IN THE SUPREME COURT OF FLORIDA

WILBURN LAMB,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 70,369
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENTS

POINT I: The Eighth and the Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution prohibit cruel and unusual punishment. The imposition of the death penalty on an individual who was a juvenile at the time of the crime violates these constitutional provisions.

POINT II: Appellant's death sentence cannot stand. The aggravating circumstances of previous conviction of a felony involving the use of violence, heinous, atrocious and cruel, and cold, calculated and premeditated are not supported by the evidence. The remaining aggravating circumstance, in the commission of a burglary, is insufficient to support a death sentence.

Assuming, arguendo, the constitutionality of the death penalty for juveniles, Section 921.141(6)(g), Florida Statutes (1985) mandates the finding of a juvenile's age as a mitigating

factor which is entitled to great weight. While the weight accorded to mitigating circumstances is up to the trial judge to decide, it is error for the court to refuse to find the evidence to be mitigating.

POINT III: It is improper to permit a jury to convict a defendant of two counts of murder for a single death. It is similarly error to force the accused to defend against two counts of murder especially where the defense of one could entail an admission of guilt as to the other.

POINT IV: In determining the voluntariness of a confession the trial court must look to the totality of the circumstances. When the confession is by a juvenile, the trial court must consider whether the arresting officer complied with the requirements of Section 39.03(3), Florida Statutes (1985) which requires notification of the juvenile's parents. The court must also consider such things as the conduct of the police and the youth of the defendant.

POINT V: The combination of trial errors in the instant case deprived the Appellant of his constitutional right to due process and a fair trial. These errors included the admission of irrelevant and highly inflammatory photographs, the refusal of the trial court to allow Appellant to present evidence of bias and motive on the part of the key state witness, the improper admission of hearsay, the resual to instruct the jury on

circumstantial evidence, and the denial of the trial court of Appellant's motion for judgment of acquittal as to the count of premeditated murder.

POINT VI: Because the instant offenses occurred after October 1, 1983 it is mandatory that as to the non-capital offense a guideline scoresheet be prepared and sentencing proceed in accordance with the sentencing guidelines. The failure of the trial court to follow the procedure requires resentencing as to the non-capital offenses.

POINT VII: Although this Court has previously rejected numerous attacks to the constitutionality of the death penalty in Florida Appellant urges reconsideration particularly in light of the evolving body of case law which in some cases has served to invalidate the very basic cases on which the death penalty was upheld in the State of Florida.

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE IMPOSITION OF THE DEATH PENALTY ON AN INDIVIDUAL WHO WAS A JUVENILE AT THE TIME OF THE CRIME CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

Appellee states in his Answer Brief at pages 18-19:

> If this court were to set a minimum chronological age for the imposition of the death sentence, there is no doubt that defendants who were older chronologically would contend that mental or emotional deficiencies placed them in the same constitutional category as a seventeen year old murderer who would be immunized by the mere fact of his chronological age. Therefore, this court or the United States Supreme Court would inevitably be forced to attempt to create a constitutional definition of minimum criminal responsibility. Furthermore, the court would have to decide whether a different standard applies in capital and non-capital cases.

This statement clearly shows that Appellee misunderstands the thrust of Appellant's argument. First, Florida's capital punishment statute already permits a person of <u>any</u> age to contend that his or her mental or emotional deficiencies are sufficiently mitigating so as to prevent imposition of the death penalty. Second, ruling that the death penalty as applied to juveniles is unconstitutional would <u>not</u> require this Court to create a constitutional definition of minimum criminal responsibility. Appellant is not contending that he cannot be found criminally responsible for his actions. Rather he is arguing only that the death

penalty as applied to juveniles who commit first degree murder is unconstitutional. Third, different standards already apply in capital and non-capital cases. Appellee himself notes that for any juvenile convicted of any non-capital felony, before he may be sentenced as an adult the trial court must follow the procedures set forth in Section 39.111(6), Florida Statutes (1985) and determine that juvenile sanctions are inappropriate. Even if the criteria are met, the trial court still retains the option of sentencing the non-capital defendant as a youthful offender pursuant to Chapter 958, Florida Statutes (1985). In any event, sentencing is required to be pursuant to the sentencing guidelines. None of these options is applicable to a juvenile convicted of a capital offense. Quite simply, if this Court rules that imposition of the death penalty on juveniles is unconstitutional (the so-called "bright-line" approach), there would be no resulting constitutional problems with the death penalty statute. Florida's capital punishment statute would remain intact. As noted in the initial brief, there are presently five persons on Florida's death row who were juveniles at the time their crimes were committed. Of these five, only one is in a position of having had his sentencing affirmed. Magill v. State, 428 So.2d 649 (Fla. 1983).

It is instructive to consult the American Law Institute's Model Penal Code which has provided useful guidance to the United States Supreme Court in capital sentencing issues. See e.g. Gregg v. Georgia, 428 U.S. 153, 189, 191, 193, 96 S.Ct. 2909, 49 L.Ed.2d 859, 884-885 (1976). Since 1962, the Model Penal Code

has embodied a recommendation that the death penalty should not be imposed on offenders below the age of eighteen. American Law Institute, Model Penal Code Section 210.6(1)(d)(Proposed Official Draft, 1962) reads:

> (1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of a first degree if it is satisfied that:
>
> * * *
>
> (d) the defendant was under 18 years of age at the time of the commission of the crime.

The revisers of the Model Code reaffirmed that considered judgment, despite suggestions from several quarters that the minimum age for imposition of the death penalty ought to be reduced:

> [T]here is at least one class of murder for which the death sentence should never be imposed. This situation is murder by juveniles. The Institute believes that civilized societies will not tolerate the spectacle of execution of children, and this opinion is confirmed by the American experience in punishing youthful offenders. Subsection (1)(d) therefore excludes the possibility of capital punishment where the actor was under 18 years of age at the time of the homicide. Of course, any bright line of this sort is somewhat arbitrary, and many juveniles of lesser years have the physical capabilities and mental ingenuity to be extremely lethal. The Institute debated a motion to lower the age of exclusion to 14 but rejected that proposal on the ground that, however dangerous some children may be, the death penalty should be reserved for more mature adults. It should also be noted that 18 is the limit of juvenile court jurisdiction contemplated in Section 4.10 of the Code. A more difficult issue is the choice between an absolute bar of capital punishment, as provided in Subsection (1)(d), and mere consideration of youth as a mitigating

> circumstance, as indicated in Subsection (4)(h). The Institute defeated a motion to delete the former provision altogether and relegate the offender's age to evaluation as one of several mitigating factors. This decision reflects the view that no juvenile should be executed.

American Law Institute, Model Penal Code, Section 210.6, Comment, 133 (Official Draft and Revised Comments, 1980).

All the indicia of contemporary standards of decency - history and precedent, legislative enactments - demonstrate a rejection of the death penalty as an acceptable societal response to juvenile crime, even to juvenile murder. Our society has learned too much during the past century about the special nature of childhood and the turbulent developmental pressures which peak during adolescence, as well as about the encouraging rehabilitative potential possessed by many disturbed young people, to impose upon them its most terrible and final punishment. The entire modern history of juvenile justice argues against such a draconian response, even for outrageous and unacceptable juvenile behavior.

Yet these objective factors do not alone decide the matter, for "the Constitution contemplates that in the end [the] judgment [of the Court] will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment," Coker v. Georgia, 433 U.S. 584, 497, 97 S.Ct. 2861, 53 L.Ed.2d 982, 992 (1977). At issue is whether the execution of juveniles "comports with the basic concept of human dignity at the core of the Amendment." Gregg v. Georgia, supra, 428 U.S. at 182.

Surely it does not. The Eighth Amendment demands that the extreme sanction of capital punishment be restrained by consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944, 961 (1976). At a time when the unique frailties of youth are universally recognized as relevant to the proper disposition of children who commit criminal acts of all degrees of seriousness, it is simply inconceivable that the concept of human dignity embodied in the Eighth Amendment could tolerate the execution of a child of tender years. Some minimum age of susceptibility to the punishment of death must be recognized by a constitutional guarantee that decency will fix the outer boundaries of the criminal sanction.

The problem, of course, here as elsewhere in the evolution of constitutional law, resides in drawing the line. Shall it be 12, 15, 18, 20? The inevitability of the difficult task of linedrawing is endemic to a Constitution that has not chosen to leave it to the vagaries of isolated juries and trial judges to determine exclusively and irremediably the state of our national conscience. And if a line must be drawn - as assuredly it must - the appropriate place to draw it is at least far clearer in relation to the present subject than in many constitutional areas. The overwhelming concentration of relevant indicators fixes age 18 at the line of full adult responsibility with a clarity that is not merely convenient but compelling when the

gravest penal sanction of a society is sought to be exacted of its youth.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE IMPOSITION OF THE DEATH PENALTY IN THE INSTANT CASE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION BECAUSE IT IS BASED ON AGGRAVATING CIRCUMSTANCES WHICH WERE NOT PROVEN BEYOND A REASONABLE DOUBT AND CERTAIN MITIGATING FACTORS WERE TOTALLY IGNORED.

A. THE AGGRAVATING FACTORS:

1. That Appellant was Previously Convicted of a Felony Involving the Use of Violence.

Rather than merely conceding the invalidity of this aggravating circumstance pursuant to Wasko v. State, 505 So.2d 1314 (Fla. 1987), Appellee asks this Court to merely replace this aggravating circumstance with a "finding" that the capital felony was committed for pecuniary gain. Such argument is fallacious. The trial court found as an aggravating circumstance that the capital felony was committed while Appellant was engaged in the commission of burglary. The indictment clearly charges that the burglary was committed for the purpose of committing a theft. (R3074) Therefore, it is improper to double the aggravating circumstance by also finding that the capital felony was committed for pecuniary gain. See Provence v. State, 337 So.2d 2783 (Fla. 1976) cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977).

4. The Capital Felony was Committed While the Defendant was Engaged in the Commission of a Burglary.

Appellant draws this Court's attention to the fact that the United States Supreme Court has accepted for review the case of Lowenfield v. Phelps, 42 Cr.L. 4089 (Dec. 7, 1987). At issue in this case is the constitutionality of using an essential element of the capital felony as an aggravating circumstance.

B. MITIGATING CIRCUMSTANCES

1. The Trial Court Erred in Failing to Find Appellant's Age as a Mitigating Factor.

Appellant is unaware of any case where the trial court failed to find a juvenile's age as a mitigating factor. Indeed, Appellee has cited no such case. Although this Court upheld a death sentence on a juvenile in Magill v. State, 428 So.2d 649 (Fla. 1983), the defendant's age of 17 was found to be a mitigating circumstance. Appellee cites to Cooper v. State, 492 So.2d 1059 (Fla. 1986) as authority for rejecting Appellant's age of 17 as a mitigating factor. However, Cooper is easily distinguishable. Cooper was 18 and as this Court noted "he was legally an adult." The basic fact is that Appellant was not legally an adult. It is a gross abuse of discretion to refuse to recognize Appellant's age as a mitigating factor.

POINT VI

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW, THE TRIAL COURT ERRED IN SENTENCING HIM ON THE BURGLARY AND GRAND THEFT CHARGES WITHOUT COMPLYING WITH THE SENTENCING GUIDELINES.

Appellee argues that since the sentences are not illegal, the failure to prepare a scoresheet is harmless error. Such argument is untenable. The trial court at no time announced his intention to depart from the recommended sentence. Indeed, in light of the imposition of the death penalty, it is entirely possible that Judge Harris would find it unnecessary to depart. Without a scoresheet we do not know if the sentences are illegal or not. Certainly there are no written reasons for departure as required. State v. Jackson, 478 So.2d 1054 (Fla. 1985).

CONCLUSION

Based on the foregoing reasons and authorities, and those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to grant the following relief:

As to Points I and II, vacate the sentence of death and remand for imposition of a life sentence;

As to Point III, reverse the conviction for murder and remand for a new trial;

As to Points IV and V, reverse his judgments and sentences and remand for a new trial.

As to Point V, reverse his judgment and sentence for premeditated murder and remand with instructions to discharge him as to that count;

As to Point VI, to vacate the sentences imposed for burglary and grand theft and remand for resentencing pursuant to the guidelines;

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th floor, Daytona Beach, Fla. 32014 in his basket at the Fifth District Court of Appeal, and mailed to Mr. Wilburn Lamb, #106546, P.O. Box 747, Starke, Fla. 32091 on this 11th day of January 1988.

Michael S Becker

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