IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,030

WILLIE JAMES KING,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

REPLY BRIEF OF APPELLANT

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I

THE DEFENDANT'S NEIL ISSUE WAS PROPERLY PRESERVED BY DEFENSE OBJECTION TO THE STATE'S PEREMPTORY CHALLENGE AND THE COURT OVERRULING THE OBJECTION, AND FURTHER, THE COURT ERRED IN OVERRULING THIS OBJECTION WHERE THE STATE FAILED TO SHOW ITS REASON FOR STRIKING MR. ASHLEY WAS NOT RACIALLY MOTIVATED.

In its answer brief, the state first argues the burden never shifted to the state to explain its reason for striking Mr. Ashley because there was no determination made of a "strong likelihood" the state was using the peremptory in a racially discriminatory manner. (Answer brief, pg. 9) This is directly refuted by the record which demonstrates that when the defendant interjected his Neil objection to the striking of Mr. Ashley, the judge agreed and told the state that unless they could give him a race neutral reason, he could find no basis for the strike against Mr. Ashley. (T: 270) There could be no clearer statement that the judge found a strong likelihood of an improper peremptory.

The state then argues the defendant's Neil issue was not preserved because the defendant never objected to the jury panel. (Answer brief, pg. 9) On the contrary, the defendant's Neil issue was properly preserved. When the prosecutor exercised a peremptory challenge against Mr. Ashley, the defendant objected to the strike on Neil grounds, stating there was no basis from his answers to strike him other than racial reasons. (T: 270-272) The court agreed and told the state that unless they could give him a reason, he could find no basis for the strike against Mr. Ashley. (T: 270)

After the state proffered its reason, the court, after hesitation, accepted the reason over the defendant's objection. (T: 272) Mr. Ashley, therefore, did not sit on the jury. (T: 272) Thus, the defendant properly and correctly and timely objected to the prosecutor's peremptory challenge on Neil grounds.

This objection was entirely sufficient to preserve the issue for appellate review. In Law v. State, ___ So.2d ___, 17 FLW D-2747 (Fla. 3d DCA, Dec. 8, 1992), the Third District held that a Neil error "will be held adequately preserved on a showing that a timely objection was interposed and overruled." The Third District based its holding in Law on this Court's decision in Jefferson v. State, 595 So.2d 38 (Fla. 1992). In Jefferson, this Court held that where a trial court finds that a peremptory challenge is based upon improper racial grounds, the court has the discretion to impose the remedy of seating the improperly challenged juror. The implicit rationale in Law is that because seating the improperly challenged juror is a proper remedy for Neil error, it is enough that the defendant sought that remedy by objecting to the state's peremptory excusal of that juror and the law does not require further futile objections.

This is precisely what was done in the present case. The defendant properly and timely objected to the state's peremptory excusal of Mr. Ashley. No motion to strike the subsequent jury panel was necessary since the error had already been committed when the court permitted the state to improperly challenge Mr. Ashley and the damage was already done when Mr. Ashley was prevented from sitting on the jury. The defendant's rights to an impartial jury

and to equal protection under the law were violated at that point as the remaining venire was "partially or totally stripped of potential jurors through the use of discriminatory peremptory challenges." Jefferson v. State, 595 So.2d 38 (Fla. 1992). A motion to strike the subsequent jury panel - the jury panel the judge deemed constitutionally impartial - would be an exercise in futility. See also Richardson v. State, 575 So.2d 294 (Fla. 4th DCA 1991), where the Fourth District held that a defendant's subsequent approval of a final jury panel did not constitute a waiver of the right to appeal the trial court's denial of his Neil objection to the state's improper challenge to an earlier juror, where at the time the defendant expressed his approval of the jury panel, the improperly struck juror had already been excused.[1]

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[1]This issue regarding the preservation of Neil issues is presently pending before this Court in the case Joiner v. State, Case No: 79,567, juris. accepted, 604 So.2d 487 (Fla. 1992).

In the district court's opinion in Joiner v. State, 593 So.2d 554 (Fla. 5th DCA 1992), the court held a Neil issue was not preserved. The defendant had objected to the state's peremptory challenge of a juror and, when the judge ruled the state's reasons were valid, the defendant further objected. After jury selection proceeded, the defendant accepted the jury panel. The Fifth District stated the issue was not preserved because the defendant "should have moved to strike the jury panel at some time during the jury selection, but before the jury was sworn, at the latest." Id., at 556. Accord Brown v. State, 606 So.2d 742 (Fla. 1st DCA 1992); Suggs v. State, 603 So.2d 6 (Fla. 5th DCA 1992).

The defendant submits that Joiner has been overruled by this Court's decision in Jefferson v. State, 595 So.2d 38 (Fla. 1992). When Joiner was decided, Florida courts believed the only remedy for a Neil violation was striking the jury panel. Jefferson makes it clear that seating the improperly challenged juror is a proper remedy and a timely made Neil objection at the time that juror is improperly struck would be sufficient to preserve the issue.

Moreover, this case is different from Joiner in that here the defendant never accepted the jury panel. The record shows that Willie King "tendered" the panel after exercising his challenges, which means he had no further challenges to make. (T: 277) This is very different from "waiving" his right to appellate review of his properly objected to Neil issue.

And finally, the state's last argument is that the trial judge did not err in accepting the state's reasons for striking Mr. Ashley. (Answer brief, pg. 10) This misses the point outlined in Mr. King's initial brief. It is true that the state's proffered reason - that Mr. Ashley might understand the problems that victims have identifying defendants - can be a valid and race neutral reason for exercising a peremptory challenge. The error here, as outlined on pages 38-40 of the initial brief, is that the state failed in its burden of showing record support and absence of pretext in the challenge. The record demonstrates that, despite an overwhelming number of jurors who had been either witnesses to or victims of crime, the prosecutor singled out Mr. Ashley and asked only him regarding his ability to identify the perpetrator. (T: 75-77, 87, 93-94, 97, 99, 101, 108, 110-111, 119, 122-126, 128-130, 135, 137-139, 140-144, 145-150, 155-158, 161-162, 168-171, 175) The prosecutor admitted he never questioned Mr. Ashley as to whether he even had the opportunity to view his assailant. (T: 271) The state failed to overcome the strong showing of lack of record support for its explanation and the strong suspicion of pretext. The trial court erred in overruling the defendant's objection and in permitting the prosecutor to peremptorily challenge Mr. Ashley.

II

THE DEFENDANT PROPERLY PRESERVED EACH OF THE IMPROPER PROSECUTOR COMMENTS MADE DURING OPENING STATEMENT AND CLOSING ARGUMENT REGARDING APPEAL TO SYMPATHY AND THE DEFENDANT IMPROPERLY INFLUENCING HIS WITNESSES, AND NO CURATIVE INSTRUCTION COULD HAVE CURED THE PREJUDICIAL IMPACT OF THESE COMMENTS.

In its answer brief, the state first argues that the defense failed to preserve for appellate review the propriety of the prosecutor's comments made during opening statement and closing argument regarding appeal to sympathy and the defendant improperly influencing his witness.

All these comments were properly preserved. The defendant immediately objected to all these comments. (T: 302, 886-887) When the judge sustained the objection to the "mother gunned down" comment, the defendant moved for mistrial and the court denied the motion. (T: 887-889) The defendant also moved for mistrial on the "wipe off the face of this earth the mother of his children" comment and the court denied that motion. (T: 302) The defendant objected on two occasions to the "nobody else is getting phone calls from the defendant" comment and also moved for mistrial, which the judge denied. (T: 886, 888-889) The issue is properly preserved for appeal. State v. Cumbie, 380 So.2d 1031 (Fla. 1980); Clark v. State, 363 So.2d 331 (Fla. 1978).

The state then claims the issue should be affirmed by this Court because the defendant never requested curative instructions below. Curative instructions could not have cured the impact of the improper comments here which indulged in improper appeal to

sympathy for the mother of three children and which suggested to the jury the defendant had improperly influenced his own witness to testify on his behalf. As this Court stated in Briklod v. State, 365 So.2d 1023, 1026 (Fla. 1978): "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." (quoting from Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citations omitted)). Cautionary instructions under these circumstances simply fail to undo the damage done by such prejudicial comments. Shorter v. State, 532 So.2d 1110, 1111 (Fla. 3d DCA 1988).

And finally, the state has not responded to the defendant's claim that these improper comments also constitute victim impact and character evidence, the admission of which violated Florida law under §921.141(5), Florida Statutes (1989), and Article I, sections 9 and 16, Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, entitling him to a new sentencing hearing before a new jury.

III

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE GRUESOME PHOTOGRAPH WHERE ITS GRUESOME NATURE WAS CAUSED BY FACTORS APART FROM THE CRIME ITSELF AND WHERE ITS PROBATIVE VALUE WAS MINIMAL.

With respect to the gruesome photograph issue, the state claims the photograph was shown to the jury and used by the medical examiner and therefore, it was not error to admit it.

The record shows the photograph, state's exhibit 20, was shown to the jury by the prosecutor and the medical examiner showed the jury where the wound was. (T: 423) However, the record also demonstrates the medical examiner did not use this photograph to explain her testimony, but instead used the prosecutor as a model to point out to the jury precisely where the wound was located in relation to the body and the direction and angle the projectile would have to travel to leave that type of abrasion. (T: 423-426) The medical examiner also used exhibits 21 and 22 to show the directionality of the projectile as it entered the neck. (T: 424-425) The judge, who obviously was present in court and observed exactly what occurred during the testimony, specifically stated that although the medical examiner claimed she needed exhibit 20 to show the course of the bullet, she never used it but used the prosecutor instead. (T: 433) The photograph was thus of minimal relevance and, considering its gruesome nature was caused by factors apart from the crime itself, whatever relevance it had was outweighed by its shocking and inflammatory nature and it was error to admit it. Czubak v. State, 570 So.2d 925, 929 (Fla. 1990).

PENALTY PHASE REPLY ARGUMENT

IV

THE PROSECUTOR'S ARGUMENT TO THE JURY DURING THE PENALTY PHASE REGARDING THEIR DUTY TO RETURN A DEATH RECOMMENDATION AND TO NOT COOPERATE WITH EVIL WAS IMPROPER AND INFLAMMATORY AND CONSTITUTED AN IMPROPER NONSTATUTORY AGGRAVATING FACTOR.

In his initial brief in Argument IV, the defendant argued the prosecutor's arguments to the jury during the penalty phase that unless the jury recommended death, the defendant would eventually be released from prison to commit further crimes, and comments regarding the jury's duty to return a death recommendation and to not cooperate with evil or else they would be evil like the defendant, were improper and inflammatory and constituted a nonstatutory aggravating factor. The state's response is that the comments should be put in "proper context" and that we should not look at what the prosecutor said, but what he meant by what he said. (Answer brief, pg. 19)

However, what the prosecutor said is of utmost importance because that is what the jury heard. What the state would like this Court to believe the prosecutor meant is quite different from what he actually said. What matters is what he said in context of his entire closing argument and, as outlined on pages 49-57 of the initial brief, what he said was highly improper in any context.

The prosecutor started out saying that Willie King had led "a life of crime" (which was not true) and, despite having been sent to prison, he had not been rehabilitated, and that if the jury recommended life, he would get out on parole. (T: 996-1000) The

intended message to the jury is obvious: unless the jury recommended death, the defendant would eventually be released and, because he was nonrehabilitatable, he would continue to lead his "life of crime." This Court has found similar statements to be improper. Teffeteller v. State, 439 So.2d 840, 845 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984); Freeman v. State, 563 So.2d 73, 76 (Fla. 1976), cert. denied, 111 S.Ct. 2910 (1991).

The prosecutor further said that perhaps the reason why Willie King commits crimes is that "he is evil and an evil person cannot be rehabilitated." (T: 1000) He then told the jury that he who passively accepts evil is just as involved in it as the person who commits evil and that he who accepts evil without protesting against it is really cooperating with evil. (T: 1001; CT) He then warned the jury to not violate their "duties in this case," to not "cooperate with the evil here," and to give the defendant death. (T: 1001) The prosecutor thus exhorted the jury to recommend death, told them it was their duty to do so, otherwise they were cooperating with evil and were just as evil as Willie King.

These comments are all highly improper. And placing them in context of the prosecutor's entire argument only accentuates their impropriety. The prosecutor acknowledged to the jury that this particular crime was not "so atrocious itself it would scream out for the ultimate penalty." (T: 998) He admitted to the jury that Willie King was not such a bad guy with such a bad background as to compel the death penalty. (T: 999). The prosecutor acknowledged this "is a case that falls in the middle." (T: 999) Although the prosecutor informs the jury of the legal standard of

aggravating factors outweighing mitigating factors, he acknowledges the aggravators are weak and the defendant is not so bad. Thus, by labeling Willie King as "nonrehabilitatable" and "evil," the prosecutor clearly intended to fire up emotionally what he acknowledged was a weak case for the death penalty. And he intended to capitalize on his emotional characterization by throwing the ball back to the jury and telling them they would "help perpetuate" and "cooperate" with such evil if they failed to vote for death. (T: 1001; CT)

The context is very clear. The prosecutor knew he had a weak death case, so he had to inject elements of emotion and fear and consideration of improper factors. This was no ordinary, permissible discussion of aggravating and mitigating factors as the state suggests in its answer brief. (Answer brief, pg. 18-27) It was "used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law," Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985), and as such was highly improper and fundamental error. Moreover, the prosecutor's clear intention was for the jury to use this as a consideration of a nonstatutory aggravating factor, which was improper. Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985); e.g. Jones v. State, 569 So.2d 1234, 1240 (Fla. 1990); Robinson v. State, 520 So.2d 1, 6 (Fla. 1988). Accorodingly, Willie King's death sentence must be reversed for a new penalty phase proceeding untainted by references to such irrelevant and prejudicial factors.

V

THE TRIAL JUDGE'S SHORTHAND NOTATION "FELONY" ON THE SENTENCING GUIDELINES SCORESHEET IS NOT A SUFFICIENT REASON FOR DEPARTURE FROM THE GUIDELINES AND IS NOT SUFFICIENT TO CONSTITUTE WRITTEN REASONS FOR DEPARTURE, REQUIRING REVERSAL OF WILLIE KING'S LIFE SENTENCE ON COUNT 2.

In its answer brief, the state lamely suggests that the sole word "felony" written in the reason for departure space on the sentencing guidelines scoresheet should mean the trial judge departed from the presumptive sentence of 22-27 years for the reason there was "an unscored capital felony conviction in Count I." (Answer brief, pg. 28) As the state admits, this is an argument of first impression. The defendant submits that while the trend toward simplification of legal verbiage is important to judicial economy, there is simply no way the cryptic word "felony" can be stretched to a proper reason for departure or to a contemporaneous written reason for departure. Consequently, Willie King's life departure sentence on count 2 must be reversed and remanded for resentencing within the guidelines. Stewart v. State, 588 So.2d 972, 974 (Fla. 1991); Pope v. State, 561 So.2d 554 (Fla. 1990); Ferguson v. State, 554 So.2d 1214 (Fla. 2d DCA 1990).

VI

THE TRIAL COURT'S CONSIDERATION OF WILLIE KING'S EXERCISE OF HIS RIGHT TO PLEAD NOT GUILTY IN IMPOSING THE DEATH SENTENCE WAS IMPERMISSIBLE AND CONSTITUTED A NONSTATUTORY AGGRAVATING FACTOR.

As Argument VI in his initial brief, the defendant argued the trial court's consideration of the defendant's exercise of his right to plead not guilty as a factor in imposing the death sentence was impermissible and constituted an improper nonstatutory aggravating factor. The state's response is that the trial judge did not use the defendant's refusal to plead guilty against him, but instead "used it as mitigation" in sentencing the defendant. (Answer brief, pg. 29)

Of course, the "mitigation" did not go far because the judge sentenced Willie King to death. Indeed, the state's theory the judge used the defendant's refusal to plead guilty as mitigation is directly refuted by the judge's sentencing order in where, immediately preceding the part about the refusal to plead guilty, the judge wrote: "Mitigating factors do not exist." (A: 3) Although the record demonstrates the judge did not base his sentence on the defendant's decision to forego a plea and have a trial, it cannot be said that consideration of this unconstitutional factor played no part in the sentencing process. The fact is the trial judge, in his assessment of the proper sentence, clearly reviewed the fact the state had once offered a pretrial plea to the defendant in exchange for dropping the death penalty and that the defendant did not plead guilty and went to

trial instead. This plea offer and the defendant's decision to go to trial were irrelevant to the sentencing process and should not have been considered by the court. Gillman v. State, 373 So.2d 935, 939 (Fla. 2d DCA 1979), quashed in part on other grounds, 390 So.2d 62 (Fla. 1980); McEachern v. State, 388 So.2d 244 (Fla. 5th DCA 1980).

The state also suggests that this portion of the sentencing order is actually the trial judge "musing that the prosecution did not really believe this to be a death case, despite the prosecutor's urgings for death." (Answer brief, pg. 29) If so, this points out another infirmity in the judge's sentencing order: the judge failed to make his own independent, reasoned judgment as to the imposition of the death penalty and instead deferred to the recommendations of the prosecutor and the jury, even though both the judge and the prosecutor knew this was not a death case. (see Argument VIII of Initial brief)

VII

THE TRIAL JUDGE FAILED TO CONSIDER AND WEIGH ALL MITIGATING CIRCUMSTANCES, IMPROPERLY DISMISSED THE EVIDENCE IN MITIGATION AS HAVING NO WEIGHT, AND WROTE A CONFUSING SENTENCING ORDER, REQUIRING REVERSAL OF WILLIE KING'S DEATH SENTENCE.

In its answer brief, the state claims the trial court properly considered and weighed all mitigating circumstances and wrote a sentencing order that was clear and unambiguous. (Answer brief, pg. 29-31) In its effort to clarify contradictions in the court's sentencing order, the state suggests the court's statement that "mitigating factors do not exist" really means "that the court found the proposed mitigators to have virtually no weight." (Answer brief, pg. 31)

Under Florida law, however, there is a big difference between a sentencing judge finding that mitigating factors do not exist and that mitigating factors do exist and were considered, but found to have little weight. The law is quite clear that the "trial court's obligation is to both find and weigh all valid mitigating evidence available anywhere in the record at the conclusion of the penalty phase," Maxwell v. State, ___ So.2d ___, 17 FLW S-396 (Fla. June 25, 1992); Wickham v. State, 593 So.2d 191 (Fla. 1991), pet. for cert. filed, (Case No: 91-8126); Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990), and that once the existence of mitigating evidence has been recognized, it may not be dismissed as having no weight by the sentencing judge. Campbell v. State, 571 So.2d 415, 420 (Fla. 1990), citing Eddings v. Oklahoma, 455 U.S. 104, 114-115, 102 S.Ct. 869, 876, 71 L.Ed.2d 1 (1982).

In this case, the judge's sentencing order finds evidence to support several mitigating circumstances, although, as pointed out in the defendant's initial brief, the judge ignored other proper mitigating evidence available in the record which he was obligated to consider and weigh. (Initial brief, pgs. 63-64) The sentencing order even states the judge "considered and weighed" all statutory and nonstatutory mitigating factors and that the "necessary conclusion is that the proven aggravating factors outweigh the mitigating factors." (A: 3; R: 1136) The problem, however, is that the judge then, in his analysis imposing his death sentence, gave these mitigating circumstances no weight and expressly stated that "mitigating factors do not exist." (A: 3-4; R; 1136) He stated that since the two aggravating factors did exist and there were no mitigating factors, he "cannot state that there is no basis for the jury recommendation, and, therefore, the recommendation of the jury should be followed." (A: 4; R: 1134)

The state cannot pretend the judge properly found and weighed the mitigating evidence when the judge expressly stated "mitigating factors do not exist" and that he found two aggravating factors and "no" mitigating factors. At a minimum, the state should admit the judge's sentencing order is ambiguous as to the judge's true sentencing analysis. Santos v. State, 591 So.2d 160 (Fla. 1991); Lucas v. State, 417 So.2d 250, 251 (Fla. 1982); Mann v. State, 420 So.2d 578, 581 (Fla. 1982). The trial judge failed to properly consider and weigh all the mitigating circumstances and failed to enter a clear and unambiguous sentencing order, requiring reversal of Willie King's sentence of death.

VIII

THE TRIAL COURT GAVE UNDUE WEIGHT TO THE JURY RECOMMENDATION OF DEATH AND FAILED TO MAKE AN INDEPENDENT JUDGMENT AS TO THE IMPOSITION OF THE DEATH PENALTY, WHICH ERROR WAS FURTHER EXACERBATED BY IMPROPER PENALTY PHASE JURY INSTRUCTIONS.

The defendant's argument in Argument VIII is that the trial judge erred in giving undue weight to the jury recommendation of death and in failing to make an independent judgment as to the imposition of the death penalty after acknowledging the death penalty would normally not be appropriate in this case. (Initial brief, pgs. 69-75) The state's response is that since the trial court twice stated that the aggravating factors outweighed the mitigators, "it clearly undertook an independent weighing." (Answer brief, pg. 31)

What the state ignores is the trial court's analysis and conclusion in its sentencing order that the jury "as the conscience of the community, by an overwhelming vote, has recommended a sentence of death" and that the "jury's recommendation is entitled to great weight and should not be overturned unless no reasonable basis exists for the opinion." (A: 4; R: 1137) The judge further stated that although this case did not "fit the class of cases in which one would ordinarily believe the death penalty was appropriate" because it was not especially wicked, heinous, atrocious or cruel, or cold, calculated or premeditated, nonetheless he could not state "there is no basis for the jury recommendation, and, therefore, the recommendation of the jury should be followed." (A: 2, 4; R: 1135, 1137)

Thus, even after acknowledging this was not the type of case for which the death penalty was ordinarily appropriate, the judge believed he should follow the jury recommendation of death unless there was "no basis" for it. The judge may have said he weighed aggravators and mitigators (which, as pointed out in Argument VII, is not actually the case, since the judge gave the mitigating evidence no weight), but the judge also said and the sentencing order demonstrates the judge deferred to the jury recommendation of death because he believed he had to unless there was "no basis" not to - even though he knew the recommendation was out of the ordinary. In its answer brief, the state fails to explain the judge's actions and fails to cite a single case in which such action is permissible in imposing a death sentence.

As in Ross v. State, 386 So.2d 1191 (Fla. 1980), the court gave undue weight to the jury recommendation of death. Moreover, as outlined in the defendant's initial brief on pages 73-75, this error was exacerbated by the instructions given the jury in the penalty phase instructing the jury that their sentencing decision would be advisory and that the final sentencing decision rested with the trial judge (which was not done here since the judge deferred back to the jury), and which instructed the jury on the aggravating factor of pecuniary gain resulting in an improper doubling of aggravating factors and an indirect weighing of an invalid aggravating factor. Consequently, Willie King's death sentence must be reversed.

IX

WILLIE KING'S SENTENCE OF DEATH IS UNCONSTITUTIONAL AND DISPROPORTIONAL TO THE LIFE SENTENCES OF SIMILARLY SITUATED DEFENDANTS CONVICTED OF FELONY MURDER UNDER SIMILAR CIRCUMSTANCES.

In its answer brief, the state argues the "death sentence is far from disproportionate," suggests that the "cases relied on by the defendant are all inapposite, involving only a single aggravating factor or domestic killing with major mitigation," and states this Court "has uniformly dismissed proportionality attacks in situations similar or indeed indistinguishable from that herein." (Answer brief, pgs. 31-32) The state's response lacks substance and merit.

Quite simply, the imposition of the death penalty in this case is as disproportional as it can get. This is not a death case. The prosecutor himself recognized this when he told the jury during penalty phase argument that this particular crime was not "so atrocious itself it would scream out for the ultimate penalty," and that Willie King was not such a bad guy with such a bad background as to compel the death penalty. (T: 998-999) The prosecutor acknowledged this "is a case that falls in the middle." (T: 999) The prosecutor recognized this when he offered the defendant a plea to life imprisonment because he felt the defendant had the potential for rehabilitation. (T: 1059) The trial judge also recognized this in his sentencing order when he said this is not the type of case for which the death penalty is ordinarily considered appropriate. (A: 4; R: 1137) An affirmance of the

death penalty here would mean that any defendant who "falls in the middle," any defendant with an average prior record who quickly shoots and kills someone during a simple robbery can be executed.

As pointed out in the defendant's initial brief, this is not the law, it was not the intent of the legislature, and it certainly would violate the long standing directive of this Court that the death penalty be reserved for "only the most aggravated and unmitigated of most serious crimes" and the most culpable of murderers. Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989); Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988); State v. Dixon, 283 So.2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). It would also be unconstitutional as failing to "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 977, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983); Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990), cert. denied, 111 S.Ct. 1024 (1991); Jackson v. State, 575 So.2d 181, 193 (Fla. 1991).

In looking first at the factual circumstances of this crime and comparing them to other similar felony murders where the defendant received life imprisonment, it is clear this type of murder can only be described as the least aggravated of capital murders. Rembert v. State, 445 So.2d 337 (Fla. 1984); Mendez v. State, 419 So.2d 312 (Fla. 1982); Lloyd v. State, 524 So.2d 396 (Fla. 1988).[2] This Court has rarely upheld the death sentence for

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[2]Contrary to the state's assertion in its answer brief, these cases do not involve a domestic killing. (Answer brief, pg. 32) While it is true these cases involved one aggravating factor whereas the present case has two, this Court has stated over and over again that it is not the number of aggravating and mitigating

any type of straight felony murder as this, and defendants who have committed more reprehensible felony murders than Willie King frequently have their death sentences reduced to life imprisonment. McKinney v. State, 579 So.2d 80 (Fla. 1991); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Livingston v. State, 565 So.2d 1288 (Fla. 1988).

And although Willie King's prior record is factored into the sentencing decision as the aggravating circumstance of prior "violent" felony, the fact remains his prior criminal record is not egregious and did not involve death or physical violence. Willie King has never killed anyone before. This is not the record of a young man of such despicable character and violent propensities that he deserves to be executed. Willie King's prior record simply does not warrant his execution for a crime that by itself does not deserve the death penalty.

Moreover, important mitigating circumstances exist here. The

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factors that is important, but the totality of circumstances in the case. Tillman v. State, 591 So.2d 167 (Fla. 1991); Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), cert. denied, 111 S.Ct. 1024 (1991); Smalley v. State, 546 So.2d 720, 723 (Fla. 1989); State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

As noted in the defendant's initial brief, Rembert also apparently had a prior record, yet with that and despite the absence of any mitigation, this Court reversed the death penalty due to the facts of what was termed a "classic" felony murder, which was nearly identical to the present case. Rembert v. State, 445 So.2d 337 (Fla. 19884). The only distinction between Willie King and the defendants in Menendez and Lloyd is that Menendez and Lloyd had the mitigating circumstance of no significant history of prior criminal activity whereas Willie King has a prior record comprising the aggravating factor of prior violent felony. (Initial brief, pg. 81) This distinction, however, is not so significant under the circumstances as the defendant's prior record is not egregious and did not result in death or physical injury to another.

undisputed evidence shows that the defendant shot impulsively as the victim's car started moving; the trial judge found, and the record demonstrates, no intent to kill and no premeditation. See Jackson v. State, 575 So.2d 181, 186 (Fla. 1991). In fact, the evidence at trial is even conflicting as to whether Willie King was the actual shooter. (See Initial brief, pgs. 86-87) It is undisputed that Willie King is of low intelligence, borderline retarded, with a disadvantaged background.

The purpose of proportionality review is to ensure consistency in the imposition of death sentences in Florida and to eliminate the irrationality of imposing the death sentence upon a defendant when similarly situated defendants, convicted of similar crimes, have received lesser sentences and escaped the death penalty. Tillman v. State, 591 So.2d 167 (Fla. 1991); Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988). Imposing the death penalty here is disproportionate to the decisions in Rembert, Menendez, and Lloyd where this Court gave similarly situated defendants life imprisonment for similar crimes, and is truly unfair when we consider that undoubtedly hundreds of defendants with similar prior records are convicted in Florida every year of this same type of simple felony murder and receive lesser sentences. Willie King's death sentence is disproportional and unconstitutional and must be reversed.

CONCLUSION

Based upon the foregoing, the defendant requests that this Court reverse his conviction and sentence of death and remand the case to the trial court for a new trial and a new sentencing or, in the alternative, reverse his sentence of death for imposition of a life sentence, or in the alternative, remand the case for a new sentencing hearing before a new sentencing jury or, in the alternative, remand the case for a new sentencing before the judge.

Respectfully submitted,

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Florida Bar No: 320285

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, Criminal Division, P.O. Box 013241, Miami, Florida 33101, this 15th day of January, 1993.

By: Marti Rothenberg
MARTI ROTHENBERG
Assistant Public Defender

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 90-1739

THE STATE OF FLORIDA,

Plaintiff,

vs.

WILLIE JAMES KING,

Defendant.

SENTENCE

The defendant, Willie James King, was convicted by a jury of the crime of First Degree Murder. The same jury, by a vote of 9 in favor, 3 opposed, advised the court to impose the death sentence.

Upon the record of trial and the sentencing proceedings the Court finds:

The defendant was convicted of the violent felony of robbery in cases numbered 81-23131 and 81-23366, one of which involved the use of a firearm. These crimes were committed in 1981, within a week of each other, at a time when the defendant was a juvenile. He was originally sentenced as a youthful offender in 1982 and when he violated the community control conditions of the sentence he was sentenced to the state penitentiary.

The capital felony for which the defendant is to be sentenced was committed while the defendant and others, was engaged in the commission of an attempted robbery. The victim and her husband were about to be robbed by the defendant and his accomplices when the defendant fired a bullet into the victims' car and killed her for what seems to be no other reason than the fact that the victim started to accelerate her car to leave

APPENDIX: A:1

from what was perceived to be the imminent commission of a robbery. These two aggravaring circumstances were proven beyond a reasonable doubt. No other aggravating factor was proven.

The Court instructed the jury to consider two mitigating factors: (3) the victim was a participant in defendant's conduct, and (8) any other aspect of the defendant's character or record, and any other circumstances of the offense.

The evidence showed that the victim and her husband, who may have strayed into the area where the crime took place, did decide to purchase some illegal drugs. They drove from location to location, with the aid of members of the community who were apparently assisting them to find drugs to purchase, and went to the place where the murder occurred to complete the purchase.

The evidence also showed that the defendant is probably of below average intelligence.

In sum, the murder was not committed in a cold, calculated or premeditated manner, nor was it especially heinous, atrocious, or cruel. But it was committed by a person twice convicted of violent felonies, and while the defendant was committing a violent crime, armed robbery.

The fact that the victim was about to purchase drugs does not outweigh the aggravating circumstances. Nor does the defendant's claimed lack of intelligence.

The court has considered and weighed the jury recommendations as well as the evidence presented during both phases of the trial, and the matters presented at the sentencing hearing.

The necessary conclusion is that the proven agggravating factors outweigh the mitigating factors, and the jury could reasonably recommend imposition of the death penalty.

The court also finds that two aggravating circumstances have been proven beyond a reasonable doubt, and that the jury was correct when it failed to find mitigating circumstances sufficient to outweigh the aggravating ones.

The court has considered and weighed all statutory and non-statutory mitigating factors, and finds that none exist. The defendant was not under the influence of extreme mental or emotional disturbance. Although the victim was engaged in attempting to buy drugs at the time of the murder, she was not buying them from the defendant, and even if she was, the action did not constitute consent, nor was she a participant in the defendant's conduct. The defendant's participation in this crime was not minor. Although there were participants, the defendant was deeply involved in the planning of the robbery, and he is the person who shot and killed the victim. There is no evidence to suggest that the defendant was under duress or the domination of another person. The defendant, although of low intelligence, had no impairment affecting his ability to appreciate his criminal conduct or to conform his conduct to the requirements of law. At the time of the commission of the crime the defendant was twenty-five years of age. The defendant presented psychological expert testimony; it showed that he was of low intelligence, but not to a degree that would reach the level of a mitigating circumstance. After reviewing all the evidence and matters of record, the court finds no other non-statutory mitigating circumstances were shown.

In sum, this was a senseless killing by a twice convicted felon (who was a juvenile when he committed them), committed during the perpetration of an armed robbery for which there was neither justification nor mitigating circumstances. Unfortunately, this seems to be a much too common occurence. The jury, as the conscience of the community, by an overwhelming vote has recommended a sentence of death. The jury's recommendation is entitled to great weight and should not be overturned unless no reasonable basis exists for the opinion.

The aggravating factors claimed in this case exist. No subjective test is required, certified copies of the prior convictions were introduced during the penalty phase. The second aggravating factor, the fact that the killing occurred during the commission of an armed robbery, was proved beyond a reasonable doubt. Mitigating factors do not exist. The State also urges the imposition of the death penalty, although it did not always do so. Prior to trial the State offered not to seek the death penalty if the defendant would plead guilty, a fact not known to the jury.[1] This case may not fit the class of cases in which one would ordinarily believe the death penalty is appropriate; this murder was not especially wicked, nor was it cold, calculated or even premeditated. However, this court cannot state that there is no basis for the jury recommendation,and, therefore, the recommendation of the jury should be followed.

The defendant, being personally before this Court, accompanied by his attorney, Andrew Kassier, and having been

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[1] See letter to defendant's counsel, dated November 27, 1990.