment with first-degree murder in violation of Florida Statute 782.04.

2. Florida Statute 775.082 sets forth the penalties applicable when a defendant is convicted under Florida Statute 782.04:

> . . . a person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole, unless the proceeding held to determine sentence according to the procedure set forth in Section 921.141 results in findings by the Court that such person shall be

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punished by death and in the latter event such person shall be punished by death.

3. Through passage of Florida Statute 775.082, the legislature has established a fixed penalty which totally eliminates judicial discretion, and in so doing has violated the Constitutional requirement of separation of powers between the legislative and judicial branches of the government. The separation of powers doctrine is also violated by the fact that the legislature has failed to pass sufficiently definite legislation defining those factors which authorize imposition of the death pnelaty. The definitions of the terms set forth in Section 921.141 have been improperly and unconstitutionally provided by the Supreme Court of Florida, primarily in State v. Dixon, 283 So.2d 1 (Fla. 1973).

4. Florida Statute 921.141, which provides the procedures to be followed in determining when the death penalty is appropriate, is unconstitutional on its face, and as applied herein in that said legislation violates the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 9 and 17 of the Constitution of the State of Florida. In support of this conclusion, the defendant would allege:

(a) The aggravating circumstances as enumerated in Florida Statute Section 921.141 are impermissibly vague and overbroad to wit:

(i) The capital felony was committed by a person under sentence

of imprisonment.

This factor does not inform the accused whether such sentence is civil or criminal in nature; or whether the accused must be in custody at the time; or whether said sentence has been suspended; or the accused is an escapee. It further fails to specify whether the imprisonment is based on violent or non-violent conduct.

(ii) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

This circumstance fails to precisely set forth those specific prior crimes which would qualify hereunder though such specifics could be easily spelled out; fails to distinguish how "previous" such other conviction must be; it does not distinguish between those arising out of the same criminal episode and others, those for which a sentence has been served or those which are pending in the appellate courts; fails to specify if the use or threat of violence must be an essential element of the previous felony or whether such violence or threat thereof was a fact of the case.

(iii) The defendant knowingly created a great risk of death to many persons.

This circumstance fails to set forth any ascertainable standard to define terms contained therein, such as "great" and "many." The clear and ordinary meaning of these terms is at best and by definition ambiguous.

(iv) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, a flight after committing or attempting any

robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

This circumstance, on its face, through its incorporation of accomplice, attempt, flight after crime, flight after attempt includes such a broad range of conduct when interpreted with existing law controlling attempts, accomplice, and flight that the most insignificant involvement by an individual would subject him to the death penalty. The offenses specified herein by their very definition contain elements set forth in other aggravating circumstances under Florida Statute Section 921.141. As such, one course of conduct by the accused could easily establish at least two aggravating circumstances. The alleged facts of the instant case demonstrate how the evidence as to one particular criminal episode would serve not only as the basis for a conviction but also to establish at least two aggravating circumstances.

(v) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

The broad, generally ambiguous meaning of such terms as "disrupt", "hinder", "lawful exercise", and "governmental functions" encompass so many varied activities that an accused could not possibly know what conduct would subject him to the ultimate punishment anticipated under this statute.

(viii) The capital felony was especially heinous, atrocious and cruel.

Capital felonies by their very nature would appear to

satisfy this requirement. Criminal activity such as premeditated murder and child rape were found by the legislature to be of an unusually serious nature based on penalty to be imposed upon conviction. Proof of the crime itself, which of course is a pre-condition to the application of these circumstances, might satisfy this requirement in the minds of the laymen jurors who seldom, if ever, deal with such crime as premeditated murder or child rape. The application of this circumstance would vary with the personal values of the individuals applying it and as such, reasonable, consistent and equal application thereof if impossible.

(ix) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

This circumstance clearly is unconstitutional under the dictates of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), by requiring mandatory imposition of death unless the accused has mitigating circumstances to present, to wit: The only homicide which is a capital felony is first-degree murder -- first-degree murder requires proof of premeditated design to effect the death of another human being, even where such intent is supplied by proof of felony murder.

By definition, first-degree murder must be committed in a premeditated manner -- by definition, first-degree murder is without moral or legal justification. The law presumes that death is the appropriate penalty where one aggravating circumstance exists in the absence of mitigating circumstances.

The logical, unconstitutional result hereof of first-degree murder is that the defendant must be sentenced to death unless the defense proves otherwise.

(b) The mitigating circumstances as enumerated in Florida Statute Section 921.141 are unconstitutional in that the factors to be considered are limited by said statute; in light of Lockett v. Ohio, 98 S.Ct. 2964 (1978), where in the United States Supreme Court required that the defendant be allowed to present all evidence relevant to the mitigating of sentence.

(c) Florida Statute Section 921.141 is unconstitutional on its face in that the State of Florida is unable to justify the death penalty as the least restrictive means available to further a compelling state interest, as is required by Roe v. Wade, 410 U.S. 113 (1973) where a fundamental right such as life is involved.

5. Florida Statute Section 921.141 is unconstitutional as applied and therefore violative of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution, in that:

(a) The prosecution has absolute discretion as to whether to seek the death penalty.

(b) The evidence presented as mitigating circumstances will vary greatly depending on the particular judge, prosecutor and defense in each case.

(c) The evidence presented as mitigating circumstances will vary greatly depending on the particular judge, prosecutor

and defense in each case.

(d) The jury recommendation will vary greatly depending on particular jury members, judge, prosecutor and defense counsel in each case.

(e) The alternate sentence imposed will vary depending on the particular judge in each particular case.

(f) The imposition of sentence will vary, depending on particular make-up of the reviewing court and Governor of the State of Florida and his cabinet at the time sentence is to be carried out.

(g) All who are involved in the process of such a conviction and sentence are human beings with necessary human frailties; their respective educations, titles, and political power does not endow them with any special insight to set judgment on the life of another human being.

6. The standard contained in Section 921.141 that mitigating factors must outweigh the statutory aggravating factors denies due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, 16 and 22 of the Florida Constitution. That standard is impermissbly vague, it shifts the burden to the defendant, and violates the Eighth Amendment by imposing an indefinite standard which allows arbitrary and capricious imposition of the death penalty.

WHEREFORE, based on the pleadings herein, the facts and law as alleged herein, and the law of the State of Florida as it

presently exists, the defendant respectfully requests that this Honorable Court declare Florida Statutes Section 775.082(1) and Section 921.141 unconstitutional.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

HOWARD PEARL
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 62045
410 St. Johns, Room 126
Palatka, Fla. 32077

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered to the Office of State Attorney John Tanner, Putnam County Courthouse, Palatka, Fla. on this 7 day of March, 1991.

HOWARD PEARL
ASSISTANT PUBLIC DEFENDER

No. _____

IN THE

Supreme Court of the United States

RANDALL SCOTT JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix H

Motion for Use of Special Verdict Form Specifying Jury's Consideration of Statutory Aggravating Circumstance(s) and Statutory and Non-Statutory Mitigating Circumstances. Circuit Court Case No. 87-001695-CF-M (March 7, 1991).

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
PUTNAM COUNTY, FLORIDA

CASE NO. 87-1695

STATE OF FLORIDA,

Plaintiff,

vs.

RANDALL SCOTT JONES,

Defendant.

MOTION FOR USE OF SPECIAL VERDICT FORM
SPECIFYING JURY'S CONSIDERATION OF STATUTORY
AGGRAVATING CIRCUMSTANCE(S) AND STATUTORY
AND NON-STATUTORY MITIGATING CIRCUMSTANCE(S)

The Defendant, by and through the undersigned, hereby moves this Court to require the jury, during the penalty phase, to use a special verdict form specifying which statutory aggravating circumstance(s) and statutory and non-statutory mitigating circumstance(s) were found and considered by them in rendering its sentencing recommendation, and in support thereof respectfully states the following:

1. The Defendant is guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 22 of the Florida Constitution to unanimous determination of all essential elements of the offense for which he is to be punished. Mullaney v. Wilbur, 421 U.S. 685 (1975); In re: Winship, 397 U.S. 358 (1970); Duncan v. Louisiana,

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391 U.S. 145 (1969); Patterson v. New York, 432 U.S. 197 (1977); Williams v. State, 386 So.2d 538 (1980).

2. In Hildwin v. Florida, 109 S.Ct. 2055 (1989), the United States Supreme Court held that the Sixth Amendment does not require the jury to unanimously determine the existence of statutory aggravating factors as elements of the offense for which a defendant is to be punished. The Defendant respectfully submits that, notwithstanding Hildwin, considerations of Due Process under the Fifth Amendment and the Constitution of Florida requires that the jury unanimously find the existence of each statutory aggravating factor before it may be used to impose the death penalty. See State v. Overfelt, 457 So.2d 1385 (Fla. 1984); But see, Hildwin v. State, 531 So.2d 124 (Fla. 1988), affirmed, 109 S.Ct. 2055 (1989); Provenzano v. State 497 So.2d 1177 (Fla. 1986). The failure to ensure and to provide a vehicle whereby it can be verified that each aggravating factor is found by the jury beyond and to the exclusion of every reasonable doubt, which implicates considerations of unanimity, before an aggravating factor is used to recommend the death penalty, denies the defendant Due Process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution.

3. Imposition of the death penalty in an arbitrary and capricious manner violates the Eighth Amendment to the United States Constitution and Article 1, Section 17 of the Florida Constitution. The failure of the jury to articulate what it used

in issuing its recommendation to the court deprives the sentencer and the reviewing courts of the ability to meaningfully review the propriety of imposition of the death penalty and/or to intelligently apply a harmless error test. The consequences of error are decided by reviewing courts through sheer speculation and conjecture, which results in arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment and Article 1, Section 16 of the Florida Constitution. See Burch v. State, 522 So.2d 810, 815 (Fla. 1988) (Shaw, Ehrlich and Grimes, JJ. dissenting); Combs v. State, 525 So.2d 853, 858-60 (1988) (Shaw, J., dissenting). The inability of the reviewing court to accurately review what factors the jury use in issuing the recommendation to this Court results in arbitrary, capricious and inconsistent imposition of the death penalty.

4. Use of a special verdict form whereby the jury would affirmatively list each statutory aggravating factor and each statutory and non-statutory mitigating factor that it considered in recommending its sentence, be it a recommendation of life or death, affords the minimum criteria needed to meaningfully review a case to determine consistency in application of the death penalty, consequences of error that occurred at trial or during the penalty phase, and further serves to clarify to the jury that it may consider only statutory aggravating factors to recommend death, but may consider statutory and non-statutory factors to recommend imposition of a life sentence.

WHEREFORE, this Court is respectfully requested to permit a special verdict form to be used by the jury whereby the statutory aggravating factors and statutory and non-statutory mitigating factors used by them to recommend the sentence in this case can be specified.

Respectfully submitted,
JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

HOWARD PEARL
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 62045
410 St. Johns, Room 126
Palatka, Fla. 32077

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered to the Office of State Attorney John Tanner, Putnam County Courthouse, Palatka, Fla. on this 7 day of March, 1991.

HOWARD PEARL
ASSISTANT PUBLIC DEFENDER

No. _____

IN THE

Supreme Court of the United States

RANDALL SCOTT JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix I

Motion to Prohibit Any Reference to the Advisory Role of the Jury.
Circuit Court Case No. 87-001695-CF-M (March 7, 1991).

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
PUTNAM COUNTY, FLORIDA

CASE NO. 87-1695

STATE OF FLORIDA,

Plaintiff,

vs.

RANDALL SCOTT JONES,

Defendant.

91 MAR 7 P4:06

FILED AND RECORDED
IN PUBLIC RECORDS
OF PUTNAM COUNTY, FLA.

MOTION TO PROHIBIT ANY REFERENCE
TO THE ADVISORY ROLE OF THE JURY

Defendant, by and through the undersigned counsel, respectfully requests this Honorable Court to prohibit any reference to the advisory role of the jury. As grounds, he would state:

1. The United States Supreme Court has stated:

> It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 2639 (1985).

2. The Eleventh Circuit Court of Appeals held that the Caldwell rationale applies to Florida's sentencing scheme. Mann

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v. Dugger, 817 F.2d 1471 reh'g granted and opinion vacated, 828 F.2d 1498 (11th Cir. 1987) and Adams v. Wainwright, 804 F.2d 1526, 1529-1530 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987). The court in Adams granted a petition for writ of habeas corpus, despite the lack of objection. 804 F.2d at 1530-1531. Defendant concedes that the Florida Supreme Court has previously ruled that Caldwell is not applicable in Florida. Combs v. State, 525 So.2d 853 (Fla. 1988).

3. Reference to the advisory role of the jury would deny the Defendant due process of law and a fair trial pursuant to Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, the Defendant, respectfully requests this Honorable Court to issue its order prohibiting any reference to the advisory role of the jury.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

HOWARD PEARL
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 62045
410 St. Johns, Room 126
Palatka, Fla. 32077

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Appendix J

Order of the Florida Supreme Court directing the Appellant to show cause as to why the trial court's order denying *Hurst* relief should not be affirmed in light of *Hitchcock v. State*. *Jones v. State*, Appeal No. SC18-1098 (September 18, 2018).

Filing # 78059973 E-Filed 09/18/2018 02:06:51 PM

Supreme Court of Florida

TUESDAY, SEPTEMBER 18, 2018

CASE NO.: SC18-1098
Lower Tribunal No(s).:
541987CF001695CFAXMX

RANDALL SCOTT JONES vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant shall show cause on or before Monday, October 8, 2018, why the trial court's order should not be affirmed in light of this Court's decision in *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017). The response shall be limited to no more than 20 pages. Appellee may file a reply on or before Tuesday, October 23, 2018, limited to no more than 15 pages. Appellant may file a reply to the Appellee's reply on or before Friday, November 2, 2018, limited to no more than 10 pages.

Motions for extensions of time will not be considered unless due to a medical emergency.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

cd
Served:

MARIA CHRISTINE PERINETTI
LISA MARIE BORT
ADRIENNE JOY SHEPHERD
LISA MARTIN