IN THE SUPREME COURT OF FLORIDA

JESSIE JAMES LIVINGSTON,

Appellant,

v.

CASE NO. 68,323

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR TAYLOR COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

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_____	:	

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Jessie James Livingston is the appellant in this capital case. The record on appeal consists of 15 volumes, and references to volumes 1-5 will be indicated by the letter "R." References to the remaining volumes will be indicated by the letter "T."

II STATEMENT OF THE CASE

By way of two informations filed in the Circuit Court for Taylor County on February 21, 1985 and March 13, 1985, the state charged Jessie James Livingston with one count of burglary of a structure, one count of grand theft, one count of grand theft of a pistol, one count of trafficking in stolen merchandise, one count of robbery and two counts of attempted first-degree murder (R 1,2,10). Because Livingston was a juvenile when charged with these crimes, the court ordered that the state try him as an adult (R 750-751).

Subsequently, the state filed a nolle prosoque for the robbery and attempted first-degree murder charges (R 66), and the grand jury filed an indictment for robbery with a firearm, attempted first-degree murder, first-degree murder, and display of a pistol during the course of a robbery (R 30-31). The state then filed a motion to consolidate the indictment and information (R 75) which the court granted (R 79). Livingston and the state each filed several other motions, but they are not relevant to this appeal. Livingston, however, did file a motion to change venue or to dismiss the murder charge (R 147) which the court denied (R 743).

Livingston proceeded to trial before the Honorable Wallace Jopling, and after hearing the evidence, arguments, and the law, the jury found Livingston guilty as charged on all offenses (T 1091-1092).

During the subsequent penalty phase of his trial, Livingston presented mitigating evidence, and after hearing this evidence,

argument, and the law, the jury returned the recommendation of death by a vote of 7 to 5 (T 1179).

Accordingly, the court sentenced Livingston to death. In aggravation, the court found the following factors:

> 1. That at the time of the crime for which he is to be sentenced the defendant had been previously convicted of another capital offense or felony involving the use of, or threat of violence to some person.
>
> 2. That the crimes for which the defendant is to be sentenced were committed while the defendant was engaged in the commission of, or an attempt to, commit any robbery, involuntary sexual battery, arson, burglary, kidnapping, or aircraft priacy, or the unlawful throwing, placing or discharging of a destructive device or bomb.
>
> 3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(R 798-802).

In mitigation, the court found:

> 1. The age of the defendant at the time of the crime (17).
>
> 2. That the defendant was reared in a home without a father and/or strong disciplinary authority. That his home life was unhappy and disruptive and that he was subjected to unwholesome activity and mistreatment by his mother's boy friends and others.

(R 802-804).

In addition, the court sentenced Livingston as follows for the other crimes for which he was convicted:

> COUNT II Attempted Murder of Willie Mae Evans, that you be sentenced to imprisonment for LIFE to run consecutive to the imposition of the sentence in Count I above [murder in the first degree].

COUNT III for robbery while armed with a firearm that you be sentenced to LIFE imprisonment to run consecutively to the sentence in Count II above.

COUNT IV for display of a firearm during the commission of a felony you are sentenced to ten (10) years imprisonment to run consecutively to the sentences imposed in Counts II and III above.

SENTENCE AS TO CASE 85-32-CF

COUNT I burglary of a dwelling; you are sentenced to ten (10) years imprisonment to run concurrent with sentences imposed in Case 85-56-CF.

COUNT II grand theft in second degree, you are sentenced to five (5) years imprisonment to run concurrent with the sentence in Count I above.

COUNT III grand theft in second degree; you are sentenced to five (5) years imprisonment to run concurrent with the sentence imposed in Counts I and II in Case 85-32-CF.

The recommended guideline sentence was 22-27 years (R 807). In support of its departure from the recommended guideline scoresheet, the court found:

1. The Defendant's contemporaneous conviction for a capital felony was not scored on the Guidelines Score Sheet.

2. The Defendant utilized excessive force in the commission of the robbery for which he was convicted.

3. The crimes for which the defendant was convicted involved the use of a weapon (a firearm).

4. Threats of death were made against the victim, Millie Mae Evans, a sixty-eight year old woman.

5. The crimes committed by this Defendant showed an utter disregard for human life.

6. The Defendant's recent release from a juvenile detention facility and his failure

to successfully complete alternative treatment programs (Community Control) is grounds for departure.

7. The recommended Guideline sentence is deemed inadequate for rehabilitation or deterrence and/or the Defendant is not amenable to rehabilitation.

8. The pattern of new crimes committed by this Defendant is one of escalating violent criminal activity.

(R 819-820).

This appeal follows.

II STATEMENT OF THE FACTS

About noon on February 18, 1985, 17 year old (T 50) Jessie Livingston broke into a residence in Perry, Florida and stole some jewelry, cameras, and a pistol (T 624-628, 815). About 8:00 p.m. that evening, Livingston entered a SuperTest gas station in Perry to rob the clerk (T 787). He told Irene Hill, the clerk, to give him some money, but she bent over behind the counter and Livingston shot her (T 787). He then shot her again. Millie Evans was a friend of Ms. Hill's who helped her occasionally at the store (T 669), and while Livingston was in the front, she was in a little room in the back of the store (T 673). She heard the two shots, and then she heard Livingston say, "Now, I'm going to get the one in the back" (T 674). He shot at Ms. Evans, but she closed the door to the room, and the bullet missed her (T 675).

Livingston took the cash register and left the store (T 787). Unable to open the cash register, he threw it in a dumpster (T 789), and threw the gun underneath an air conditioning vent

of a local club (T 790).

Livingston went to Terry Baker's house which was about two or three blocks from the SuperTest store (T 707). He told Baker (who was an acquantance (T 703)) that he had shot Ms. Hill and needed help opening the cash register (T 708). Not believing Livingston, Baker went to a neighbor's house, and the neighbor said that he had heard an ambulance and police car go by minutes before (T 710). Somebody called the police, and within minutes they arrived at Baker's house (T 756). Livingston was arrested and returned to the SuperTest store where Ms. Evans identified Livingston as her assailant (T 677-678).

The police took Livingston to the police station, and after reading him his Miranda rights (which he waived) (T 785), Livingston gave a detailed confession (T 787-797).[1]

Ms. Hill was flown to the Tallahassee (T 735, 847), where she died six weeks later (T 855). The cause of death was a gunshot wound to the head (T 947).

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[1] Livingston also gave a statement to a juvenile case worker with the Department of Health and Rehabilitative Services (T 418), but the court excluded that statement because it was not freely and voluntarily given (T 923).

IV SUMMARY OF ARGUMENT

This is a capital case in which the trial court granted the state's motion to consolidate a burglary and theft criminal episode with the murder, attempted murder, robbery, and dangerous display of a weapon episode. This was error as the two criminal transactions were not connected in any episodic manner. They also had no temporal, geographic or other significant connections that would have justified consolidation. The only link these two episodes have is that the gun Livingston used in the robbery-murder was stolen during the earlier burglary. (Livingston also was wearing some stolen jewelry when he was arrested).

During trial, the court limited Livingston's ability to cross-examine Terry Baker, a key witness for the state, concerning charges that were then currently pending against him. Livingston should have been able to do this to demonstrate Baker's possible bias in testifying as he did.

The court also erred in allowing an investigator Robertson to testify about Baker's prior consistent statement even though the court had prevented Livingston from challenging Baker's motive to lie or recent fabrication of the trial testimony.

In sentencing Livingston to death, the court found that this murder was committed to avoid lawful arrest. The murder victim, however, was not a policeman, and the state has failed

to carry its heavy burden showing that the dominant reason for committing the murder was to avoid lawful arrest. What Livingston said or did after this murder does not support this aggravating factor.

At the time Livingston committed this murder, he was 17 years old. This mitigating factor when coupled with his disastrous childhood are strong mitigating factors. They are especially strong in light of the fact that the only remaining aggravating factors that the trial court found inhered in the nature of the crime Livingston committed and are not particularly strong.

In addition to the sentence of death, the court departed from the recommended guideline sentence of 17 to 22 years, and it imposed two consecutive life sentences and a consecutive 10 year sentence as well as a concurrent 10 year sentence. The court gave six reasons for justifying this departure. None of these reasons, however, withstand scrutiny.

V ARGUMENT

ISSUE I

THE COURT ERRED IN CONSOLIDATING THE INFORMATION CHARGING LIVINGSTON WITH BURGLARY AND GRAND THEFT WITH THE INDICTMENT CHARGING LIVINGSTON WITH MURDER, ATTEMPTED MURDER, ROBBERY, AND DISPLAY OF A FIREARM DURING THE COURSE OF A FELONY, IN VIOLATION OF RULE 3.151, FLORIDA RULES OF APPELLATE PROCEDURE.

About noon on February 18, 1985, Livingston broke into the house of a T. A. Jackson and stole some jewelry, two cameras, and a .38 calibre pistol (T 628-630). Eight hours later and about one mile away (T 11), Livingston used the gun he had stolen from Jackson's home to shoot Ms. Hill (T 820-821). He also wore some of the stolen jewelry when arrested (T 810, 815). Based upon these facts, the court, upon a state motion to consolidate (R 75), ordered the indictment charging Livingston with murder, attempted murder, robbery, and display of a firearm during the course of a felony to be consolidated with the information charging Livingston with committing a burglary, theft of jewelry, theft of a firearm, and trafficking in stolen property (R 79). The court erred as a matter of law as the counts charged in the information and indictment were not based on the same act or transaction, nor were they based on two or more connected acts or transactions.

Rule 3.151, Florida Rules of Appellate Procedure.

Two or more offenses are related (and thereby eligible to be tried together) if:

> 1. They are triable in the same court.
>
> 2. They are based on the same act or transaction or on two or more connecting acts or transactions.

Rule 3.151(a), Floria Rules of Criminal Procedure

Clarifying this relationship requirement, this Court adopted Judge Smith's dissenting opinion in Paul v. State, 365 So.2d 1063 (Fla. 1st DCA 1979) in its opinion in Paul v. State, 385 So.2d 1371 (Fla. 1980):

> I conceive that consolidation rule 3.151 and its counterpart, joinder rule 3.150, refer to "connected acts or transactions" in an episodic sense, and that the rules do not warrant joinder or consolidation of criminal charges based on similar but separate episodes, separated in time, which are "connected" only by similar circumstances and the accused's alleged guilt in both or all instances. Contrast Hall v. State, 66 So.2d 863 (Fla. 1953).

In Paul, the first victim was attacked as she left the shower room of a dormitory on the FAMU campus. Almost a month later, two other victims were attacked in the shower areas of two other dormitorys on the FAMU campus. Each attack occurred about 5:00 a.m. on an upper floor of the girl's dormitory, and the threats used and actions taken towards each victim were similar. On review, this Court's quashed the opinion of the First District Court of Appeal which affirmed the trial court's order consolidating the three offenses. These offenses were not sufficiently connected to justify consolidation.

The purpose underlying Rules 3.151 and 3.150 that require

separate trials for unrelated offenses is to assure that the evidence submitted to prove one charge will not be used to dispel doubt on other charges. State v. Williams, 453 So.2d 824 (Fla. 1984). Not only is a person presumed innocent of all charges, but the state must prove a defendant guilty beyond a reasonable doubt for every offense charged. Some sort of nebulous cumulative or collective guilt will not do. Taylor v. State, 455 So.2d 562 (Fla. 1st DCA 1984).

A key fact in determining whether two or more criminal acts are connected is their relation in time. Paul v. State, 385 So.2d 1371 (Fla. 1980). The closer they are in time the greater the likelihood consolidation is justified. For example, in Green v. State, 408 So.2d 1086 (Fla. 1982) the state charged Green in one indictment with committing a murder and an aggravated assault. Only seconds separated the two crimes. In Rogers v. State, 325 So.2d 48 (Fla. 2d DCA 1975), Rogers committed an armed robbery, and in the course of escaping, he committed a burglary, assaults, kidnappings, and other crimes. In both cases, the courts justified consolidation because the evidence necessary to prove each crime would have been the same if the offenses had been charged separately. Zeigler v. State, 402 So.2d 365 (Fla. 1981). To have proven one offense would have necessarily proven the others as the evidence of one crime was intertwined with the evidence of the others. Dedmon v. State, 400 So.2d 1042 (Fla. 1st DCA 1981).

On the other hand, in cases like Paul, supra, a separation of several hours is fatal to consolidation when discrete

crimes are involved. Harris v. State, 414 So.2d 557 (Fla. 3d DCA 1982), McMullen v. State, 405 So.2d 479 (Fla. 3d DCA 1981).

Other factors besides time, however, are important. In Bundy v. State, 455 So.2d 330 (Fla. 1984), this Court considered the temporal and geographical association, the nature of the crimes, and the manner in which the crimes were committed. In that case, the crimes were similar in that a person entered the off-campus residence of female FSU students and beat young, white women as they slept. The beatings occurred within blocks and hours of each other. In contrast to the facts in Paul, the crimes in Bundy were episodic because of their close temporal and geographic proximity, and they involved similar methods of operation.

In this case, we have none of the similarities of Paul or Bundy and there is no episodic connection between the residential burglary and the murder.

Crimes charged in this case certainly lack the relationship the crimes in Bundy shared, and they also lack the similarity that the crimes in Paul had. Here, we have a residential burglary and thefts occurring several hours before and a mile away from where the murder, attempted murder, and robbery occurred. These crimes were not part of the same episode, but were completed incidents that were distinctive and separate from the robbery-murder. The crimes not only were of a different nature, they were committed differently.

That is, the burglary was committed while Jackson was away from his home. The robbery-murder, on the other hand, obviously involved a confrontation.

In short, the two incidents are not intertwined so that to have proven the burglary-theft would have necessarily proven or tended to have proven the robbery-murder. Dedmon v. State, 400 So.2d 1042 (Fla. 1st DCA 1981). The only link between these crimes was the gun. It was taken from Jackson's house, and it was used in the robbery and killing. Livingston can perceive no relevance that the burglary may have had to the robbery-murder and dangerous display of a weapon incident. It tended to prove no essential element of any of those crimes, Section 90.401, Florida Statutes (1983), nor did it place the robbery transaction in context. Smith v. State, 365 So.2d 704 (Fla. 1978). All it did was show Livingston criminal propensity without advancing the state's case against Livingston. C.f. Styles v. State, 384 So.2d 703 (Fla. 2d DCA 1980).

The court, therefore, erred as a matter of law in joining these two episodes as they were not part of the same transaction as required by Rule 3.151, Florida Rules of Criminal Procedure. The court's misjoinder, moreover, was not the discretionary type authorized by Rule 3.152, Florida Rules of Criminal Procedure, and because the trial court erred as a matter of law, and severance was required, prejudice is conclusively presumed and reversal is mandated. Macklin

v. State, 395 So.2d 1219 (Fla. 3d DCA 1981); Puhl v. State, 426 So.2d 1226 (Fla. 4th DCA 1983). (The weight of authority in Florida as well as in federal jurisdictions is that the harmless error doctrine is inapplicable to the improper joinder of offenses.)

ISSUE II

THE COURT ERRED IN LIMITING THE CROSS-EXAMINATION OF TERRY BAKER, ONE OF THE STATE'S KEY WITNESSES, REGARDING A PENDING CHARGE THE STATE HAD FILED AGAINST HIM.

Terry Baker is the first person Livingston spoke to after the robbery-murder, and Baker claimed that he told him that he had shot Ms. Hill, tried to kill Ms. Evans, and had taken the cash register from the store (T 708). He was also present when Ms. Evans identified Livingston (T 712).

On cross-examination, Livingston attacked Baker's general credibility by bringing out his prior convictions. The court, however, prevented him from developing any specific reason that Baker might have to lie or slant what happened that night (T 715).

BY MR. HUNT:

Q Mr. Baker, have you ever been convicted of a crime?

A Yeah.

Q How many times?

A Couple times, like fighting and all type stuff like that.

A You've got a case pending against you at this time, don't you?

> MR. BEAN: Your Honor, I'll object to that. That's clearly improper, in the first place.

(T 715).

The court sustained the state's objection, but in doing so, it denied Livingston effective cross-examination of a key witness. Watts v. State, 450 So.2d 265 (Fla. 2d DCA 1984).

It is fundamental to our system of justice that Livingston be able to confront his accusers. Pointer v. Texas, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965). Typically, this constitutional guarantee finds expression through the defense cross-examination of witnesses, Davis v. Alaska, 15 U.S. 309, 315, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1974).

This cross-examination can go beyond the facts elicited on direct examination. Brown v. State, 424 So.2d 950 (Fla. 1st DCA 1983). The inquiry can go to show matters tending to show bias or prejudice even though they may not have been mentioned on direct examination. Id. This is especially true in a case like this where witness credibility is a key issue, and it is possible that the state witness may have had a motive to lie. Taylor v. State, 455 So.2d 562 (Fla. 1st DCA 1984).

Here, the court limited Livingston's right to bring out the possibility that Baker may have had a motive to lie because he had a pending charge against him. Impeachment of a witness concerning a fact that he may expect leniency in another criminal action (such as sentencing) if he pleases

the state with favorable testimony in this case is permissible impeachment as it exposes the possibility of the witness' bias or motive for testifying other than to tell the truth. Watts v. State, 450 So.2d 265 (Fla. 2d DCA 1984); Garey v. State, 432 So.2d 796 (Fla. 4th DCA 1983).

In this case, the court evidently believed that a witness can be impeached by his criminal record only if that record involved felony convictions (T 716). Arrests or any other pending action cannot be used to impeach a witness.

As a general rule, that is correct. The exception occurs when the witness has some pending, current, criminal action. In that situation, there is a real possibility that the witness may testify to please the state; by doing so, curry its favor for his own benefit. Watts, supra. In such a case, a party may impeach that witness by inquiring about any pending criminal action against him.

Consequently, the trial court unconstitutionally deprived Livingston of his right to effective cross-examination of Baker, and this Court should reverse for a new trial because of that error.

ISSUE III

THE COURT ERRED IN ADMITTING THE PRIOR INCONSISTANT STATEMENT OF TERRY BAKER THAT LIVINGSTON ADMITTED COMMITTING THE MURDER.

During the state's examination of Investigator James Robertson of the Perry Police Department, the state asked him about certain hearsay statements that Terry Baker

allegedly made at the time of Livingston's arrest (T 773):

> Q And next?
>
> A While he was handcuffing Livingston, I went back over to Terry Baker and asked him how do you know he's the one that robbed the Super Test station. Terry Baker at that time --
>
> MR. HUNT: Objection, hearsay. He's going to testify to what Baker told him

(T 773).

Livingston objected on the grounds that this hearsay was a prior consistent statement and inadmissible (T 774-775). The court acknowledged that Baker's statement was a prior consistent statement, but it was nevertheless admissible because it rebutted Livingston's allegation of recent fabrication, motive, or improper influence (T 775). The problem is that Livingston had never made such an allegation; to the contrary, the court prohibited him from pursuing any possibility that Baker had a motive to lie. See Issue II.

The problem with this particular type of testimony is that it put a "cloak of credibility" upon Baker's statement. Van Gallon v. State, 50 So.2d 882 (Fla. 1951); Brown v. State, 344 So.2d 641 (Fla. 2d DCA 1977). When Officer Robertson testified about Baker's statement, the jury was more apt to believe Baker's statement because Officer Robertson, as a disinterested policeman, was only investigating a crime. Consequently, the jury was especially likely to give Baker's testimony more weight than it deserved because of Officer Robertson's corroboration. Perez v. State, 371 So.2d 714

(Fla. 2d DCA 1979).

In Perez, a deputy testified that an eyewitness to a killing told him that Perez had shot him and his companions. Such testimony was inadmissible because it was consistent with and corroborated the eyewitness' testimony that he had given earlier. Accord, Lamb v. State, 357 So.2d 437 (Fla. 2d DCA 1978); Roti v. State, 334 So.2d 146 (Fla. 2d DCA 1976).

Here, of course, the state argued, and the court accepted, that Officer Robertson's testimony was to rebut a charge of recent fabrication by Livingston. But Livingston was never able to elicit from Baker any motive that he might have had to lie on the stand. He was, in fact, specifically prevented from inquiring about a pending charge against Baker. See Issue II.

In McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982), the state introduced, over defense objection, the prior consistent statement of McElveen's codefendant, Watt. On appeal, the First District Court of Appeal approved the admission of this testimony because defense counsel had emphasized that Watt had not been sentenced until just before trial and therefore had a bias to give favorable testimony for the state. The prior consistent statement rebutted that allegation.

Here, defense counsel specifically denied he was alleging that Baker's statement was a recent fabrication (T 775). Moreover, he also never alleged Baker had an improper motive

or was improperly influenced. The court, therefore, erred in permitting in permitting Robertson to testify about Baker's prior consistent statement.

ISSUE IV

THE COURT ERRED IN FINDING THAT LIVINGSTON COMMITTED THE MURDER FOR THE PURPOSE OF PREVENTING OR AVOIDING LAWFUL ARREST.

The court, in sentencing Livingston to death, said that he committed the murder for the purpose of avoiding or preventing a lawful arrest:

> The existence of this aggravating factor is established by the testimony and evidence beyond a reasonable doubt. The Defendant shot an unarmed female clerk as he was in the course of committing the armed robbery, he shot her the second time as she was falling to or on the floor. He then attempted to kill the other witness to the crime, and reportedly stated, "now I'm going to get the one in the back", or words to that effect. He did fire upon the other witness, Mrs. Evans, but she was able to escape by locking herself in the storeroom. This aggravating factor is applicable.

(R 800-801).

The facts of this case, however, do not justify this finding. In enacting Section 924.141, Florida Statutes (1982) the legislature intended that this factor apply primarily to killings of police officers. White v. State, 403 So.2d 331 (Fla. 1981). However, when a court finds this factor for killings involving persons other than policemen, this Court has also said that the dominant motive for the killing must be to avoid arrest, Mendendez v. State, 368 So.2d 1278

(Fla. 1979), and the proof of the killer's intent must be very strong. Riley v. State, 366 So.2d 19 (Fla. 1979). The mere fact that someone is dead does not support finding this aggravating factor. Id.

For example, in Menendez, supra, the victim was found lying on the floor of his jewelry store with his hands outstretched in a supplicating manner. Also, Menendez had murdered the victim with a gun which had a silencer on it. While these facts certainly suggest that Menendez committed the murder to avoid arrest, they nevertheless did not amount to the "very strong" evidence this Court said in Riley was required to support a finding of this factor.

Similarly, in this case, there is no evidence Hill begged for her life, and Livingston certainly did not use a silencer on his gun (T 658). Compared with other cases, the facts found by the court in this case are insufficient to meet the "very strong" evidence standard this Court has required. For example, Ms. Hill was not a policeman and Livingston did not bury her body. White v. State, 403 So.2d 331 (Fla. 1981). Neither is there any evidence that Ms. Hill knew of Livingston and could have later identified him. Riley v. State, 366 So.2d 19 (Fla. 1978); Blair v. State, 406 So.2d (Fla. 1981). Unlike Lightbourne v. State, 438 So.2d 380 (Fla. 1983), there is no evidence that Evans or Hill knew Livingston. In Lightbourne, Lightbourne admitted knowing the victim. Similarly, in Routly v. State, 440 So.2d 1257

(Fla. 1983), the victim knew Routly. In both instances the victim's prior knowledge of the defendant's identity supplied the strong evidence that the murders were committed to avoid lawful arrest. Here, there is no such evidence.

The murder itself was not an execution style killing, another indication that it may have been committed to avoid lawful arrest. Ferguson v. State, 417 So.2d 631 (Fla. 1982); Waterhouse v. State, 429 So.2d 301 (Fla. 1983). Livingston did not move the body, further evidence that he had no intent to hide the murder. Hiding the body in a remote area, far from where the victim was last seen, is strong evidence of intent to avoid lawful arrest. In Adams v. State, 412 So.2d 850 (Fla. 1982) the victim's body was hidden in a remote area and encased in a plastic bag. Likewise in Griffin v. State, 414 So.2d 1025 (Fla. 1982), Griffin killed his victim three miles from the store he had abducted him from. Accord, Martin v. State, 420 So.2d 583 (Fla. 1982).

What these foregoing cases suggest is that much more than a "hidden" body is needed to meet the "very strong" evidence standard. But if this evidence is insufficient then how can the state ever establish that a murder was committed to avoid lawful arrest?

Typically, the state carries this very heavy burden to prove this aggravating factor was the dominant motive of the killing by the use of someone's testimony. For example, one of the victim's of a murder scheme may have lived to

tell why the defendant killed another victim. Riley, supra; Francois v. State, 407 So.2d 885 (Fla. 1981). Or, a codefendant may have said that the defendant committed the murder to eliminate a witness. Griffin v. State, 414 So.2d 1025 (Fla. 1982), Stevens v. State, 419 So.2d 1058 (Fla. 1982), Martin v. State, 420 So.2d 583 (Fla. 1982), Bolender v. State, 422 So.2d 833 (Fla. 1982), Smith v. State, 424 So.2d 726 (Fla. 1982). Or, the defendant, by confessing, may have supplied the motive. Hitchcock v. State, 413 So.2d 741 (Fla. 1982), Elledge v. State, 408 So.2d 1021 (Fla. 1981), Ferguson v. State, 417 So.2d 631 (Fla. 1983).

In this case, the only statement Livingston made which the trial court found in support of this aggravating factor was, "Now I'm going to get the one in the back." That statement, however, is insufficient to show that Livingston killed Hill to avoid lawful arrest. In Griffin v. State, 474 So.2d (Fla. 1985), Griffin twice shot a clerk in a convenience store during an early morning robbery. Griffin told Stokes, a codefendant, that "I shot the cracker, the cracker is bleeding like a hog." This Court held that the statement, when combined with the spacing of the two shots, was insufficient to establish beyond a reasonable doubt, that Griffin committed the murder to avoid lawful arrest. Similarly, here, the evidence shows that Livingston fired two rapid shots at Hill, and their closeness and timing reflects more on the premeditated intent to kill than on Livingston's intent

to eliminate a witness. C.f. Griffin, supra. Livingston's statement also is similar to Griffin's in its ambiguity as to why he shot Hill. This is in contrast to the statement made by Herring in Herring v. State, 446 So.2d 1049 (Fla. 1984). In that case, Herring expressly said that he shot the victim a second time to prevent him from recognizing him. See also Waterhouse v. State, 429 So.2d 301 (Fla. 1983).

In this case, we have only an ambiguous statement of what Livingston intended to do after he shot Hill; we do not have the clear statement of intent as this Court had in Herring. That is, Livingston's statement shows that he may have intended to kill Evans to eliminate her as a witness, but that does not mean that is why he killed Hill.

Of course, circumstantial evidence can prove this factor, see Adams, supra, but again this evidence must be very strong in establishing that Livingston committed the murder to avoid-lawful arrest. In those cases that this Court has found this factor inapplicable it had done so because the evidence was circumstantial and inconclusive. For example, in Menendez, Menendez used a silencer on his gun to commit the murder. Moreover, the victim's body was found lying with its hands outstretched in a supplicating manner. Likewise, in Armstrong v. State, 399 So.2d 953 (Fla. 1981) and Enmund v. State, 399 So.2d 1362 (Fla. 1981) the equivocal nature of the pathologists' conclusions that the victims were laid out prone to "finish [them] off" was insufficient to find that

they were killed to prevent or avoid lawful arrest.

Similarly, here the circumstantial evidence was inconclusive. Livingston fired only one shot at Evans, and that as she closed a closet door. That fact is not clear evidence that he intended to kill Hill to eliminate her as a witness. That is, if Livingston shot Hill twice to eliminate her as a witness, surely he would have shot at Evans more than one time. Moreover, Livingston knew as he fled the store that Hill was alive because she did not finish closing the door until after Livingston fired his single shot. In Rembert v. State, 445 So.2d 337 (Fla. 1984), this Court said that Rembert did not commit the murder to avoid lawful arrest because he had left a third person alive when he left the store, and he knew that this person was alive when he left. The more prudent course for Rembert and Livingston would have been to have killed the other witnesses, yet neither did, and both knew that they had not. Accordingly, the state in this case has not established beyond a reasonable doubt that Livingston committed the murder of Hill solely to eliminate her as a witness, and logical inferences do not replace the state's burden. Clark v. State, 443 So.2d 973 (Fla. 1983).

ISSUE V

A SENTENCE OF DEATH IS TOO SEVERE A SANCTION FOR LIVINGSTON, WHO WAS 17 YEARS OLD WHEN HE COMMITTED THIS CRIME.

This Court has reduced several sentences of death to life in prison even though the jury recommended death and one or more valid aggravating factors were present. Ross v. State, 474 So.2d 1170 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Caruthers v. State, 465 So.2d 496 (Fla. 1985). Livingston's case falls within the rationale of these cases, and his death sentence should be reduced to life in prison without the opportunity of parole for 25 years. In Ross, this Court approved the trial court's finding that Ross killed his wife in an especially heinous, atrocious, and cruel manner. This Court, however, also said that the trial court had given insufficient consideration to the conflicting evidence of Ross' drunkeness on the night of the murder. In addition, the court found that Ross' lack of a history of prior violent criminal activity and his lack of a long period of reflection were significant, and Ross' sentence of death was reduced to life in prison.

In Caruthers, Caruthers robbed and killed a clerk at a convenience store. In sentencing Caruthers to death (in accordance with the jury recommendation of death), the trial court found that the murder:

> 1. Was committed while Caruthers was engaged in the commission of an armed robbery.

2. Was committed for the purpose of avoiding or preventing a lawful arrest.

3. Was committed in a cold, calculated, and premeditated manner.

In mitigation, the court found that Caruthers had no significant history of prior criminal activity.

On appeal, this Court rejected the factors that the murder was committed to avoid lawful arrest and that it was cold, calculated and premeditated. That holding left only one aggravating factor and that factor was part of the criminal transaction which included the murder. In addition, this Court considered the fact that Caruthers had drunk a considerable amount of beer while on a fishing trip on the day of the murder. Despite the jury's recommendation and the trial court's order, this Court reduced Caruther's sentence of death to life in prison.

In Rembert, Rembert, entered a bait and tackle shop, hit the elderly victim once or twice on the head, and stole $40 or $60 dollars from her. Rembert also had been drinking for part of the day. The jury recommended death, and the trial court sentenced Rembert to death. The court found in aggravation, that the murder was 1) a felony murder, 2) committed to avoid or prevent arrest, 3) heinous, atrocious and cruel, and 4) cold, calculated, and premeditated. The court found nothing in mitigation.

On appeal, this Court rejected three of those aggravating factors and affirmed only that the murder had been committed

during the course of a felony. This Court then reduced Rembert's death sentence to life in prison because nothing distinguished this murder from the norm of capital felonies.

Two common facts link these unusual cases. First, each defendant had been drinking something before they committed their murders. (In Ross, even though the evidence was conflicting on this point, this Court said that Ross had been drinking heavily immediately before committing the murder). Second, only one or two aggravating factors were present, and those tended to be inherent in the type of murder committed. For example, in Caruthers the only aggravating factor applicable was that Caruthers committed the murder while he was engaged in the commission of an armed robbery. In Rembert, a similar situation existed. In all cases, this Court gave more weight to the mitigating evidence than the trial court had done, and in comparison to other capital murders, these men did not merit execution. A similar result should be reached in this case.

As argued elsewhere, Livingston did not commit this murder to avoid lawful arrest. (See Issue IV). If this is true, then the only aggravating factors applicable are that the murder was committed during the course of a robbery, and Livingston has a conviction for prior violent felony, i.e., the robbery which was part of this robbery-murder. The murder was not especially heinous, atrocious or cruel, cold, calculated or premeditated, nor was it in

any other way distinguishable from the norm of capital felonies. It was, unfortunately, a classic felony-murder. Rembert at 340. The two aggravating factors that the court found, therefore, carry little weight as by themselves, they do not set this murder apart from the norm of capital felonies for which death is not appropriate. This is especially true in light of Livingston's youth and background.

Of course, everyone has an age, but not everyone is young, and with youth goes inexperience, immaturity and a general inability to foresee consequences. Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982). In Livingston's case, his youth is an overwhelming mitigating factor because by the time he was 17, Livingston had obviously never had the love or discipline that may have steered him away from his crimes.

Perhaps fortunately, Livingston never had any close contact with his father as his father had been sentenced to prison for committing a murder. Livingston v. State, 383 So.2d 947 (Fla. 2d DCA 1980); Livingston v. State, 415 So.2d 872 (Fla. 2d DCA 1982). Instead, Livingston saw a steady stream of live-in boyfriends that his mother brought home; some were better than others (T 1123-1126), yet one in particular, a Jimmy Williams, took a perverse pleasure in beating Livingston (T 1126-1128). Until Williams' appearance, Livingston was earning A's and B's in school (T 1129). After Williams' appearance, Livingston failed fifth grade (T 1159).

Williams would knock Livingston about and whip him (T 1127), and this boy had more than scars on his body (T 1127); mentally he had changed (T 1128).

His mother (who also was the mother of 12 other children which Livingston was the youngest (T 1119)) never exercized any control over Livingston. In 1970 (when Livingston was only three years old), she became very ill and apparently never regained her health. She died in 1985 while Livingston was in jail awaiting trial for these crimes (T 61). No one taught Livingston values, no one loved this boy.

In contrast, Joe Reiter, President of the Florida Bar, had a similar background, yet he obviously turned out differently.

> Joseph J. Reiter was born under the "el" in a near-Northside Chicago slum tenement 45 years ago. He was brought into the world by an Irish midwife, the eighth of ten children. His mother emigrated from Ireland with only a second grade education. His father was a laborer, often absent from the home.
>
> "We had nothing, my friend," Joe recalls with a tired smile. "Absolutely nothing. My mother worked in kitchens to try to feed the kids. We were poor, but never on welfare." He spent most of his first two years in an orphanage, under the care of the Sisters of St. Vincent's. The state wanted to put the Reiter children in foster homes, but his mother wouldn't allow it. She accepted help from the Catholic Church, though, and in time brought all the children back home.
>
> With his mother working and his father away from the family, Reiter was brought up largely by his brothers and sisters. He spent a lot of time on his own, a lot

of time on the streets of Chicago.

Florida Bar Journal, July/August 1986, pp. 10-11.

Nothing? Reiter had everything, everything that mattered. He had a mother and father who loved him and who fought to keep their family together. People cared about him. He had values.

> When he got out of the Army he went back to Chicago. He knew the only way out of poverty was education and hard work. "I had that beaten into me at home. My parents pounded in education like the sisters pounded in 'You don't steal' at the academy. I knew I had to get an education."

Id. at p. 11).

The only thing beaten at the Livingston's home was Livingston. Livingston had nothing; he had no father, his mother's broken health prevented her from raising her son,[1] and Livingston had no one that could "pound" values into him like Reiter's parents and teachers did.

Livingston ran wild and his inevitable criminal activity (for burglaries) (R 762), brought him in contact with others like him. Incarcertated at the usual detention center, the inevitable fights broke out (R 762), and except for this fighting in institutions, Livingston has no violent criminal history. Ross, supra. Livingston's youth thus summarizes the inexperience and lack of time that he had to outgrow or overcome his disastrous childhood.

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[1] Livingston said that he had $90 a day cocaine and marijuana habit. His mother, however, did not think it was that expensive (R 764).

In other cases involving juveniles, this Court has been extremely reluctant to affirm a sentence of death upon a person less than 18 years old. Magill v. State, 428 So.2d 649 (Fla. 1983) (Boyd dissenting). In fact, until Magill, this Court had not affirmed any death sentence imposed upon a juvenile. Peavy v. State, 442 So.2d 200 (Fla. 1983) (age 17); Simpson v. State, 418 So.2d 984 (Fla. 1982) (age 17); Thompson v. State, 328 So.2d 1 (Fla. 1976) (age 17); Morgan v. State, 392 So.2d 1315 (Fla. 1981) (age 16); Brown v. State, 367 So.2d 616 (Fla. 1979) (age 16); Vasil v. State, 374 So.2d 465 (Fla. 1979) (age 15); Ross v. State, 386 So.2d 1191 (Fla. 1980); Anderson v. State, 420 So.2d 574 (Fla. 1982) (precise age unknown); Taylor v. State, 294 So.2d 648 (Fla. 1974) (precise age unknown).

Youth, therefore, is a very important mitigating factor, and in this instance it is controlling. In Caruthers, Ross, and Rembert, alcohol mitigated the death sentence in each case. In this case, Livingston's youth mitigates the death sentence.[2] This Court, therefore, should reverse the trial court's sentence of death and remand for an imposition of a sentence of life in prison without the possibility of parole for 25 years.

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[2] In this case, the jury's death recommendation was by a vote of 7 to 5. Had one more person voted for life, Livingston would have received a life recommendation. Had Livingston got such a recommendation and a death sentence still had been imposed, this Court would have very closely scrutinized the trial court's sentencing order. Tedder v. State, 322 So.2d 908 (Fla. 1975). In light of this Court's treatment of other juveniles, it is likely that this Court would have found Livingston's age to have been a reasonable basis for their recommendation. Should that one vote result in such a vast difference?

ISSUE VI

THE COURT ERRED IN DEPARTING FROM THE RECOMMENDED GUIDELINE SENTENCE OF 22 TO 27 YEARS FOR THE NON-CAPITAL CRIMES FOR WHICH LIVINGSTON WAS CONVICTED.

In addition to his sentence of death, the court also sentenced Livingston to two consecutive life sentences and a consecutive ten year sentence for the attempted murder, robbery, and display of a firearm convictions (R 805). The court also imposed a ten year sentence for the burglary and the two concurrent five year sentences for the grand thefts. These last three sentences are to be served concurrently with the other sentences.

In order to sentence Livingston as it did, this Court departed from the recommended guideline sentence of 22 to 27 years (R 807), and in doing so, it listed eight reasons to justify this departure:

> 1. The Defendant's contemporaneous conviction for a capital felony was not scored on the Guidelines Score Sheet.
>
> 2. The Defendant utilized excessive force in the commission of the robbery for which he was convicted.
>
> 3. The crimes for which the Defendant was convicted involved the use of a weapon (a firearm).
>
> 4. Threats of death were made against the victim, Millie Mae Evans, a sixty-eight year old woman.
>
> 5. The crimes committed by this Defendant showed an utter disregard for human life.
>
> 6. The Defendant's recent release from a juvenile detention facility and his failure to successfully complete alternative treatment programs (Community Control) is grounds for departure.

7. The recommended Guideline sentence is deemed inadequate for rehabilitation or deterrence and/or the Defendant is not amenable to rehabilitation.

8. The patern of new crimes committed by this Defendant is one of escalating violent criminal activity.

(R 819-820). None of these reasons are valid.

1. Use of a Weapon (Reason #3) and Rehabilitation, etc. (Reason #7)

In Scurry v. State, Case No. 67,589 (Fla. opinion filed June 5, 1986) this Court rejected as aggravating factors justifying departure from the recommended guideline sentence the use of a rifle and rehabilitation and deterrence. See also Santiago v. State, 478 So.2d 47 (Fla. 1985).

Similarly, here, Livingston's use of a firearm (Reason #3) and the inadequacy of the guideline sentence for rehabilitation and deterrence (Reason #7) are improper reasons to depart from the recommended guideline sentence.

2. Failure to Complete Community Control (Reason #6)

In State v. Mischler, Case No. 66,191 (Fla. opinion filed April 3, 1986), this Court said that the sentencing court could not use factors justifying departure from the recommended guideline sentence which were already taken into account in calculating the guideline score. Also, an inherent component of the crime cannot justify departure. In this case, Livingston's failure to complete community control is an inherent result of the crimes he committed. That is, the

reason he did not complete community control was due to his committing these crimes. Failure to complete community control inheres in the crimes for which he was convicted. Moreover, Livingston had already been scored for being under legal restraint at the time he committed these crimes, and a necessary implication of being so scored was that he had failed to complete the program exercising the restraint over him. Thus, Reason #6 amounts to an impermissible doubling of factors. Hendrix, Mischler, infra.

3. Threats, (Reason #4), Excessive Force (Reason #3), Utter Disregard for Human Life (Reason #5)

Similarly, the fact that Livingston made threats to Ms. Evans is not a valid aggravating factor as threats are an inherent part of the fear required to convert a theft into a robbery, Mischler. Excessive force apparantly refers to the shooting of Ms. Hill, and again it is an inherent part of the robbery-murder. The court tried to limit the excessive force to the robbery, but his criminal transaction was a classic felony-murder, and the force used against Ms. Hill cannot be so precisely limited to the robbery while ignoring the fact that the murder was committed during its commission.

Finally, any time a person kills or attempts to kill someone else, we can assume he had an utter disregard for human life. That is what makes the killing unlawful, and as such, it is an essential or inherent part of these crimes.

For the court to find that this is a factor justifying aggravation is incorrect.

4. Escalating Violent Criminal Activity (Reason #8)

In Hendrix v. State, 475 So.2d 1218 (Fla. 1985), this Court prohibited aggravating a sentence based upon a factor that had already been considered in determining the guideline score or as another aggravating factor. Here, the court's finding that Livingston's latest criminal activity was escalating was invalid as the guideline scoresheet already considered or scored Livingston's latest crimes in determining the recommended guideline sentence. Similarly, in Williams v. State, Case No. 67,380 (Fla. opinion filed June 26, 1986), this Court said that the fact that Williams had engaged in a violent pattern of conduct which indicated a serious danger to society was not a clear and convincing reason, and it was also an impermissible doubling of factors considered. Likewise, in this case, Livingston's escalating violent criminal activity had already been considered by the additional offenses at conviction and prior record categories. Hence, it is an improper reason to depart.

5. The Capital Conviction (Reason #1)

At first glance, an unscored capital conviction would appear to be a legitimate aggravating factor as the sentencing guidelines nowhere considers capital crimes. Moreover, in

Weems v. State, 469 So.2d 128 (Fla. 1985), this Court indicated that factors that could not be considered in determining the guideline score could be used to aggravate the recommended sentence. To be able to use a capital crime as a reason to depart, however, violates Hendrix, supra.

In sentencing a person convicted of committing a capital crime, a court has only two choices: death or life in prison without the possibility of parole for 25 years, Section 921.141, Florida Statutes (1985). Death, of course, is the ultimate penalty for capital murder, but even the alternative to that sentence, life without the possibility of parole for 25 years, is a more harsh sentence than is merited by any other single noncapital offense. Moreover, there is no way that the trial court can legally vary those sentencing choices. Thus, even under the most mitigated circumstances, the most lenient sentence possible that the trial court can impose is far more severe than the highest single crime guideline score for a noncapital offense (165 points for a category 1 offense or 15 years in prison). Capital crimes, in short, are so serious that the guidelines do not apply to those crimes. Committee Note to the 1985 amendment to the Rule 3.701, Florida Rules of Criminal Procedure. Hence, to again consider the capital crime, but this time as a reason to depart from the recommended guideline sentence unfairly emphasizes the very serious nature of capital crimes. Weems, supra, therefore is inappropriate to this case as a capital

offense cannot be considered in computing the guideline score or as a reason to depart. To permit its double consideration violates the rationale underlying Hendrix, supra.

V CONCLUSION

Based upon the arguments presented above, Jessie James Livingston asks for the following relief:

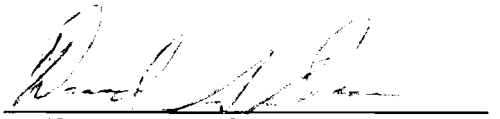
1. Reversal of the trial court's judgment and sentence and remand for a new trial.

2. Reversal of trial court's imposition of a sentence of death and remand for an imposition of a sentence of life imprisonment without the possibility of parole for 25 years.

3. Reversal of the imposition of the sentence of death and remand for a new sentencing hearing. Or, for reversal of the trial court's noncapital sentences and a remand for a sentence within the guidelines.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



DAVID A. DAVIS
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General Norma J. Mungenast, The Capitol, Tallahassee, Florida, 32302, this 24 day of July, 1986.

DAVID A. DAVIS
Assistant Public Defender