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.

REPLY BRIEF OF APPELLANT

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

		PAGE(S)
TABLE OF CONTENTS		i
TABLE OF CITATIONS		ii
I	ARGUMENT	1
	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.	1
	ISSUE IV	
	THE COURT ERRED IN FINDING THAT LIVINGSTON COMMITTED THE MURDER FOR THE PURPOSE OF PREVENTING OR AVOIDING LAWFUL ARREST.	4
	ISSUE V	
	A SENTENCE OF DEATH IS TOO SEVERE A SANCTION FOR LIVINGSTON, WHO WAS 17 YEARS OLD WHEN HE COMMITTED THIS CRIME.	8
II	CONCLUSION	13
III	CERTIFICATE OF SERVICE	14

TABLE OF CITATIONS

CASES:	PAGE(S)
Burr v. State, 446 So.2d 1051 (Fla. 1985)	7
Caruthers v. State, 465 So.2d 496 (Fla. 1985)	13
Clark v. State, 443 So.2d 973 (Fla. 1983)	6
Echols v. State, 484 So.2d 568 (Fla. 1986)	6
Eddings v. Oklahoma, 455 U.S. 104, 68 L.2d 270, 101 S.Ct.1852(1981)	9
Essex v. State, 478 So.2d 450 (Fla.1st DCA 1985)	1
Griffin v. State, 474 So.2d 777 (Fla. 1985)	4
Herring v. State, 496 So.2d 1049 (Fla. 1984)	4-5,7
Johnson v. State, 438 So.2d 778 (Fla. 1983)	2-3
Kokal v. State, 492 So.2d 1312 (Fla. 1986)	5-7
Macklin v. State, 395 So.2d 1217 (Fla. 3d DCA 1981)	1
McElroy v. U.S., 164 U.S.76 41 L.3d 355 17 S.Ct. 31 (1896)	1
Menendez v. State, 368 So.2d 1278 (Fla. 1979)	4
Oats v. State, 446 So.2d 90 (Fla. 1980)	7
Parker v. State, 421 So.2d 712 (Fla. 3d DCA 1982)	2-3
Pohl v. State, 426 SO.2d 1226 (Fla. 4th DCA 1983)	1
Riley v. State, 366 So.2d 19 (Fla. 1979)	4
Rembert v. State, 445 So.2d 337 (Fla. 1984)	12
Roach v. Martin, 757 F.2d 1463 (4th Cir.1985)	9
Ross v. State, 474 So.2d 1170 (Fla. 1985)	12
Routly v. Stte, 440 So.2d 1257 (Fla. 1983)	7
Rumbaugh v. Procunier, 753 F.2d 395 (5th Cir. 1985)	9
State v. Chapple, 660 P.2d 1208 (Ariz. 1980)	6
U.S. v. Boba, 493 F.2d 33 (CA5 1974)	1
U.S. v. Parker, 421 So.2d 712 (Fla. 3d DCA 1982)	2

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.

In Livingston's initial brief, he pointed out at the end of his argument on this issue that several cases from appellate courts in this state have held that a wrongful consolidation of offenses under Rules 3.150 and 3.151, Florida Rules of Criminal Procedure, was error as a matter of law and amounted to reversible error without resort to the harmless error exception. Macklin v. State, 395 So.2d 1217 (Fla.3d DCA 1981); Puhl v. State, 426 So.2d 1226 (Fla. 4th DCA 1983); see also, Essex v. State, 478 So.2d 450 (Fla. 1st DCA 1985). While these cases support this argument, the federal cases cited in Macklin and Puhl supply the rationale for this holding.

To begin with, this issue involves the application of Rules 3.150 and 3.151, Fl.R.Crim.P., rules approved by this court. The framers of these rules in drafting them, and this court in approving them, weighed the defendant's and public's interests in trying offenses separately when they fashioned the particular standard set forth in these rules. Establishing a particular standard was discretionary, and once it was established, it became a rule of law, and the trial court had no choice but to apply it correctly. See U.S. v. Bova, 493 F.2d 33 (CA5 1974). The traditional justifications for discretionary acts, see Rosenberg, Appellate Review of Trial Court Discretion, 79 FRD 173, thus, have no application in determining whether offenses should be tried jointly or separately.

Moreover, in McElroy v. U.S., 164 US 76 41 L.ed 355 17 S.Ct. 31 (1896),

held that misjoinder of parties cannot be harmless error because it was impossible to say that a defendant had not been prejudiced or the jury distracted by the improper joinder. Such reasoning also applies to the improper joinder of offences. U.S. v. Parker, 531 F.2d 754 (CA5 1976).

As argued in Livingston's initial brief, the trial court in this case improperly joined the burglary/theft charges with the murder/robbery charges. The state in its brief focused chiefly upon what it saw as a close relationship in time between these criminal incidents (Appellee's brief 16-20). As pointed out in Livingston's initial brief, time or rather the proximity of two or more criminal episodes, is important, but it is only one of several factors in determining the appropriateness of joining offenses. Instead of focusing on a single factor, a correct analysis of the situation involves a "totality of the circumstances" approach. Temporal and geographical proximity are important as well as the similarity of offenses. What these various factors try to capture is the sense of flow or continuity in the criminal episodes that justifies the joinder of them in one trial. This is well illustrated by two of the cases cited by the state in its brief. Parker v. State, 421 So.2d 712 (Fla. 3d DCA 1982); Johnson v. State, 438 So.2d 778 (Fla.1983).

In Parker, the victim of a robbery immediately reported that crime to her father who also quickly reported it to the police. The police, responding to this report, approached Parker the next day. Parker ran but was caught and charged with robbery, resisting an officer without violence and possession of cocaine. These offenses were properly joined for trial because the events naturally led from the robbery to Parker's arrest:

> The first offense led to and was connected with the other offenses; that is, the robbery and subsequent investigation led to the arrest and charges of cocaine possession and resisting arrest without violence.

Id. at 713.

The evening of 8 to 9, January, 1981, can only be described as a night of terror in Polk County. During that evening, Paul Johnson killed three people, one of whom was a policeman investigating an earlier murder he had committed. All of these murders were properly tried together this court said because only hours separated the offenses which were all homicides.

In contrast to Parker and Johnson, in this case we have no similar certainty as the burglary could have been eight hours, eight days, or eight weeks earlier and the connection with the murder/robbery would have been the same: the gun.

The state bolsters its argument by claiming that the police investigation is another link between the burglary and murder. In Parker, the police investigation of the earlier robbery linked the robbery with the subsequent resisting and possession charges. Here, the police investigation of the murder revealed the common element, the gun, which was taken from the earlier burglary. Under the state's rationale any time a person commits several crimes, if a policeman does a subsequent investigation and finds common pieces of evidence, the cases are eligible for consolidation. That is not the case law, and what the police do (generally) is irrelevant in considering whether two or more charges should be consolidated for trial.

ISSUE IV

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

The key to analyzing whether a particular murder was committed to avoid lawful arrest was what this court said in Riley v. State, 366 So.2d 19 (Fla.1979), and Menendez v. State, 368 So.2d 1278 (Fla. 1979).

> As to the factor of avoidance of lawful arrest, we stated in Riley v. State, 366 So.2d 19 (Fla. 1978), that the mere fact of a death is not enough to invoke this section when the victim is not a law enforcement official. "Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." 366 So.2d at 22. Also, it must be clearly shown that the dominant or only motive for the murder was the elimination of witnesses. Menendez v. State, 368 So.2d 1278 (Fla. 1979). (emphasis supplied)

Oats v. State, 446 So.2d 90, 95 (Fla. 1984).

Here, the facts found by the court do not amount to the strong evidence required, and the "facts" supplied by the state are speculative and likewise do not supply the strong evidence required by this court to prove that the dominant motive Livingston had was to avoid lawful arrest when he killed Ms. Hill.

Initially, the facts in the court's sentencing order are ambiguous. The primary facts relied upon by the court in finding that this murder was committed to avoid lawful arrest were that Livingston fired two shots at Ms. Hill, said he was going to get "the one in the back," but shot at Ms. Evans only one time. The court and the state, however, seem to think that anytime a defendant fires more than one shot the second shot is fired to eliminate a witness. In some cases this is true, see Herring v. State, 496 So.2d 1049 (Fla. 1984), while in others it is not. See Griffin v. State, 474 So.2d 777 (Fla. 1985). In Griffin this

court said that the two shots fired by Griffin were sufficient evidence of premeditation, but that those two shots even when considered in light of his statement admitting that he had shot his victim were not the strong evidence that he committed this murder to avoid lawful arrest.

Similarly, in this case the fact that Livingston shot Ms. Hill two times may have shown his premeditated intent, but certainly it was not strong evidence that he shot her to avoid lawful arrest. Even when his statement concerning Ms. Evans is considered, the aggregate of this evidence does not amount to the strong evidence required by this court to establish this aggravating factor.

This is true because what Livingston subsequently did renders his statements concerning Ms. Evans ambiguous about his motives regarding Ms. Hill. First, he shot at Ms. Evans only one time (T.675), and he left the store knowing that she was alive (T.708). If his intent was the same for Ms. Evans as it was for Ms. Hill, he certainly would have made more of an effort to eliminate her as a witness. The state, on pp. 36-37 of its brief suggests that this intent was thwarted by the door Ms. Evans had closed and locked. Yet nothing prevented Livingston from breaking down the door or shooting through it if his intent was to eliminate Ms. Evans as a witness and that intent was the same as when he shot Ms. Hill.

The statements he made after he fled the scene also do not clarify Livingston's intent. Like Griffin, all Livingston ever admitted to his friend Terry Baker (T.708) and the police (T.787-797), was that he had shot Ms. Hill. He never said why. Thus, this case is clearly distinguishable from Herring, supra, and Kokal v. State, 492 So.2d 1312 (Fla. 1986), where facts suggesting that the murders were committed to avoid lawful arrest were confirmed by the statements of the Defendant which clearly indicated that they killed their victims to avoid

lawful arrest.

Similarly, the state's "facts" do not provide the strong evidence required to establish this aggravating factor.[1] On pp. 35-36 of its brief, the state says that because Ms. Evans recognized Livingston, and she only worked at the store when Ms. Hill did, Ms. Hill also would have recognized him. That is sheer speculation. It assumes that Ms. Hill saw Livingston at the store, remembered seeing him, and then could have subsequently identified him. Notwithstanding the large body of scientific evidence on the problems of eyewitness identification which refutes the state's implied conclusion, see State v. Chapple, 660 P.2d 1208 (Ariz. 1980), the state's inferences are not evidence, and they do not replace the proof required to support its claim that the murder was committed to avoid lawful arrest. Clark v. State, 443 So.2d 973 (Fla.1983).

The state cites several cases to bolster its factual argument, but its analysis of these cases is often incomplete. For example, on page 38 of its brief, it cites Kokal v. State, 492 So.2d 1317 (Fla. 1986), and recites some of the facts in that case. What it omits and what was crucial to finding that the murder in that case was committed to avoid lawful arrest was that:

> The victim was beaten unconscious and posed no threat to Kokal's escape, but he did pose a threat to later identification of the robber(s). Kokal's own statement to his friend to the effect that dead men can't talk confirms that the murder was committed to avoid or prevent arrest.

Id. at 319.

---

[1] In evaluating the sufficiency of the facts supporting a trial court's finding of a particular aggravating factor, this court should look to the trial court's sentencing order rather than the record. Echols v. State, 484 So.2d 568 (Fla. 1986).

Similarly, on page 38 of its brief, the state cites Herring v. State, 446 So.2d 1049 (Fla. 1984), and gives some of the facts of that case, but does not tell this court that Herring told a detective that he shot the clerk a second time to prevent him from being a witness against him. Id. at 1057. When Livingston's statement concerning Ms. Evans (and not Ms. Hill) is measured against the unambiguous statements made by Herring and Kokal concerning why they killed their victims, it is clear that the state presented no "strong evidence" to establish that Livingston committed this murder to avoid lawful arrest. The state also ignores crucial facts in Oats v. State, 446 So.2d 90 (Fla.1980), Burr v. State, 446 So.2d 1051 (Fla. 1985), and Routly v. State, 440 So.2d 1257 (Fla.1983). The state cites those cases for the proposition that similar fact evidence can help establish that the dominant motive for a particular murder was to avoid lawful arrest. But by itself, such similar fact evidence would probably have not been sufficient, and in each case additional evidence was present to establish this aggravating factor. In Oats, Oats' statement was the additional evidence. In Burr, Burr shot his victim in the back of the head while the victim was in a kneeling position. Finally, in Routly, the only explanation for why Routly bound, kidnapped, and took his victim to a secluded wooded area was so that he could kill him to avoid lawful arrest.

Moreover, in Oats, Burr, and Routly, this intent was so clear that the trial court in each case found, and this court affirmed on appeal, that the murder was committed in a cold, calculated and premeditated manner. In this case, the trial court did not find Livingston's intent so clear that it supported that aggravating factor, and the evidence is not so strong that it shows that Livingston's dominate motive in killing Ms. Hill was to avoid lawful arrest.

ISSUE V

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

The state's response to this issue has three parts. First, it discusses several cases cited in Livingston's brief. The state then makes the predictable arguments that age by itself is not a per se mitigating factor (Appellee's brief at pp. 43-44). Finally, the state argues that the weight given to Livingston's age is for the trial court to determine, not this court (Appellee's brief at pp.44-46).

But the state has missed the point of Livingston's argument. It is more than that the judge failed to give adequate weight to Livingston's age or disastrous childhood. The full implications of Livingston's claim is that age, or more properly youth, is in general a constitutional prohibition against execution of children, and specifically in this case, it would be cruel and unusual punishment to execute this child for committing a crime when he was 17.

It is cruel to execute a child the law presumes to be incompetent to fully and independently live in our society. "Our history is replete with laws and judicial recognition that minors, especially in their earlier years, are less mature and responsible than adults." Eddings v. Oklahoma, 455 U.S. 104, 116-117, 68 L.2d 270, 101 S.Ct. 1852 (1981). Florida law itself is protective of 17-year-olds, defining them as "minors" and "children," see Fla.Stat. secs. 1.01(12), 39.01(7), and treating them as children, not as mature adults capable of exercising judgment or discretion. Thus, for example, an unmarried 17 year old, such as appellant, cannot vote, serve on a jury, purchase or possess alcoholic beverages, attend a horse or dog race, dispose of property by will, enter into a contract, sue, or be sued. See Fla.Stats. secs. 97.041, 40.01, 562.11, 550.04, 732., 501, 743.01 (by implication) (1983). Without parental consent, a 17-year-old may not marry

or obtain an abortion. Id. at secs. 741.0405, 390.001(4)(a).

Florida's special concern for children worked a particular iron in this case as the trial court made certain that all veniremembers were "eighteen years of age or older." (T.137)

Recognizing that adolescence is a turbulent pathway on the road to maturity, our system of criminal justice--while holding minors responsible for their misconduct--has also acknowledged that the level of juvenile responsibility is lower than for adults. The development of a rehabilitative model of juvenile justice in this country, reflected an appreciation for adolescents' diminished responsibility and culpability in long-range thinking and moral judgments. To execute a child for even the most reprehensible conduct is inconsistent with our knowledge of adolescent behavior and culpability and, ultimately, with a system of civilized and humane justice.

Execution of Livingston also would be unusual as this state has not executed a child at least since the early 50s. A 20 year national moratorium in executing children ended when Charles Rumbaugh was executed on September 11, 1985. Rumbaugh, however, as an adult and after a full evidentiary hearing on his competency to waive further legal action to save his life, volunteered for execution. Rumbaugh v. Procunier, 753 F.2d 395 (5th Cir.1985). Early in 1986, Terry Roach became the first nonconsensual execution of a juvenile since 1964; Roach, however, did not allege in his first federal habeas corpus proceeding that execution of a juvenile per se violates the Constitution. Roach v. Martin, 757 F.2d 1463 (4th Cir.1985). Thus, of the 50 people executive in the post-Furman era, only two were under the age of 18 at the time of their crime and one of the two volunteered for execution.

Thus, in this case executing Jesse James Livingston would violate Florida's and this nation's evolving sense of decency as the threat of death to a child

is largely an abstraction, not a reality.

Threatening a child with death does not have the same impact as threatening an adult with death. Adolescents live for today with little thought of the future consequences of their actions. Kasterbaum, Time and Death in Adolescence, in The Meaning of Death 99 (H.Feifel ed. 1959). The defiant attitudes and risk-taking behaviors of some adolescents are related to their "developmental stage of defiance about danger and death." Fredlund, Children and Death from the School Setting, 47 J.School Health 533 (1977). Some adolescents play games of chance with death from a feeling of unimportance. Miller, Adolescent Suicide: Etiology and Treatment, 9 Adolescent Psychiatry 327 (1981). They typically have not learned to accept the finality of death. R.Lonetto, Children's Conceptions of Death, 134-41 (1980); Hostler, The Development of the Child's Concept of Death, in The Child and Death (O.Sahler ed. 1978). Adolescents tend to view death as a remote possibility; old people die, not teenagers. Consider, for example, teenagers' propensity to flirt with death through reckless driving, ingestion of dangerous drugs, and other similar "death-defying" behavior.

Adolescense is a time when young persons are frequently struggling to arrive at a definition of their own identity; adolescents are particularly likely to rebel against adult authority and to seek affirmation by their peers. E. Erikson, Childhood and Society, 261-63 (2d ed. 1963). The teen years are "a period of experiment, risktaking and bravado. Some criminal activity is part of the patterns of almost all youth subcultures." F. Zimring, "Background Paper" 37, in Twentieth Century Fund Task Force, supra at 3. But

> much of the criminal activity attributable to the yougn seems to abate with age. As they pass from the turbulent years of adolescence to the period of 'settling in' that characterizes the early twenties, most young offenders-whether or not they are apprehended and whether or not they participate inofficial rehabilitation programs-seem to commit fewer offenses. For most adolescents age alone is the cure of criminality.

Id.

By the time a child attains the age of 15 or 16, he has generally achieved significant cognitive ability and is able to deal with abstract concepts and ideas. J.Piaget, The Moral Judgment of the Child, (1932). Nevertheless, a child's abiltiy to think abstractly and to engage in mature judgment continues to develop further into late adolescence and early adulthood. See M. Rutter, Changing Youth in a Changing Society, 83 (1980); E. Peel, The Nature of Adolescent Judgment, 131-34 (1971). Of particular significance is the considerable body of research which demonstrates that a person's ability to think in moral terms and to engage in moral judgments develops significantly during late adolescence, reaching a plateau only after leaving school or reaching early adulthood. See, e.g., Rest, Davison and Robbins, Age Trends in Judging Moral Issues, 49 Child Development 263 (1978); Kohlberg, Development of Moral Character and Moral Ideology, in Hoffman and Hoffman, Review of Child Development Research, 404-05 (1964). The ability to make moral judgments depends, at least in part, on broader factors of social experience. Most adolescents simply do not have the breadth and depth of experience which are essential to making sound value judgments and to understanding the long-range consequences of their decisions. See Kohlberg, supra at 404-05; Rutter, supra, at 238.

Thus, if Livingston went to great length in his initial brief to detail his tragic childhood (Appellee's brief at p.45) it was simply done to show that emotionally, intellectually, and chronologically, Jessie James Livingston lived in a child's world when he committed this murder. And, contrary to the court's mechanical recitation of the requirements of Section 39.,111(6)(c), Florida Statutes (1985) (R.750), there is nothing in this case, including the Pre-Disposition Report, to indicate that Livingston's home, environmental situation, emotional attitude, or pattern of living in any way suggested his sophistication or maturity was

more than that of a child of 17.

Livingston's youth, reflecting as it does his immaturity, like alcohol use in 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), is such a compelling mitigating factor in this instance that a life sentence is mandated even in the face of a jury's recommendation of death and the presence of one or more aggravating factors.

CONCLUSION

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

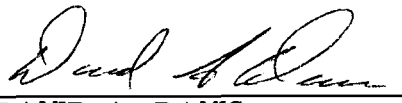
1. Reversal of the trial court's judgment and sentence and remand for a new trial.

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, FL 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Assistant Attorney General , The Capitol, Tallahassee, FL, 32301, this 4th day of ~~October~~ November, 1986.

David A. Davis
Assistant Public Defender